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By JOHN T. COOK.

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VOL. I.

ALBANY, N. Y.:
WILLIAM GOULD, JR., AND COMPANY,
LAW PUBLISHERS.
1885.

Aug. 20

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EASTERN REPORTER,

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OF THE STATES OF MAINE, NEW HAMPSHIRE, VERMONT,
MASSACHUSETTS, RHODE ISLAND, CONNECTICUT, NEW
YORK, NEW JERSEY AND PENNSYLVANIA,
AS SOON AS THEY ARE FILED, WITH
STATEMENT OF THE CASE.

By JOHN T. COOK.

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ALBANY, N. Y.:
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LAW PUBLISHERS.
1885.

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THE EASTERN REPORTER.

NEW YORK COURT OF APPEALS.

KNOWER v. REYNOLDS.

June 2, 1885.

MERGER — COVENANT TO ASSUME — COMPLAINT — JOINDER OF ACTIONS — CODE OF CIV. PROC., § 483.

A covenant in a deed "to assume and pay a mortgage on the granted premises" is merged in a judgment of foreclosure of the mortgage and for deficiency in another State against the party covenanting. The complaint alleged the making of the covenant and the subsequent recovery in another State, of a valid judgment thereon. There was no allegation that the mortgage had not been paid or that defendant failed to perform his covenant. The answer admitted the making of the covenant but denied the judgment. On the trial plaintiff failed to prove the judgment.

Held, that the complaint contained a cause of action on the judgment only, and that he should have been nonsuited for failure to prove it.

ANDREWS, J. Judgment in the action was recovered against the defendant upon his covenant in his deed from Shaw, to assume and pay the mortgage on the granted premises, executed by Shaw to Capron. The trial judge in substance ruled that the complaint set forth two causes of action, one upon the covenant, and the other upon the deficiency judgment against Reynolds, founded on the covenant, rendered by the New Jersey court in an action for the foreclosure of the Capron mortgage, in which Reynolds was joined as a party defendant. The defendant insists that only one cause of action was set forth in the complaint, to-wit: A cause of action on the judgment, and that the plaintiff having failed to prove a valid judgment against him, the complaint should have been dismissed. This presents the main question on this appeal.

The allegations in the complaint are embraced in a single statement or count, and if it embraces two causes of action, the pleading does not conform to the requirements of the Code (§ 483).

But an omission to separate two different causes of action in a complaint is a defect to be corrected on motion. If the defendant proceeds to trial without making his motion, the defect, being in a matter of form only, and not affecting a substantial right, will be disregarded. Code, § 723.

The question to be determined is, whether the complaint in substance set forth two causes of action, or a cause of action on the judgment only. It alleges the making of the bond and mortgage by Shaw to Capron, an assignment to Oodkirk, the plaintiff's testator, the subsequent purchase of the mortgaged premises by Reynolds, the defendant, the assumption by him of the mortgage, and his consent to pay the same in consideration of the purchase and conveyance, the subsequent commencement by Oodkirk of a foreclosure action to foreclose the mortgage, in the court of chancery in New Jersey, alleged to be a court of general jurisdiction, against Shaw, Reynolds and others, by process duly issued and served on the defendants therein, in which action judgment was duly recovered by the plaintiff against Reynolds on the 26th day of October, 1877, for \$5,053.78, on his liability on his covenant, the death of Oodkirk and the appointment of the plain-

tiffs as his executors. The complaint concludes by demanding judgment against Reynolds for \$5,053.78, with interest from October 26, 1877, the date of the judgment.

It is to be observed that upon the facts stated in the complaint the covenant was merged in the judgment, and no subsequent action on the covenant could be sustained. This consideration is not decisive upon the point in controversy, because a plaintiff may join in his complaint different and even inconsistent causes of action, provided only that they all belong to one of the classes mentioned in section 484 of the Code. But the fact that an action on the covenant could not be maintained after a judgment had once been rendered thereon, has a material bearing upon the construction of the pleading. The pleader has blended in a single statement, the averments of the making of the covenant and the subsequent recovery of a valid judgment thereon. Did he intend to set forth in this single statement two inconsistent causes of action, or only one cause of action, that is to say, a cause of action on the judgment, inserting the allegations as to the bond and mortgage, and the assumption of the debt by the defendant, and his covenant to pay the mortgage, only by way of introduction or inducement to the final act, viz.: the recovery of the judgment. This latter seems the most natural and reasonable construction of the pleading.

There is another material consideration. The complaint does not contain the averments necessary to a complete cause of action on the covenant. It alleges the making and the consideration of the covenant, and that the defendant thereby became liable to pay the mortgage. But there is no breach alleged. This was necessary. *Marie v. Garrison*, 83 N. Y. 23. There is no averment that the mortgage had not been paid, or that Reynolds had failed to perform his covenant. If the averments in respect to the judgment should be eliminated, the complaint would be dismissible as not stating facts sufficient to constitute a cause of action. If the parties had gone to trial on a complaint so framed, an amendment would doubtless have been allowed, but the point here is, whether allegations proper, if not necessary to a cause of action on the judgment, by way of inducement, are to be construed as intended to set up an independent cause of action, and this when a material averment to such cause of action is wanting.

The answer of the defendant admitted the facts alleged in the complaint as to the making of the covenant, but denied the judgment and set up certain facts by way of equitable defense thereto.

On the trial the plaintiffs made no attempt to prove the judgment alleged in the complaint, but rested on proof of their appointment as executors. The defendant thereupon moved for a nonsuit on the ground that the plaintiffs had not proved the cause of action set forth in the complaint.

We think the motion should have been granted. We fully approve of the rule that pleadings should be liberally construed, with a view to promote substantial justice, but we are of opinion that the complaint in this case, fairly construed, sets forth a single cause of action upon the judgment and does not embrace a cause of action on the covenant.

Judgment reversed and new trial granted.

All concur.

THOMAS v. NEW YORK LIFE INSURANCE CO.*

June 2, 1885.

PRACTICE—NEW TRIAL—WHEN GENERAL TERM SHOULD ORDER.

In an action for conversion of chattels, tried by the court without a jury, the court from the facts as found by it decided that plaintiff was entitled to a judgment of \$400; on appeal, the general term reversed the judgment, and rendered final judgment for nominal damages only.

Held error, that the case should have been sent back for a new trial.

Appeal from judgment of general term, superior court, affirming a judgment

* S. C., 50 N. Y. Supr. Ct. R. 225, reversed.

entered upon findings, and conclusion of the court who tried the cause without a jury, by consent.

W. B. Cockran, for appellant. *W. B. Hornblower*, for respondent.

FRANCIS, J. The appellant here, does not complain of the reversal of her judgment by the general term, but of the new judgment rendered by that tribunal awarding nominal damages only, instead of the \$400 recovered by her in the trial court. The action was for the conversion of certain articles of personal property belonging to Griffith Thomas in his life-time, and claimed by the plaintiff as executrix of his last will. The complaint alleged her title; a demand and refusal; that the property was worth \$5,000, and claimed judgment for that amount. The answer denied the conversion, and the valuation put upon the property, and pleaded as an affirmative defense a purchase of the furniture from the plaintiff after the death of her husband and before the issue of letters testamentary for the sum of \$400 paid to her in cash. The trial court found as facts: the ownership of the property by the testator, and that its value was \$400; his death; the issue of letters testamentary to plaintiff in July, 1879; the taking of the property by defendant on February 18th of that year, and six days later, the execution by plaintiff of a bill of sale and release of the furniture to the defendant for the consideration paid of \$400, and the discharge and cancellation of an alleged debt due from her husband of \$5,250; and that when this contract was made, the purchaser knew that the seller had not yet received letters testamentary or qualified as executrix. From these facts was deduced the legal conclusion that the plaintiff as executrix, was entitled to judgment for \$400, while the general term ruled, that the proper legal conclusion should have been a judgment for nominal damages only, and drawing that conclusion, awarded the corresponding judgment.

The appellant, without criticising the propriety of the reversal by the general term, insists that it should have been followed by an order granting a new trial, and not by a final judgment for six cents damages. We have so held in a precisely similar case. *Ehrichs v. De Mill*, 75 N. Y. 374. There the action was tried before a court, without a jury; the facts were all found, and without apparent exception or error in the process; the trial court drew from them the legal inference of a judgment for the defendant; the general term on the contrary, drew an opposite conclusion from the facts found, and ordered judgment for the plaintiff; and on appeal to this court, while justifying the reversal, we determined that a new trial should have been ordered, and that the rendition of final judgment was a mistake. It was then contended, as it is now, that the rule had already been declared to be that where the facts were found by the trial court without exception or error in the process of their determination, and so the only open question was as to the legal inference to be drawn, the appellate court might draw that inference and render judgment accordingly. But the answer made was that in such a case we could not know that there had not been exceptions or asserted errors in the process of finding the facts, since the respondent, not having appealed, was under no obligation to procure their appearance upon the record, and might very well have deemed their presence immaterial for any legitimate purpose of the appeal. And the rule was declared to be, that wherever the character of the issues framed by the pleading was such that upon a new trial it would be possible for the defeated party to recover, such new trial should be awarded.

The appellant claims the benefit of that rule, and is entitled to have it enforced. But his adversary contends that even then, there could be no recovery for more than the nominal damages awarded, because the contract of sale, although unauthorized when made, was subsequently validated by the after issue to the seller of letters testamentary. Conceding so much for the purpose of the argument, we still cannot say that within the issues, the contract may not be attacked for fraud or mistake, or some other reason outside of lack of authority to make it.

So much of the judgment of the general term as awards judgment for the plaintiff for six cents damages should be reversed, and a new trial granted, costs to abide the event.

All concur.

PEOPLE, *ex rel.* MUTUAL UNION TEL. CO., *v.* COMMISSIONERS OF TAXES.*

June 2, 1885.

TAXATION — CORPORATION — ACTS OF 1853, 1859 AND 1880 — NEGLECT TO MAKE REPORT OF COST. Relator failed to make the report required by its act of incorporation (Laws 1853, chap. 471, § 8).

Held, that the commissioners of taxes were not thereby deprived of jurisdiction to assess relator's property.

Under the act of 1859, chap. 302, § 8, the tax book was kept open for examination and correction during the time limited by said act; the relator did not appear, and made no objection to the assessment, until after the right of the commissioners to correct the same had expired.

Held, that under the act of 1880, chap. 269, relator was entitled to no relief.

Appeal from order of general term affirming order of special term confirming the decision of the commissioners.

ANDREWS, J. There was jurisdiction in the commissioners of taxes to make the assessment in question. The capital stock of the relator was subject to assessment in some amount under the act of 1853, under which the relator was incorporated.

The third section of the act, for the purpose obviously of putting into the possession of the assessing officers information requisite for an accurate ascertainment of the amount of the stock of the corporation subject to taxation, requires a telegraph company whose line is partly within and beyond the limits of the State, to render "to the proper officer a true report of the cost to such company of their works within the State." The officer referred to, must mean the assessing officer, or body which makes the assessment. The relator omitted to make any report as required by this section, between the 1st day of September, 1880, and the 1st day of May, 1881. Meanwhile the deputy tax commissioner having ascertained, from the certificate of incorporation of the relator, that its capital stock was \$600,000, inserted this sum in the assessment list as the valuation of the relator's property for the purpose of taxation. The board of tax commissioners entered this sum in the "annual record," and gave the notice that the books were open for examination and correction as required by the act of 1859 (chap. 302). The relator did not appear or make any objection to the assessment during the time limited, nor until after the right of the tax commissioners to correct the assessment had expired. See *Clark v. Norton*, 49 N. Y. 243; *Oving v. Foote*, 65 id. 263.

The eighth section of the act of 1859 declares that on the first day of May the books "shall be closed" to enable the commissioners to prepare the assessment-rolls for delivery to the supervisors. It was not until the 6th day of June, 1881, that the relator objected to the assessment.

The failure of the relator to make the report required by the act of 1853 did not deprive the tax commissioners of jurisdiction to assess the relator's property, and they were authorized, we think, in fixing the amount of the assessment, to proceed upon such information as they might have, and the assessment cannot be avoided for want of jurisdiction.

The case made by the relator does not entitle it to relief under chapter 269 of the Laws of 1880. The assessment was regular. The relator did not avail itself of the opportunity to apply for a correction of the assessment, either on the ground of overvaluation or of irregularity. The act of 1880 gives a remedy by *certiorari* to review and correct an illegal, excessive or unequal assessment. But it would, we think, be an unwarrantable construction of the statute to permit a party complaining of an assessment to lie by, without availing himself of the opportunity to remedy his grievance by application to the tax commissioners under the regulation of the statute of 1859, and after the assessment had become confirmed by lapse of time, to arrest the collection of the tax by a proceeding under the act of 1880.

* S. C., 31 Hun, 568, affirmed.

There is an apparent injustice in compelling the relator to pay a tax on its whole capital, but it is an injustice brought about by its own negligence, first in omitting to make a report in compliance with the statute, and then in neglecting to apply to the tax commissioners, within the time limited, for a correction of the assessment.

The order should be affirmed.

All concur.

HICKEY v. TAAFFE.*

June 2, 1885.

NEGLECTANCE — CHILD UNDER SIXTEEN — ACT 1876, CHAP. 122 — ERROR IN SUBMITTING QUESTION TO JURY.

The "business or vocation" within the meaning of the act "to prevent and punish wrongs to children," must be an employment either vicious in itself or in the nature of an amusement, and has no application to productive industries, etc.

Plaintiff who was under sixteen years of age, and employed in defendant's laundry, while at her work, and without negligence on her part, her hand was injured. The trial court submitted the question to the jury, whether the employment was within the term "dangerous to life or limb," and charged that if so, plaintiff was entitled to recover.

Held error.

Appeal from judgment and order of general term, second department, affirming judgment for plaintiff, and order denying motion for new trial on the minutes. The opinion states the facts.

Mr. Van Wart, for appellant. *Mr. Keady*, for respondent.

DANFORTH, J. The plaintiff was under the age of sixteen years, and the jury have found that the business at which she was put by the defendant was dangerous to life and limb; that without negligence on her part, she was, while pursuing it, seriously injured, and have awarded damages. The case was so treated both by the trial court and general term, that the only question for our consideration is whether the cause of action may be dealt with under the provisions of the act "to prevent and punish wrongs to children (Laws of 1876, chap. 122)." The first section declares that "any person having the care, custody or control of any child under the age of sixteen years, who shall exhibit, use or employ * * * such child * * * in or for the vocation, occupation, service, or purpose of singing, playing on musical instruments, rope or wire walking, dancing, begging or peddling, or as a gymnast, contortionist, rider or acrobat, in any place whatsoever; or for, or in any obscene, indecent or immoral purpose, exhibition or practice whatsoever; or for, or in any business, exhibition or practice whatsoever; or for, or in any business, exhibition or vocation injurious to the health or dangerous to the life or limb of such child; or who shall cause, procure or encourage such child to engage therein, shall be guilty of a misdemeanor."

The next section provides that "every person who shall take, receive, hire, employ, use, exhibit or have in custody any child under the age, and for any of the purposes mentioned in the first section of this act, shall be guilty of a misdemeanor."

The fourth section is in these words: "Whoever, having the care or custody of any child, shall willfully cause or permit the life of such child to be endangered, or the health of such child to be injured, or who shall willfully cause or permit such child to be placed in such a situation that its life may be endangered, or its health shall be likely to be injured, shall be guilty of a misdemeanor."

Is the defendant within the statute? He was the owner of a laundry, and on the 1st of April, 1882, the plaintiff was employed by him in its business. Having regard to the primitive mode of conducting it, such occupation would evidently be attended by no greater danger than that of the kitchen or the dairy. But with the introduction of machinery a very different condition of things exists as is shown in the case before us. The collar and cuff ironer at which the

*S. C., 32 Hun, 7, reversed.

plaintiff was employed had four rollers, of which two were heated; there was no guard or protection in front of them; the machine was supplied with wheels, catches, bolts and other parts, but no shifter or lever with which to stop or start it; it was run by steam, its motion in no way controllable by the operator, and when, as in the case before us, the hand became entangled, it was necessarily crushed to the thinness of a linen collar, or burned beyond the possibility of restoration. But notwithstanding all this we are constrained to say that the employment in which she was engaged is not one of those stigmatized by statute, and consequently that the defendant upon that alone cannot be charged. The scope of the act cannot be broader than its title; "to prevent and punish wrongs to children." To that end it prohibits, first, their employment in certain specified avocations intended for the amusement of the public, and which, however unprofitable to them and dangerous to the actor, are at least in themselves innocent; second, in the most general terms, "any purpose, exhibition or practice" which is either obscene, or has an indecent or immoral purpose; and third, their employment for or in any "business, exhibition, or vocation injurious to the health," or "dangerous to the life or limb of such child." Here are three clauses, the first implying a service or exhibition attractive to the spectator because of the personal skill or dexterity of the performer; the second, practices which, tending to degrade and corrupt, are against good morals; the third, "any business, exhibition or vocation which is injurious or dangerous." The word "vocation" appears in the first clause, where its meaning is illustrated by an enumeration of pursuits literally within the mischief of the act; the word "exhibition" fitly describes those pursuits, and if they stood alone in the third clause, although preceded by the word "any," would, within well-settled rules of construction, embrace only things of the same kind or class as those with which they were first connected. The other word, "business," is, it is true, used for the first time. In general use it has a broader significance than either of the others, and might include any affair, however serious or trivial, into which volition entered. But here it is used with words of limited meaning, which have received in the same act a particular application, and upon the same principles of construction must be referred to things of the same kind as those specified, and to which the other words are referred. *Wakefield v. Fargo*, 90 N. Y. 218. We think, therefore, that a "business or vocation," to be within the purview of the statute, must be an employment either vicious in itself, or one which partakes of the character of an amusement, and that it has no application to productive industries, or useful or necessary business or occupation. The defendant's employment was undoubtedly of the latter character, and although in the abstract he was engaged in "business," and the machine employed in its prosecution dangerous, there is no analogy with the avocations specified in the act, and we find nothing to show that any wider sense was intended.

The trial court, therefore, erred in submitting the case to the jury as one in which the plaintiff might recover if, in their opinion, the employment of the child involved such risk to her as to bring the avocation within the meaning of the term "dangerous to life or limb." Much stress is laid by the learned counsel for the appellant upon the remarks of FOLGER, Ch. J., in *Cowley Case*, 83 N. Y. 464; S. C., 38 Am. Rep. 464, that the life of a child might be endangered, or its health injured, "by putting him to ride on a vicious or unmanageable horse, or by putting him to tend a dangerous piece of machinery." The remarks were pertinent to the question then in hand — a conviction under the fourth section (*supra*), but did not involve a consideration either of an inquiry or facts similar to those now before us. The case was put by way of illustration merely, and cannot serve as precedent or authority.

The appellant also argues that without the statute the plaintiff might recover. That may well be. The complaint was properly framed to make out a cause of action at common law. There was evidence tending to support it, but in that aspect the defendant had the ruling of the trial court in his favor, and it is not now the subject of review.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

All concur.

BOARD OF HEALTH OF NEW YORK v. PURDON.

June 2, 1885.

NUISANCE — INJUNCTION — ADULTERATED TEAS — EXPERT TESTIMONY.

Where the evidence raises a question of fact, as to whether the use of adulterated teas would or would not produce irreparable mischief or a necessity for the interposition of the court, an injunction restraining the sale thereof will not be granted.

Opinions of experts based wholly upon theoretical knowledge of the nature and character of adulterating substances are of no greater value, as evidence, than the testimony of witnesses who had used the teas, as to their practical effect upon the human system.

RUGER, Ch. J. The fact that the teas, the sale of which this action was brought to restrain, were adulterated, and that their possession for the purpose of sale to the general public was a nuisance subjecting the offenders to an indictment, and in case of sale, to actions for penalties for selling adulterated goods, cannot be successfully controverted; and yet this fact alone is insufficient to support the action. The plaintiffs have thereby established but one of the elements necessary to entitle them to the relief demanded. Courts will not in all cases interfere by way of injunction to restrain the continuance of an illegal trade, the abatement of a nuisance, or the prosecution of a dangerous employment. *Wolcott v. Melick*, 8 Stockt. 204; *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371. Its power, however, to do so in case of the exercise of any trade or business which is either illegal or dangerous to human life, detrimental to health, or the occasion of great public inconvenience, is not only conferred by the provisions of the statute, but belongs to the general powers possessed by courts of equity to prevent irreparable mischief and obviate damages for which no adequate remedy exists at law. N. Y. Cons. Act of 1882, §§ 636, 637, and 646; Story's Eq. Jur., §§ 921, 924; Eden on Injunctions, chap. 11. Whatever source of jurisdiction is appealed to, the rule governing its exercise is the same, and the court will inquire not alone as to the unlawfulness or offensiveness of the act complained of but also as to its extent, the circumstances surrounding its exercise, and the degree of danger to be apprehended from its continuance. It was said in the case of *Jordan v. Woodward*, 38 Me. 424: "It is not every violation of the rights of another which may be ranked under the general head of nuisance which will authorize the interposition of this court by means of an injunction. It must be a case of strong and imperious necessity, or the right must have been previously established at law, or it must have been long enjoyed without interruption." The ground of equity jurisdiction in such cases has been said to be to "prevent irreparable mischief and also to suppress offensive and vexatious litigation." Story's Eq. Jur., §§ 923, 925. He also says: "That in all cases of this sort, courts of equity will grant an injunction to restrain a public nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence. For if the evidence be conflicting and the injury to the public doubtful, that alone will constitute a ground for withholding this extraordinary interposition. *Id.*, § 924, a.

It was held in *Eastman v. Company*, 47 N. H. 78, that "the plaintiffs should, of course, show by their proof a case of strong and clear injustice, of pressing necessity and imminent danger, of great and irreparable damage, and not of that nature for which an action at law would furnish a full and adequate remedy." In the *Earl of Ripon v. Hobart*, 3 M. & K. 180, it was said by Lord Chancellor BROUGHAM that "it is always to be borne in mind that the jurisdiction of this court over nuisances by injunction at all, is of recent growth, has not till lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it even in cases where the act or thing complained of was admitted to be directly and immediately hurtful to the complainant." The language used in the consolidating act giving courts jurisdiction to interfere by injunction to restrain nuisances in the city of New York, has not changed the established rule as to the imminency of the danger to be apprehended or the necessity of such a remedy to avoid irreparable injury. By that act it must appear that the injunction is "needed," among other things, to prevent "serious danger to human life or serious detriment to health," and unless the facts of this case bring it within the requirement, that it is imperatively necessary to prevent the

consequences described, the plaintiffs have failed to show such a case as entitles them as matter of right to the remedy demanded.

If we regard the findings of the court below alone, we see that although it has found the teas in question were adulterated and colored to some extent with offensive and noxious drugs and substances, it still reaches the conclusion that no sufficient evidence had been produced to prove that the use of said tea was "dangerous to human life or detrimental to health, and unwholesome, or that the injunction prayed for is needed to prevent serious danger to human life or detriment to health, or that the said teas, or the selling or offering for sale of the same, is a nuisance."

It is claimed by the appellants that these findings are inconsistent and that they should be considered in their most favorable aspect for the appellant. When the findings of the trial court are apparently inconsistent, it is the duty of the appellate tribunal, if possible, to reconcile them and give effect to the real meaning and intent of the court in making them. *Bennett v. Bates*, 94 N. Y. 360. But the application of this rule is not called for here, as we find no irreconcilable repugnancy in the findings. It is quite possible that the substances found in the teas in question, did not exist in such proportions or quantities as rendered their use necessarily dangerous or unwholesome to human health or life, even though some of them were in their nature deleterious and unhealthy and might, under certain circumstances, and if absorbed into the system in sufficient quantities, be both unwholesome and dangerous.

It results therefrom, unless the undisputed evidence shows the conclusion reached by the court, that the use of these teas was not unwholesome, is erroneous, there is no ground upon which the judgment appealed from can be disturbed.

The case on the part of the plaintiff was sought to be made out by the introduction of expert evidence alone, and this was to the effect that the use of the teas in question as a beverage was, in the opinion of the witnesses, deleterious and unwholesome. These opinions were based wholly upon theoretical knowledge of the nature and character of the substances used in adulteration, and their supposed effect upon the human system when used in connection with the teas as a beverage. Many, if not all of them, testified they never knew, neither had they heard of a case where the use of teas like those in question had proved injurious to the health of those using them. These opinions were undoubtedly competent to prove the subject of the issue, but they were certainly of no greater value as evidence than the testimony of witnesses who had used the teas as to their practical effect upon the human system when imbibed as a beverage, and did not constitute conclusive evidence of the facts in issue.

On the other hand, the evidence of the defendant, tended strongly to show not only that all green teas were similarly adulterated, but that their use as a beverage was not thereby rendered unwholesome.

A number of dealers of long experience in the business of buying and selling teas were called and testified uniformly to the effect that in all their experience they had never heard of a case where the use of such teas had proved injurious to those using them. One of the defendants had drank steadily and daily for a number of months of the teas in question, and had discovered no injurious effects therefrom. An expert of established character for scientific attainments and learning was also called by the defendants and testified that he drank of the tea in question and found it very palatable and followed by no ill effects, and that he had carefully examined and analyzed samples of the tea, and that in his opinion there was nothing injurious or unwholesome in its use.

To say the least, this evidence raised a question of fact for the consideration of the court below, and one upon which it might well conclude that the sale and use of these teas would not produce irreparable mischief or a necessity for the interposition of the court by way of injunction.

The question raised as to whether the sale of these teas was not protected from any interference therewith by the State courts under the laws of the State by the acts of Congress authorizing their importation, is one which, in the view we have taken of the case, it is unnecessary to discuss or decide.

We are of the opinion that the judgment should be affirmed.

All concur.

COOKE, Infant, etc., v. LALANCE AND GROSJEAN MANUFACTURING CO.

Mr. Tracy, for appellant. ————, for respondent.

DANFORTH, J. Our recent decision in *Hickey v. Taaffe* is decisive of this appeal and requires a reversal of the judgment.

Judgment reversed, new trial granted, with costs to abide the event.

All concur.

SUPREME COURT OF RHODE ISLAND.

HOWLAND v. HOWLAND.

October 18, 1884.

PARTITION FENCES—CONTRIBUTION TO COST—REMEDY.

In an action brought under Pub. Stat. R. I., chap. 106, § 6, of fences:

When a fence was built by the plaintiff on his own land, not on the boundary line between his land and the defendant's and not on a boundary line recognized and acted on by the parties, *held*, that the defendant was not bound to contribute to the cost of the fence even though the fence, if paid for by both parties, would become a boundary line by estoppel.

Sembla, that the statute assumes a recognized or undisputed boundary line as the basis of the fence viewer's jurisdiction.

Held, further, that section 5 of said act does not authorize an order to build a new fence where none has existed, but applies only to the rebuilding of a former fence or the repair of one which has become defective or ruinous.

Held, further, that when a fence viewer under Pub. Stat. R. I., chap. 106, § 8, apportioned a line of fence, but did not "direct the time within which each party shall erect or repair his share of the same," no right of action arose.

Under the statute, the common-law remedy for the neglect to build a partition fence in discharge of the statutory duty is case in tort, not *assumpsit*.

Case under Public Statutes, chap. 106, § 6. Heard by the court, jury trial being waived.

The statute referred to, sections 2, 5, 6, 8, provide.

§ 2. All partition fences shall run on the dividing line, and the owners shall have the right to place one-half on the width thereof on the land of each adjoining proprietor. Such fences shall be kept up and maintained in good order through the year, unless the parties concerned shall otherwise agree.

§ 5. Whenever any proprietor or possessor of land shall neglect or refuse to repair or rebuild any partition fence, or shall withdraw his fence from any division line, the aggrieved party may complain to any fence viewer of the town, who, after due notice to such party, shall attend and view the same; and if he shall find said complaint to be true, he shall, in writing, require the delinquent party to repair or rebuild the same within such time as he shall therein appoint, not exceeding fifteen days.

§ 6. If such order shall not be complied with, the complainant may repair or rebuild the same in the manner set forth in said order, and when the same shall be completed to the satisfaction of such fence viewer, he shall ascertain the cost thereof and give a certificate of the same, including also his fees, to the complainant, who may demand of the party delinquent double the sum in said certificate mentioned. If the same be not paid within one month after demand, the complainant may recover the same in an action of the case for money laid out and expended, with interest at the rate of twelve per centum per annum.

§ 8. Whenever any controversy shall arise about the rights of the respective occupants in partition fences and their obligation to maintain the same, either party may apply to a fence viewer of the town where the lands lie; who, after due notice to each party, may, in writing, assign to each his share thereof, and direct the time within which each party shall erect or repair his share of the same; which assignment, being recorded in the office of the town clerk, shall be binding

on the parties and all succeeding owners and occupants of the lands, and they shall always thereafter maintain their respective shares of said fence, until the rights of the respective parties shall be determined differently in some proper action.

William P. Sheffield & William P. Sheffield, Jr., for plaintiff.

E. L. Barney & Christopher M. Lee, for defendant.

DURFEE, C. J. This is an action under Pub. Stat. R. I., chap. 106, §§ 5 and 6, to recover double the cost of one-half of a fence erected as a partition fence. The case was tried to the court, jury trial being waived. It appeared on trial that the land divided by the fence was formerly all one lot, belonging to the defendant. The whole lot was taken on execution and 17 2775-10000 acres of it were sold to one Charles W. Howland under the execution in satisfaction thereof. The sheriff in his deed to said Charles conveyed said 17 2775-10000 acres with boundaries on the north, east and west, and bounded the same on the south by land of the defendant, thus leaving the south line undetermined, as no length was given for the east and west boundaries or either of them. Afterward said Charles employed a surveyor to measure off for him said 17 2775-10000 acres on the north side of the lot, and, after the measurement, had the south line, as found by the surveyor, apportioned between him and the defendant, and then conveyed said 17 2775-10000 acres to the plaintiff. The defendant took no part and as appears was not asked to take any part in the proceeding. The plaintiff went into possession and built his part of the fence under the apportionment aforesaid; the defendant did not build. Thereupon the plaintiff made complaint to the fence viewer, who, acting under, or intending to act under section 5, notified the defendant "to put the said wall or fence in repair, and of legal height within fifteen days." The defendant did not comply with this order. The plaintiff therefore completed the fence himself.

The defendant disputes the validity of the sheriff's sale and contends that, even if the sale was valid, the plaintiff cannot maintain his action for several reasons, some of which we think are valid. The statute expressly declares that "all partition fences shall run on the dividing line." The defendant introduced testimony to show that, accepting the plaintiff's theory of his rights under the sheriff's deed, the fence erected by the plaintiff was not on the dividing line, but was two feet away from it on the plaintiff's land. We think the testimony is probably correct. The defendant contends that, this being so, he cannot be required to pay for the fence. We think the point is well taken in this case, however it may be in a case where the fence is built on a line which, though not the true line, has been recognized and acted upon as such by the parties. The plaintiff replies that the defendant cannot make the objection because it is to his advantage if the fence be off the line. We do not think he is bound to accept the advantage. We do not see how he can be required to pay for a fence built on the plaintiff's land, about two feet away from the dividing line, any more than he could be required to pay for any other structure erected on the plaintiff's land. It may be urged that the fence will become the dividing line by estoppel if it is paid for. But, admitting this, the estoppel does not yet exist and the defendant cannot in our opinion be compelled, against his will, to assist in creating it. Indeed the statute seems to contemplate the existence of a recognized or undisputed line as the ground of the jurisdiction which it confers on the fence viewers; for it gives them no power to establish a new line when the parties do not agree upon it.

The defendant also contends that the order or notice to him from the fence viewers "to put the wall or fence in repair" was not authorized by section 5, because section 5 does not authorize an order or notification to erect a new wall or fence where none has ever existed, but only applies when an existing fence has become defective by dilapidation or decay, or where a fence, formerly existing on a dividing line, has been withdrawn. We think this construction is correct. The section does not authorize the fence viewer to require the delinquent party to build anew, but only authorizes him, in case of neglect to repair or rebuild, to require the delinquent to repair or rebuild; and it is impossible to repair or rebuild what has never existed. If any special remedy be conferred, where no fence has ever existed, in the case of improved land, it is conferred by section 8;

but though the fence viewer undertook to act under section 8 and did apportion the line, as the same was claimed to exist by the plaintiff's predecessor in title, he did not "direct the time within which each party shall erect or repair his share of the same," as there provided. The plaintiff is therefore not entitled to any special remedy under section 8, if indeed there be any special remedy under it.

The plaintiff has inserted in his declaration a count in *assumpsit* for the actual cost of the fence, and contends that the count is good at common law on the ground of an implied promise to pay. We do not think so; for the owners or tenants of adjoining lands are not bound to fence them at all at common law except by prescription. Perhaps, however, the plaintiff means that the count is maintainable as the common-law remedy under the statute. We do not think that is so. The common-law remedy under the statute, if any, is not *assumpsit* for the cost of building the fence, but case *ex delicto* for damages for the injury suffered by the plaintiff for the neglect of the delinquent party to build it in discharge of his statutory duty.

Judgment for the defendant.

JAMES v. JAMES.

October 18, 1884.

INSOLVENCY — CLAIM HOLDER — RIGHT OF ACTION.

A claim holder against the insolvent estate of a decedent may, after his claim has been stricken out of the commissioners' report, under the statute, bring suit thereon without giving notice of his intention so to do.

Exceptions to the court of common pleas.

Benjamin L. Dennis, for plaintiff. *Thomas H. Peabody*, for defendant.

CARPENTER, J. This is an action to recover damages for non-payment of a sum of money alleged to have been due from the defendant's testator. The defendant pleads that the estate was represented insolvent; that the commissioners allowed the claim of the plaintiff; that the defendant, being dissatisfied with the allowance, gave notice thereof to the probate court and to the plaintiff within forty days after the report was received, and the claim was thereupon stricken out of the report; and "that no notice in writing was ever given by said plaintiff in the office of the clerk of said probate court that she should have said claim determined at common law in manner and form as is required by the statute." To this plea the plaintiff demurred; the demurrer was overruled by the court of common pleas, and judgment given for the defendant, and the plaintiff brings this bill of exceptions.

The question is whether notice in writing was required to be given by the plaintiff in the office of the clerk of the court of probate before bringing this suit. The statute applicable to the subject is contained in sections 12 and 15 of chapter 186 of the Public Statutes, which are as follows:

"§ 12. Notwithstanding the report of the commissioners, any creditor whose claim is wholly or in part rejected may have the same determined at common law, in case he shall give notice thereof, in writing, in the office of the clerk of the probate court within forty days, and bring and prosecute his action within sixty days after such report shall be received."

"§ 15. In case the executor or administrator shall be dissatisfied with the claim of any creditor allowed by the commissioners, and shall give notice thereof in the office of the clerk of the probate court, and also to the creditor, within forty days as aforesaid, such claim shall, by the court of probate, be stricken out of the report of the commissioners; in which case the claimant may, within sixty days after notice thereof, bring his action at common law, in the same manner, upon the same conditions and with like effect as if his claim had been wholly or in part rejected by the commissioners."

The fifteenth section applies to the present case, and contains no requirement of notice by the claimant unless such notice be required by the provision that he

shall bring his action "in the same manner" and "upon the same conditions" as if his claim had been rejected. But it is to be noted that the forty days allowed to the claimant for giving notice in case his claim is rejected, and the forty days allowed to the executor for giving notice in case the claim is allowed, commence at the same time; that is, at the time the report is received. If, therefore, notice be required from the claimant, in case his claim is allowed and afterward stricken out, it will follow that the time for giving such notice runs out at the same time with the time allowed to the executor in which to give notice of his objection to the claim. The executor might delay his notice until the last moment of the allotted time, and thus prevent any notice and suit by the claimant. The statute thus interpreted would require a notice from the claimant and, at the same time, leave no time within which it could be given.

It is, perhaps, somewhat difficult to say what are the conditions referred to and prescribed by the last clause of the fifteenth section; but we think it clear that they do not include a notice which the executor by his own action may make it impossible to give. The exceptions must be sustained.

Exceptions sustained.

NEW SHOREHAM v. BALL.

November 22, 1884.

MUNICIPAL CORPORATION — TITLE BY ADVERSE POSSESSION — INTERRUPTION.

In ejectment wherein the plaintiff's title rested on possession for more than twenty years, the *locus* was a long, sandy waste along the seashore, and the defendants were mere intruders. The plaintiff, a municipal corporation, had by vote let the *locus* year by year from 1829 to 1875. The court instructed the jury that to show title the town must prove open, adverse actual and exclusive possession for twenty continuous years, and "that the votes, though they were evidence of a claim of right on the part of the town, were not sufficient to prove title by possession unless the lessees took actual possession under them, that it was not necessary for the plaintiff town to show that the possession of its lessees was continuous in the sense of their being on the premises all the time, and that if the lessees were in possession of any part of said East Beach (the *locus*) under the votes it might be considered that they were in possession of the whole for the purpose of acquiring title by possession by the town."

Held, that the instruction in the circumstances contained no error entitling the defendants to a new trial.

Passage over the *locus* by the inhabitants of the town to get sea weed or sand, or use thereof for temporary deposit of sea weed, would not amount to an interruption of the possession.

There being evidence to show that the *locus* was known as the East Beach,

Held, that it was for the jury to determine whether or not the town let the *locus* by that name.

Defendants' petition for a new trial.

William P. Sheffield & William P. Sheffield, Jr., for plaintiff. *William F. Slocum & Nicholas Van Slyck*, for defendant.

DURFEE, C. J. This is a petition for the new trial of an action of ejectment in which the plaintiff, the town of New Shoreham, recovered a verdict against the defendants, who are the petitioners. The new trial is asked because, as alleged, the court erred in certain rulings and instructions given at the trial and in refusing certain rulings and instructions requested by the defendants.

The town in proof of title adduced evidence of possession for more than twenty years. It appeared, however, that the premises were not used for municipal purposes, but were part of a larger tract which was for the most of the time in the occupation of tenants of the town. The defendants contended that the town could not acquire title by possession for any other than municipal purposes, and requested the court so to charge, but the court refused so to charge and they excepted. The cases cited in support of the exceptions do not go to the point that a town cannot acquire land by possession for other than municipal purposes, but only to the point that it is *ultra vires* for a town to purchase land for other than such purposes. We think this is quite a different proposition; for a town

cannot purchase land without expending its moneys, and it has no right to expend its moneys, raised by taxation or otherwise for municipal purposes, for other purposes. The acquirement of land by possession does not involve an expenditure any more than does the acquirement of land by deed or devise, and it has been decided that a gift or devise of land to a town is good, even though the land be given or devised in general terms, and be accepted without any intent to use it directly for municipal purposes. *Inhabitants of Worcester v. Eaton*, 13 Mass. 371; *Sargent v. Cornish*, 54 N. H. 18; *Dillon on Municipal Corporations*, § 437. Land so given, even when not wanted for municipal purposes, may be applied by sale or lease to the alleviation of municipal burdens. It is not necessary to suppose that the possession here, which was maintained under a claim of right, began otherwise than rightfully. Indeed the cases hold that if land be acquired *ultra vires* by a corporation, the title passes, nevertheless, and cannot be collaterally impeached. *Chambers v. City of St. Louis*, 29 Mo. 543; *Barrow v. Nashville and Charlotte T. C.*, 9 Humph. 804; *Davis v. Old Colony Railroad*, 131 Mass. 258; *Jones v. Habersham*, 107 U. S. 174. We do not think the defendants are entitled to a new trial on the ground first assigned.

The second ground assigned for a new trial, is the refusal of the court to give certain instructions requested by the defendants, without qualifying them. The plaintiff's testimony tended to show that the demanded premises were part of a strip of uninclosed land, a mile and a half in length from north to south, lying between an ancient highway or driftway and the seashore and bounding east on the seashore; that this strip was called the East Beach; that the town had been in the habit of letting it by vote year by year, from 1829 to 1875, sometimes for pasturage and sometimes for other purposes, and that the lessees had entered upon said strip under these votes and used it for the purposes for which it had been let to them. The court instructed the jury that in order to show title the plaintiff town must prove that it had been in the open adverse actual and exclusive possession for the period of twenty years continuously, and that the votes, though they were evidence of a claim of right on the part of the town, were not sufficient to prove title by possession, unless the lessees took actual possession under them. The court, however, added that it was not necessary for the plaintiff town to show that the possession of its lessees was continuous in the sense of their being on the premises all the time, and that if the lessees were in possession of any part of said East Beach under the votes, it might be considered that they were in possession of the whole for the purpose of acquiring title by possession by the town.

The point particularly pressed by the defendants is this, that the court erred in instructing the jury that "if the lessees were in possession of any part of said East Beach, under the votes, it might be considered that they were in possession of the whole for the purpose of acquiring title for the town." The cases cited by the defendants go to show that as against the legal owner no one can acquire title by possession to an entire tract of land by merely entering into possession of and occupying a part of it, unless he enters and occupies, under a deed or some other writing which purports to give him title to the whole. There are cases, however, which hold that to constitute an *actual* possession it is enough if the demanded premises are used and occupied as they are fitted from their nature to be used and occupied. *Ewing v. Burnet*, 11 Pet. 41; *Cass v. Richardson*, 2 Cold. 28; *Ford v. Wilson*, 35 Miss. 490. The case here, finds that the strip of land called, as the plaintiff's witnesses testified, East Beach, which included the demanded premises, was nothing but an open, sandy waste, on which grew a little scanty herbage fit for pasturage, not worth fencing. It appears that cattle were once seen on the demanded premises, and it would seem that they might have gone there, or any where else on the East Beach, whenever they were on the East Beach, if there had been any thing to attract them. The case also finds, that the East Beach was let year after year by vote in open town meeting; so that though the occupation was not under deed it was as notorious and well defined as if it had been. The case, therefore, though it may not be within the letter, is within the spirit of the authorities; and it might well be argued that the publicity of the possession was such that no deed or fences were necessary to make it effective even as against a legal owner. But, how-

ever that may be, the rule which prevails as against the legal owner is not the rule which governs in the case of a mere intruder; as against a mere intruder proof of prior possession, for however short a period, affords a presumption of ownership, which according to some of the cases is sufficient, and, according to the cases most favorable to the defendants, is sufficient unless rebutted. *Doe dem. Hughes v. Dyeball*, 3 Car. & P. 610; *Asher v. Whitelock*, L. R., 1 Q. B. Div. 1; *Davison v. Gent*, 1 Hurl. & N. 744; *Doe dem. Bord v. Burton*, 18 Q. B. 807; *Nagle v. Shea*, 1 R., 8 C. L. 224; *Anderson v. Melear*, 56 Ala. 621; *Smith v. Lorillard*, 10 Johns. 338, 356. As against an intruder, too, the rule in regard to the possession is less exacting, and it has been held that the exercise of the ordinary control and dominion, even though it might not be of such a character that it would ripen into title as against the legal owner, would prevail against a stranger. *Hunter v. Starin*, 28 Hun, 529. This is good sense as well as good law. The petition here does not show any title in the defendants. It is true it alleges that the defendants, or those under whom they claim, in common with the other inhabitants of the town, had passed over the open strip which includes the demanded premises, at pleasure and had used said strip as a place of temporary deposit for sea weed gathered on the adjacent beach, but it does not allege that they had so used the demanded premises. It alleges that they had never been excluded from any use and occupation they had seen fit to exercise in the demanded premises; but it does not allege that they had ever seen fit to exercise any use or occupation there; on the contrary the jury, under the charge of the court, must have found that for a period of twenty years prior to the occupation which caused this action, they were not in possession, if in possession at all, in any other manner than by going upon it, in common with other inhabitants, to get sea weed or sand, or by using it as a temporary tipping place for sea weed. If we go beyond the petition and consult the documents filed with it and used at the hearing, we find that in 1861 certain parties conveyed to Richmond B. Negus two acres of land, bounding it east by the road before mentioned; that in 1878 Nathan C. Dodge conveyed five adjoining acres of land to said Negus, bounding it east by said road, and that on May 1, 1883, Negus conveyed said seven acres to Edward E. Pettee, who conveyed them to the defendants, and that in their conveyances the eastern boundary given was not said road, but "the beach," "the East Beach," and "the East Beach so-called." It thus appears that the deed to Negus actually excludes the demanded premises, and that it is only under the deeds from Negus and Pettee that the defendants can find the slightest pretext for their claim. But as there is no proof that Negus or Pettee was ever in possession of the demanded premises, claiming them as his own, their deeds convey no title to them, and consequently the defendants can be regarded only as mere intruders or trespassers, and even if Negus or Pettee had ever been in possession they could not be regarded as the legal owners. On the other hand we find the town, as long ago as 1765, voting to let the East Beach, and though an interval ensued in which no votes to let appear, we find that in 1829 the letting was resumed and continued until 1875, the said East Beach being treated all the time as a single tract or parcel of land. We think, therefore, that the instruction here complained of contained no error which will entitle the defendants to a new trial.

We do not think a new trial should be granted on the other grounds assigned. We think the testimony going to show that the strip of land between the road and sea shore, including the demanded premises, was called "the East Beach" was properly admitted; for though the strip was not a beach, technically speaking, it might nevertheless be called "the East Beach," and if we are going to do justice we cannot confine ourselves pedantically to our lexicons. In this State the beaches belong to the State and cannot be let by the towns. The moment it appeared that the strip was called the East Beach, it was for the jury to say whether it was not let by the town under that designation. We also think that the court did not err in telling the jury that a mere going on the East Beach by the inhabitants of the town for sea weed or sand, or the use of it for the temporary deposit of sea weed, would not amount to an interruption of the possession. An entry to amount to an interruption, even if we regard the case as a case of adverse possession, must be an entry by the owner for the purpose of interrupting the

possession. *Henderson v. Griffin*, 5 Pet. 151, 158. The entry must bear on the face of it an intent to resume possession. *Altemas v. Campbell*, 9 Watts, 28; *Hollinshead v. Nauman*, 45 Pa. St. 140. Nothing is more common in Rhode Island than for people to cross land lying along the bay to get to and from the shore, and it would hardly be possible for any occupant of such land to prove title by adverse possession, if such crossings would suffice to interrupt it. We decide, therefore, without considering some other points more in detail, that a new trial must be denied and the petition dismissed.

Petition dismissed.

KEACH, Receiver, v. CHADWICK.

December 2, 1884.

PATENT — RECEIVER — ASSIGNMENT.

A receiver of an insolvent debtor, appointed under Pub. Stat. R. I., chap. 237, § 13, is entitled to a patent right belonging to the debtor, and the court may order the debtor to assign the same to the receiver.

Petition for an order of the court.

The petitioner was by a decree of this court entered October 25, 1884, appointed receiver of the property of Chadwick & Lester, an insolvent copartnership, under Pub. Stat. R. I., chap. 237, § 13, which is as follows:

“§ 13. Whenever any debtor, being insolvent, shall do any act or make any conveyance whereby any one of his creditors shall obtain a preference over any other of his creditors, or omit to do any act which he might lawfully do to prevent one of his creditors from obtaining a preference over his other creditors, contrary to the intent of this chapter, any one or more of his creditors holding not less than one-fifth of the debts in amount of such debtor may file a petition in equity in the supreme court in the county where such debtor resides, but which may be heard in any county, and after notice to the debtor and to the creditors sought to be preferred, of the time and place of hearing thereon, the court sitting in banc shall proceed summarily to hear the parties, and if it shall appear to the court that such debtor is insolvent and has been giving or is about to give a preference to any of his creditors over others of such creditors, the court shall appoint, from the nominations by the creditors, a receiver, who shall take possession of all the property, evidences of property, books, papers, debts, *choses* in action and estate of every kind of the debtor, including estate and property attached or levied on, within sixty days prior to the filing of said petition and remaining unsold as aforesaid, and including also all estate and property theretofore conveyed by such debtor in fraud of the rights of creditors or in violation of the provisions of this chapter, but excepting so much of said estate and property other than debts secured by bills of exchange or negotiable promissory notes as is or shall be exempted from attachment by law, and convert the same into money, and marshal and distribute the same among the several creditors of the insolvent, whether their claims are due or to become due, who shall come in and prove their respective claims within such time and in such manner as the court shall direct, and the court shall order such debtor to file a schedule of his debts and to whom due, and of his property, and to do whatever may be necessary and proper to carry this chapter into effect, and all proceedings therein or thereunder shall be in accordance with the course of equity and such as the court shall by general rule or by special order prescribe.”

November 29, 1884, the receiver filed his petition stating that Chadwick & Lester owned certain patent rights under the laws of the United States which they refused to transfer to the receiver unless ordered by the court, and praying for an order requiring an immediate transfer.

Rollin Mathewson, for petitioner. *Stephen A. Cooke, Jr., & Louis L. Angell*, contra.

PER CURIAM. The receiver of an insolvent debtor under Pub. Stat. R. I., chap. 237, § 13, is required to “take possession of all the property, evidences of prop-

erty, books, papers, debts, *chooses* in action and estate of every kind of the debtor," etc., * * "excepting so much of said estate and property other than bills of exchange and negotiable promissory notes as is or shall be exempted from attachment by law." We think the receiver is entitled by this language to a patent right belonging to the debtor. We do not think a patent right is within the exception; for though not liable to attachment, on account of its intangible or incorporeal character, it is not "exempted from attachment by law," within the meaning of the statute. The exemption meant is exemption by statute. The phrase "except what is exempted (or exempt) from attachment by law" is used, and has long been used, in the assignment, oath and certificate prescribed in the provisions for the relief of poor debtors, and it has always, so far as we know, been construed as covering only statutory exemptions.

The court is authorized by section 18 to order the debtor "to do whatever may be necessary and proper to carry this chapter into effect, and all proceedings therein or thereunder shall be in accordance with the course of equity." The court, is therefore, empowered to order the debtor to convey the patent right to the receiver, if such conveyance is necessary and proper to give the receiver full dominion over it. In *Ashcroft v. Walworth*, 1 Holmes, 152, it was decided in the circuit court, SHEPLEY, J., delivering judgment, that the legal title in a patent right belonging to an insolvent debtor did not pass to his assignee in insolvency by the assignment made by a judge of probate and insolvency under the insolvency law in Massachusetts, though the assignee was entitled to the patent right under the law and could compel an assignment by the debtor. The ground of the decision is that the act of congress requires that the assignment shall be by an instrument in writing, to be recorded in the patent office. The decision of the supreme court of the United States in *Ager v. Murray*, 105 U. S. 126, seems to import that the instrument in writing may be made by some person appointed for that purpose by the court. Even if that be so we do not think it will prevent our requiring the assignment from the debtor. Let a decree be entered directing a conveyance or assignment as prayed.

BURDICK v. BURDICK.

December 15, 1884.

A conveyance by A. of land in the adverse possession of B. is ineffectual to pass title.

Exceptions to the court of common pleas.

Nathan F. Dizon, for plaintiffs; *A. B. Crafts*, for defendants.

PER CURIAM. The exceptions are not entirely explicit, but, as we understand them, the purport of them is this, that the court below found as a matter of fact that the land in suit was in the adverse possession of the defendants at the time the deed from Horatio N. Kenyon, under which the plaintiffs claimed title to it, was executed, and thereupon decided that the deed was ineffectual to pass the legal title. The decision was in accordance with the law as it has been frequently recognized by this court. *Campbell v. The Point St. Iron Works*, 12 R. I. 452. The statute, Pub. Stat. R. I., chap. 214, § 47, does not affect the question. It simply relieves a plaintiff in ejectment or trespass and ejectment, who is entitled to such estate as he claims and has a right of entry, from the necessity of proving an actual entry in certain cases in which, without the statute, he would have had to prove it in order to recover. *McCann v. Rathbone*, 8 R. I. 297; *Stearns v. Harris*, 8 Allen, 597; *Barry v. Adams*, 3 id. 493.

Exceptions overruled.

GREENE v. DISPEAU.

December 20, 1884.

CORPORATE STOCK — REDEMPTION — BILL NOT MAINTAINABLE.

A. transferred to B. certain corporate stock vesting the legal title in B., who held it as a chattel mortgage. After default by A. in the conditions of the mortgage and after B. had, subsequent to such default, held and treated the stock as his own for more than six years, A. filed a bill in equity to redeem.

Held, that the bill could not be sustained.

Bill in equity to redeem certain corporate stock.

Charles E. Gorman, for complainant. *Edwin Metcalf*, for respondent.

DURFEE, C. J. This is a bill to redeem sixty-five shares of the capital stock of the American Ship Windlass Company, of the par value \$100 per share, which, on July 15, 1874, were transferred by the trustees of Joseph P. Manton, the complainant's assignor, to the defendant as security for a promissory note for \$5,000, indorsed by the defendant and negotiated at bank for Manton's accommodation. The stock was transferred to the defendant, absolutely in form, on the company's transfer book, and a certificate of ownership was issued to him. He gave Manton, however, a receipt in writing wherein he agreed to renew his indorsement from time to time so as to enable Manton to carry the loan for one year, and wherein he further agreed that upon payment of the note by Manton and release of himself from liability at the end of the year, but not otherwise, he would re-transfer said sixty-five shares to Manton. The note was given for four months and was renewed for four months from time to time, with the defendant's indorsement, until November 25, 1875. The renewal note of November 25 matured in the spring of 1876, and, the defendant being absent from the State, was dishonored. The defendant on his return, on June 19, 1876, took up the note, paying it in full with interest and notarial expenses. The defendant testifies that soon after this Manton agreed with him that he should have the shares, then worth less than par, for payment and accordingly surrendered the receipt to him and he destroyed it. Manton denies this, and testifies that he simply agreed to let the defendant pledge the stock as security for a loan which the defendant was anxious to obtain, and that he cannot produce the receipt because it was among the contents of a box which has been stolen. The defendant is corroborated not only by the fact that he has ever since held the stock, voted on it and received the dividends, but also by the testimony of two witnesses, one testifying that in the fall of 1876, when the corporation was on the eve of an election, Manton repeatedly told him that he, Manton, had no claim on the stock, and the other testifying that at a later election Manton told him that he, Manton, had no claim on the stock; whereas Manton is corroborated by only one witness who testifies that in 1881 the defendant told him that he took the stock for security, and, being pressed, further testified, rather vaguely, that he understood the defendant to say or mean that he was still holding it as security. The testimony seems to preponderate in favor of the defendant. But, however that may be, there is no evidence except the testimony of the last-mentioned witness, which, being contradicted by the defendant, cannot be trusted, that the defendant has recognized any right in Manton or treated the stock otherwise than as his own since June or July, 1876, a period of more than six years before this suit, which was begun December 9, 1882. The defendant contends that in these circumstances the right to redeem has expired or has been lost by *laches*, limitation or estoppel.

We are very clear that the transfer of the sixty-five shares vested the legal title in the defendant and that it must, therefore, be regarded, not as a mere pledge, but as a chattel mortgage. *Jones Mortg.*, § 4. As a mortgage it became irredeemable at law sixty days after default under the statute. *Pub. Stat. R. I.*, chap. 176, § 11.*

* As follows:

§ 11. Whenever the condition of any mortgage or personal property has been broken the mortgagor or any person lawfully claiming or holding under him may redeem the same at any time within sixty days thereafter, unless the property shall in the mean time have been sold, in pursuance of the contract between the parties.

The statute, however, contemplates that the mortgage may be redeemable in equity after it ceases to be redeemable at law. Pub. Stat. R. I., chap. 176, § 13,* and chap. 223, § 4.†

The complainant contends that the right in equity continues indefinitely unless the mortgage is foreclosed by sale or otherwise. This view may be supported by a few *dicta*, but the general current of decision is against it. Undoubtedly the right in equity will continue as long as the mortgagee continues to recognize the mortgage as subsisting; but when the mortgagee, having possession, ceases, after default, to recognize the mortgage as subsisting and deals with the property as his own, it is, according to the great preponderance of authority, for the mortgagor, if he wishes to redeem, to bring his suit to redeem within a reasonable time. As to what is a reasonable time, the cases are not very clear. Mr. Jones, in his treatise on Chattel Mortgages, says that "reasonable time may well be determined by analogy to the statute of limitations applicable to actions at law for the recovery of personal property." Jones on Chat. Mortg., § 687. The time within which a real property mortgage may be redeemed is limited to twenty years, after the mortgagee in possession ceases to recognize the mortgage as subsisting, from analogy to the statute of possessions. If in like manner we determine the time for chattel mortgages from analogy to the statute of limitations of personal actions, the right to redeem will cease at the expiration of six years. This has been adopted as the rule in Alabama (*Humphres v. Terrell*, 1 Ala. 650; *Byrd v. McDaniel*, 33 id. 18); and is recognized as a proper rule in Missouri. *Perry v. Craig*, 3 Mo. 516. Evidently twenty years is unreasonably long; for personal property is not permanent and indestructible like real estate, but ordinarily it is movable, liable to be lost, perishable from use or time, and even when it consists of shares of stock, subject to great fluctuations in value. If six years is long enough for an action at law, when personal property belonging to one person has been appropriated by another, we see no reason why, in the absence of fraud or some other special ground of equitable relief, six years is not likewise long enough for the institution of a suit to redeem a chattel mortgage, when the mortgagee in possession, having an absolute title at law, ceases to recognize any right in the mortgagor and treats the property as his own. Indeed it is difficult to see why, in such a case, equity should not follow the law and hold the mortgage irredeemable at the end of sixty days after default. In the case at bar the mortgage, construing it as favorably as possible for Manton, ceased to be redeemable at law considerably more than six years ago. There is no evidence, satisfactory to us, that the defendant has, during this period, ever recognized the mortgage as subsisting. The statute of limitations has run against any claim which he has for the payment of the mortgage note. There is no reason to believe that any suit to redeem the sixty-five shares would ever have been brought if they had not greatly risen in value. It would be unreasonable, in our opinion, to permit a redemption under such circumstances after such a lapse of time. The bill must be dismissed with costs.

Decree accordingly.

* As follows:

§ 13. Any person entitled in equity to redeem any mortgaged property, whether real or personal, may prefer a bill to redeem the same to the supreme court in the county in which the real estate sought to be redeemed is situated or in which the mortgagor of personal property may reside if in this State, and if not, then in any county in this State, which bill may be heard, tried and determined by said court, according to the usages in chancery and the principles of equity.

† As follows:

§ 4. Personal estate, when mortgaged and in the possession of the mortgagor and while the same is redeemable either at law or in equity, may be levied on by execution against the mortgagor in the same manner as on his personal estate.

PLACE v. MERRILL.

December 20, 1884.

In an action for false warranty, whether it be *assumpsit* or case in tort, a *scienter* need not be averred by the plaintiff; and if averred, need not be proved.

Exceptions to the court of common pleas.

Edward D. Bassett, for plaintiff. *Hugh J. Carroll & Patrick H. Mulholland*, for defendant.

DURFEE, C. J. This is case in tort for a false warranty in the sale of a horse, the horse being warranted sound and free from disease. The declaration alleges that the defendant made the warranty deceitfully, knowing that the horse was diseased. The question raised by the exceptions is, whether the plaintiff is entitled to recover without proof that the defendant knew the horse to be diseased. We think he is on authority. An action on the case sounding in tort was the old remedy for a false warranty. In *Williamson v. Allison*, 2 East, 446, decided in 1802, Lord ELLENBOROUGH said that the remedy by *assumpsit* "had not prevailed generally above forty years." In *Stuart v. Wilkins*, 1 Doug. 18, decided in 1778, Lord MANSFIELD regarded *assumpsit* as a novelty and hesitated to sanction it. It is now well settled that either *assumpsit* or case in tort is maintainable. It is also well settled that no *scienter* need be averred either in *assumpsit* or tort, and that if averred, being unnecessary, it need not be proved. *Williamson v. Allison*, *supra*; *Gresham v. Postan*, 2 Car. & P. 540; *Brown v. Edgington*, 2 M. & G. 279; *Holman v. Dord*, 12 Barb. 336; *Howe v. Fort*, 4 Blackf. 293; *Trice v. Cockran*, 8 Gratt. 442; *Lassiter v. Ward*, 11 Ired. 448; *Tyre v. Causey*, 4 Harr. (Del.) 425; *Schuchardt v. Allens*, 1 Wall. 359. See, also, *Burgess v. Wilkinson*, 13 R. I. 646. The defendant refers to *Pierce v. Carey*, 87 Wis. 232, and *Sweeney v. Vroman*, 18 Reporter, 447, two Wisconsin cases, in which it was held that in tort the *scienter* must be alleged and proved. The reasoning of the court in those cases is very cogent, but the decisions are counter to a long and authoritative line of precedents, which we think must be held to have established the law.

Exceptions overruled.

LESTER, Administrator, v. YOUNG.

December 20, 1884.

CONVERSION — CUTTING STANDING TIMBER.

Trees, when severed from the land, become at once the property of the owner of the inheritance, and it is waste for a tenant for life to cut for sale, or to sell and allow the purchaser to cut standing trees suitable for timber or saw logs.

Exceptions to the court of common pleas.

J. Erastus Lester, pro se ipso. *Dexter B. Potter & Henry B. Whitman*, for defendant.

DURFEE, C. J. This is trover for the conversion of twenty-five cords of wood. On the trial in the court below it appeared by testimony uncontradicted, that the plaintiff's intestate had only a life estate in the land from which the wood was cut; that shortly before her death her tenant by her order sold the wood, consisting largely of pine timber and saw logs, standing; that the purchasers cut it down, carried away the timber and logs, but left the tops and branches, which were cut up into cord wood under the direction of the tenant, acting for the intestate, to be marketed and sold; that the cord wood remained on the land when the intestate died; that, by direction of the plaintiff, it was carted to the highway and there piled and measured, being regarded by him as a part of the intestate's estate; and that a part of it was carried away by the defendant for his father who had bought it from the tenants in fee in remainder of the land from which it had been cut. The counsel for the defendant requested the court to charge that the intestate in cutting the timber and wood for sale was committing

waste and doing a wrongful act, whereby she could not and did not acquire a title or right to possession as against the heirs during her life-time, and consequently that no title or right to possession as against the heirs passed to the plaintiff or her administrator. The court refused and charged on this point in favor of the plaintiff. The defendant excepted.

We think the court below erred. It was clearly waste for the intestate to cut for the purpose of sale, or to sell and suffer the purchaser to cut, trees which were suitable for timber or saw logs; and it is well settled that the special interest of the life tenant in such trees determines as soon as they are so severed from the land, and that thereupon they instantly become the property of the owner of the inheritance. 1 Greenleaf's Cruise, Tit. III, chap. 2, § 35; *Bowles' case*, 11 Rep. 79 b; *Richardson v. York*, 14 Me. 216; *Moore v. Wait*, 3 Wend. 104; *Buckley v. Dolleare*, 7 Conn. 232; *Railroad Co. v. Kidd*, 7 Dana, 245, 250. The exceptions must, therefore, be sustained and a new trial granted.

Exceptions sustained.

KENNEY v. SWEENEY.

December 20, 1884.

TRESPASS — TENANT BY CURTESY — LEASE — JURISDICTION.

A. as tenant by the curtesy, the inheritance belonging to B., leased certain realty to D. After the death of A., B. conveyed the estate to C., D. remaining in possession. C. gave D. notice both of his title and to quit the premises.

Held, that D. was tenant by sufferance of C.; that D.'s occupation was of a tenement or estate let within the meaning of the statute.

A statute gave to special courts of common pleas jurisdiction "of all actions brought for possession of tenements or estates let, against tenants and others who have broken the terms and conditions of the lease or agreement under which they hold, or who hold or occupy tenements or estates by wrongful entry of detainer, or as tenants at will or by sufferance."

Held, that a special court of common pleas had jurisdiction of an action of trespass and ejectment brought by C. against D.

Exceptions to a special court of common pleas.

Hopkins & Potter, for plaintiff. *Edward D. Bassett & Frederic Hayes*, for defendant.

CARPENTER, J. This is a bill of exceptions to the rulings of a special court of common pleas. The action was trespass and ejectment, and the facts as found by the presiding justice are as follows: The defendant was a tenant of Edward P. Knowles who was tenant by the courtesy of the premises in question, the remainder in fee-simple being in his son, Edward R. Knowles. After the death of Edward P. Knowles, the estate was conveyed by Edward R. Knowles to the plaintiff, the defendant still remaining in possession, and due notice was given to the defendant by the plaintiff of her title and to quit the premises.

The statute gives jurisdiction to special courts of common pleas "of all actions brought for possession of tenements or estates let, against tenants and others who have broken the terms and conditions of the lease or agreement under which they hold, or who hold or occupy tenements or estates by wrongful entry or detainer, or as tenants at will or by sufferance." Pub. Stat. R. I., chap. 195, § 2, as amended by Pub. Laws R. I., chap. 269, § 1, of March 10, 1882.

The exceptions raise the question whether the special court had jurisdiction on the above finding of facts by which it appears that the relation of landlord and tenant never existed between the defendant and the plaintiff or her grantor. The argument of the defendant divides itself into two parts.

In the first place it is contended that the defendant has no estate by sufferance because the demise under which he originally entered was not made by the present tenant in fee-simple, or in other words, that no man can have an estate by sufferance in the lands of another unless there be priority of contract between him and such owner; and that, therefore, the defendant is a trespasser. We think, however, that the tenancy by sufferance may exist where the original entry has been by lawful demise made by any person. The terms of the old definitions of

the estate certainly cover such a state of facts as is here disclosed and we find no authority for the limitation claimed by the defendant. 1 Inst. 57 b; *Evans v. Reed*, 5 Gray, 308.

In the second place it is argued that the premises are not a *tenement let* within the meaning of the statute since the relation of landlord and tenant never existed between the plaintiff and the defendant. The statute gives jurisdiction of actions "against tenants and others." The word "tenants" clearly means tenants of the plaintiff, and the word "others" therefore includes those who are not such tenants, and we see no reason why it should not apply to those who have never been tenants of the plaintiff as well as to those who formerly were and have ceased to be such. It follows that if the word "others" is to have any application whatever the words "tenements or estates let" must be held to include not only tenements which are held under contracts of lease subsisting and in force at the date of the writ, but also some tenements which are not held under any lease then in force. In this view it seems to us that the words "tenements or estates let" must at the least include those which the defendant has held by lease which is now expired, and in which he has acquired no further interest except an estate at will or by sufferance. The words appear to have reference to the nature of the title under which the defendant originally entered. Reading the statute with this interpretation it gives jurisdiction of actions to recover tenements held by sufferance where the original demise was made by a person other than the plaintiff, which is exactly the present case.

Exceptions overruled.

ÆTNA LIFE INSURANCE CO. v. MASON.

December 27, 1884.

MARRIAGE—INSURANCE POLICY PAYABLE TO WIFE—EFFECT OF HER PETITION FOR DIVORCE.

A. took out a policy on his wife's life, payable in four years to her if living, and if not living, to himself. He paid the premiums, retained the policy, and received payments made upon it. She was living at the maturity of the policy, but had filed a petition for divorce.

Held, that under the statute, the wife was entitled to the amount due on the policy at its maturity.

Bill of interpleader.

Louis L. Angell, for complainant and respondent trustee of Annie M. Mason.
James C. Collins, for respondent Volney W. Mason.

DURFEE, C. J. It appears in this case that on October 31, 1879, the plaintiff company issued its policy numbered 82951, on the life of Annie M. Mason, wife of Volney W. Mason, payable by its terms to said Annie on October 31, 1883, if then living, and, if dead, to said Volney; that the said Annie is still living, and that on October 31, 1883, the policy matured and the sum of \$517.57 became payable on it. It further appears that meanwhile the said Annie has filed a petition for divorce from said Volney, that he has the policy, and that both he and she claim the amount due on it. In these circumstances the plaintiff company has filed a bill of interpleader, and under a decree of the court, has paid the amount into the registry of the court, and the said Annie by her trustee duly appointed, and the said Volney have interpleaded in regard to it. The said Volney avers that without consulting said Annie he procured the policy for his own purposes, paying all that has been paid by way of premiums, or otherwise, and that said Annie never expressed or intimated any desire in regard to it. He also avers that the policy was never given to said Annie and was never in her possession but was always kept by him; and that the policy was originally for \$2,500; that payments have been made from time to time, and always to himself, until the sum of \$517.57 is all that remains due thereon; that said Annie never objected nor made any claim to said previous payments; that he has always supposed that the policy was payable according to its terms to him, except in case of his death, being payable in that case only to said Annie, and that he procured the policy for his own benefit and not for the benefit of any other person, except

in the case of his decease before it should fall due. As the case is presented we are asked to decide whether these averments, supposing them to be true, make a case which entitles the said Volney to said \$517.57.

Our statute, Pub. Stat. R. I., chap. 166, § 21, provides as follows, to-wit:

"Any policy or policies of insurance or part thereof which shall not exceed in the aggregate the sum of \$10,000 made by an insurance company on the life of any person and expressed to be for the benefit of a married woman, whether effected by herself or by her husband, or by any other person on her behalf, shall inure to her separate use and benefit, independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same on her behalf, his creditors and representatives, and such policy may be sued in the name of the person beneficially interested therein, or in the name of the representative of such person."

We think it is quite clear that under this provision, in the absence of any fraud or mistake, the policy must be taken to have inured to the benefit of the said Annie according to its terms, notwithstanding that it was never delivered to her, but was retained by her husband and was payable to him in case of her death before the time for payment. Her's was the primary right, he having no right if she survived the time for payment. Having survived, her right has become absolute. Indeed the cases go far to show that this would have been the effect without the statute. *Landrum v. Knowles*, 22 N. J. Eq. 594; *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193, 195; *Fowler v. Butterly*, 78 N. Y. 68; S. C., 34 Am. Rep. 507; *Pilcher v. N. Y. Life Ins. Co.*, 33 La. Ann. 322, 330. But even if, without the statute, it would be possible for said Volney, he having paid for the policy, to prove a resulting trust in his favor against its terms by oral testimony, we think it would not be permissible under the statute, the statute being so positive and explicit. Any other construction would make the statute a cover for fraud.

Does the answer of said Volney show a case of fraud or mistake? There is clearly no fraud alleged. We do not think the answer shows a case for relief on the ground of mistake. It does not allege that the policy differs in its terms from what the parties intended. It simply alleges that said Volney supposed it was payable to him according to its terms, and not to his wife unless he died before it became payable. We do not see how he could possibly have supposed so, for he does not allege any ignorance of the terms, but if he did suppose so, he supposed so because he misunderstood the legal effect of plain and unambiguous words. There is ordinarily no remedy for such a mistake if the other parties be not to blame, and here no circumstances are alleged to take that case out of the ordinary rule. *Blackburn's Case*, 8 DeG., M. & G. 177; *Rashdall v. Ford*, L. R., 2 Eq. 750; *Farley v. Bryant*, 32 Me. 474, 483; *Dill v. Shahan*, 25 Ala. 694; *Lanning v. Carpenter*, 48 N. Y. 408; *Nelson v. Davis*, 40 Ind. 366; *Gerald v. Elley*, 45 Iowa, 322; *Story's Eq. Jur.*, §§ 113, 116, 137; *Kerr on Fraud and Mistake*, 409, 428.

Our conclusion is, that Annie M. Mason is entitled to the money in the registry of the court, and that a decree should be entered ordering its payment to her.

Decree accordingly.

[See 22 Eng. Rep. 702; 33 id. 156.—Ed.]

FRIEDBURG v. KNIGHT.

December 29, 1834.

PLEADING—FRAUD—FACTS CONSTITUTING, MUST BE ALLEGED.

A replication of fraud to a plea of release must set out the fraudulent acts relied on, that the court may determine whether they amount to fraud, and that the defendant may know on what to take issue.

Trespass on the case. On demurrer to the replication.

This action was trespass on the case for injuries suffered by the plaintiff from the defendants' alleged negligence. The defendants pleaded in bar, *first*, the general issue concluding to the country, and the plaintiff joined with a *similiter*; also *second*, a sealed release executed after the alleged cause of action arose, and

before the date of the writ; also *third*, a general acquittance, made after the alleged cause of action arose and before the date of the writ. To the second and third pleas the plaintiff replied as follows:

"And the plaintiff, as to the plea of the defendants by them secondly above pleaded, says that he, the plaintiff, by reason of any thing in that plea alleged, ought not to be barred from having his aforesaid action, because he says that said supposed writing of release was obtained from the plaintiff by the fraud and covin of the defendants, and this the plaintiff is ready to verify.

"And the plaintiff, as to the plea of the defendants by them thirdly above pleaded, says that he, the plaintiff, by reason of any thing in that plea alleged, ought not to be barred from having his aforesaid action, because he says that said supposed receipt in full was obtained from the plaintiff by the fraud and covin of the defendants, and this the plaintiff is ready to verify."

To these replications the defendants demurred.

Jacob W. Mathewson, for plaintiff. *Arnold Green*, for defendants.

PER CURIAM. We think the replications are bad. If the plaintiff wishes to set up fraud as an answer to the pleas of a release and an acquittance, he ought to set forth the acts by which the alleged fraud was perpetrated, so that the court can judge whether they amount to fraud or not, and, if they amount to fraud, so that the defendant can know definitely what he is to take issue upon. See cases cited for defendants.*

Demurrer sustained.

WATERMAN v. ANDREWS.

December 31, 1884.

DEED — INCONSISTENT CLAUSES — CONSTRUCTION — PARTITION — EJECTMENT — PARTIES PLAINTIFF.

When a deed contains inconsistent clauses, courts in construing it will consider the whole instrument and the intentions of its maker, subject to the rules of law. If all its parts cannot stand, those will be rejected which oppose the maker's intentions. If its language can be interpreted in different ways, courts will look at the circumstances of its execution, and extrinsic evidence is admissible to enable them to do this. If the interpretation still remains doubtful, the deed will be construed in favor of the grantee.

A deed of partition between co-tenants gave an area and boundaries, which latter excluded a part of the area. The area given agreed with the result found by adding together the grants made to the original owner and deducting therefrom the grants made by him. No reason appeared why any part of the area should have been retained as common property. The grantees of the deed of partition entered on and for more than twenty-five years occupied the whole area.

Held, that the whole area passed by the deed of partition.

A reference in one deed to another "for a more particular description" of the premises conveyed, incorporates into the former whatever is contained in the latter.

In ejectment, if several plaintiffs join, all must be entitled to possession, otherwise by the general rule judgment must be given for the defendant.

This rule is not affected by Pub. Stat. R. I., chap. 230, § 1, but is modified by Pub. Stat. R. I., chap. 204, § 34.

Hence, when, of several plaintiffs, only two were found entitled:

Held, that the court, on motion, would allow amendment by striking out the other plaintiffs, and that this would be done, although the two plaintiffs had in the suit set up title to a larger tract including the *locus* in dispute, which was inconsistent with the title which they were found to validly hold.

In ejectment, the defendant's plea of the title to himself, through adverse possession, dispenses with further proof of ouster.

Trespass and ejectment. Heard by the court, jury trial being waived.

The facts involved are stated in the opinion of the court.

* *J. Anson v. Stuart*, 1 Term Rep. 748, 752, 753; *Wallingford v. Mutual Society*, L. R., 5 App. Cas. 685, 697, 701, 709; S. C., 84 Eng. Rep. 65; *Service v. Heermance*, 2 Johns. 96; *Brerton v. Howe*, 1 Denio, 75; *Wald v. Locke*, 18 N. H. 141; *Bell v. Lamprey*, 52 N. H. 41; *Sterling v. Mercantile Insurance Co.*, 32 Pa. St. 75; *Hopkins v. Woodward*, 75 Ill. 62; *Cole v. Joliet Opera House*, 79 Ill. 96; *Darnell v. Rowland*, 80 Ind. 342; *Hale v. West Virginia Co.*, 11 W. Va. 229; *Capuro v. Builders' Insurance Co.*, 89 Cal. 128; *Hynson v. Dunn*, 5 Ark. 396; *Abraham v. Gray*, 14 Ark. 301; *Giles v. Williams*, 8 Ala. 316.

James Tillinghast, for plaintiffs. *Francis W. Miner & John F. Lonsdale*, for defendant.

MATTESON, J. This is an action of trespass and ejectment, the facts in which, as they appeared on the hearing, were as follows, viz: On the 20th day of March, 1837, William F. Waterman, Sophia Waterman, and Nathan Waterman, the children of William Waterman, then deceased, were the owners of two farms, one known as the home estate of Christopher Waterman, then deceased, devised to them by him and containing about sixty-five acres; the other known as the home estate of their father, the said William Waterman, descended to them from him, and containing forty-six acres. It was agreed between them, that William F. and Sophia should have the Christopher Waterman farm, and that Nathan should have the William Waterman farm. In pursuance of this agreement, Nathan, on the date named, quit-claimed to William F. and Sophia his interest in the Christopher Waterman home estate, and the said William F. and Sophia, on the same date, quit-claimed to Nathan their interest in the home estate of their father. In each of their quit-claim deeds the consideration named was the other quit-claim deed and the sum of \$1 paid. The description of the premises conveyed in the deed from William F. and Sophia to Nathan was as follow: "All our right, title, claim and interest in and to a certain tract of land, with the buildings and improvements thereon, situate in said Cranston, containing about forty-six acres; bounded northerly and westerly on the middle road, so called, from Providence to East Greenwich, and on the Providence and Pawcatuck turnpike road; easterly partly on land of Thomas Grace, partly on land of Robert Grinnell, and partly on land of Philip Paine; southerly, partly on land of said Grinnell, and partly on land of said Paine, being the home estate of which our father died possessed."

The home estate of which their father William Waterman died possessed did contain forty-six acres, that being the exact amount of his acquisitions by deed after deducting the amounts conveyed away by him, as appeared by the following list of conveyances received and made by him during his life, viz:

By deed from Zuriel Waterman, dated September 13, 1783, he acquired one tract of.....	26	acres.
And one tract of.....	4	"
By deed from Reuben, Elizabeth and William Potter, dated December 7, 1787, he acquired.....	2½	"
<hr/>		
Making.....	32½	acres.
By deed to Reuben and William Potter, dated December 7, 1787, he conveyed.....	3½	"
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Leaving.....	29	acres.
By deed from Zuriel Waterman dated April 28, 1800, he acquired...	23½	"
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Making.....	52½	acres.
By deed to Zuriel Waterman, dated April 28, 1800, he conveyed.....	6½	"
<hr/>		
Leaving as his home estate, of which he died possessed.....	46	acres.

This home estate included a tract of about two acres, which was a part of the land conveyed to said William Waterman by the deed above mentioned from Zuriel Waterman, dated September 13, 1783, and which formed the north-easterly portion of the farm and adjoined Mashahaug pond. At the time of the conveyance from William F. and Sophia to Nathan in 1837, this tract was and ever has been separated from the rest of the farm by the road or highway mentioned in the deed as the "Middle road, so called, from Providence to East Greenwich." This tract of two acres is the *locus*, for the possession of which this suit is brought.

Sophia Waterman died January 27, 1840, intestate and without issue. The said Nathan and William F. survived her and were her heirs at law.

The said William F. Waterman died September 7, 1861, intestate. He left children, viz.: Henry, Lydia, Elizabeth, Esther F., Oliver B., William F., James and Nathan.

Nathan Waterman occupied and retained the entire farm, including the tract in controversy, until his decease, with the exception of a piece containing one acre, more or less, being the southerly portion of the tract in controversy, which he conveyed to the defendant by deed dated May 1, 1861. He died intestate and without issue, October 1, 1862. His heirs at law were the children of William F. Waterman named above.

Of these children, Nathan by deed dated March 18, 1863, Henry by deed dated March 21, 1863, William F. by deed dated June 24, 1863, and James by deed also dated June 24, 1863, quit-claimed to Nancy Waterman, the widow of Nathan, their respective interests in the land conveyed to him by William F. Waterman, Senior, and Sophia by their deed above mentioned, dated March 20, 1837. Olive B. married John C. Grinnell. Esther F. married David J. Burgess. John C. Grinnell and Olive B. Grinnell, in her right, and David J. Burgess and Esther F. Burgess, in her right, by deeds dated February 26, 1863, quit-claimed all their interest in the land conveyed to Nathan Waterman, as aforesaid, to one Cottrell T. Wilcox. Lydia married John S. Aborn, and Elibabeth married Thomas L. Stadden. Henry Waterman, after making the deed to Nancy Waterman, above-mentioned, died leaving two children, Sophia who married Thomas Sullivan, and Henry.

The description in all the quit-claim deeds mentioned in the preceding paragraph were substantially the same as that contained in the deed from William F. Waterman, Senior, and Sophia Waterman, to Nathan Waterman, dated March 20, 1837, quoted above.

Nancy Waterman, widow of Nathan, by deed dated January 27, 1871, quit-claimed to Benjamin Andrews, the defendant, all her interest in and to the northerly part of the tract in controversy, being the whole of it which had not been previously conveyed to the defendant by her husband, by his deed, dated May 1, 1861, above mentioned.

The plaintiffs, Nathan Waterman, William F. Waterman, James Waterman, Elizabeth Stadden, Esther F. Burgess, Olive B. Grinnell and Lydia Aborn are children of the above-named William F. Waterman: the plaintiffs, Thomas L. Stadden, David J. Burgess, John C. Grinnell and John S. Aborn, are the husbands, respectively, of the said Elizabeth, Esther, Olive and Lydia. The plaintiffs, Henry Waterman and Sophia Sullivan, are the children of Henry Waterman, son of the above-named William F. Waterman, Senior, and the plaintiff, Thomas Sullivan, is the husband of the said Sophia.

The plaintiffs contend that the tract of about two acres in controversy is excluded by the terms of the description in the deed from William F. Waterman, Senior, and Sophia Waterman to Nathan Waterman, above quoted, from the land conveyed; that the operation of that deed is to be restricted to the land included within the particular boundaries mentioned, and that the addition of the general words, "being the home estate of which our father died possessed," cannot enlarge the grant beyond the particular description, which is specific and unambiguous. The defendant, on the other hand, insists that those words have a controlling influence in the construction of the deed and sufficiently indicate the intention of the members to convey their interest in the entire farm.

It is laid down as a rule of construction, that where there are two clauses in a deed, which are so repugnant that they cannot stand together, the former is to prevail over the latter, unless there be some special reason to the contrary. Plowd. 541; 1 Inst. 112 b; Shep. Touch. 83; Broom's Legal Maxims, *580. But, as Judge METCALF remarks in 23 Amer. Jurist, 277, this rule has very little operation in modern times, a reason to the contrary being almost always found. Now-a-days the rules of construction applied in cases of repugnancy give effect to every part of a deed, when consistent with the rules of law and the intention of the party. When this is impossible, the part which is repugnant to the intention is rejected. And whenever the language used is susceptible of more than one interpretation the courts will look at the circumstances existing at the time of the transaction, such as the situation of the parties, the subject-matter of the conveyance, the acts of the parties contemporaneous with and subsequent to the deed. To this extent extraneous evidence is admissible to aid in the construction

of written contracts. *Wilson v. Troup*, 2 Cow. 195; *Parkhurst v. Smith*, Willes, 327, 332; *Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 100-103; *Win-nipisseogee Lake, etc., Co. v. Perley*, 46 N. H. 83, 101; *Bell v. Woodward*, id. 315, 331; *Gibson v. Tyson*, 5 Watts, 34, 41. If, after all, the interpretation to be given to the deed remains doubtful, the court will adopt the construction which is most favorable to the grantee, because it is the fault of the grantor that he has left the matter in doubt, and he ought not to be permitted to take advantage of a difficulty which he has himself created.

Applying these rules of construction to the deed under consideration, and viewing the transaction in the light of the facts surrounding it, as disclosed by the evidence, we are inclined to the opinion that it was the intention of the makers to include in the land conveyed the tract in controversy, and that the clause in the description, bounding the land "Northerly and westerly on the Middle road, so called, from Providence to East Greenwich and on the Providence and Pawcatuck turnpike road," instead of on Mashapaug pond, by which the tract in controversy was apparently excluded from the land conveyed, was inserted by inadvertence, or mistake, and should be rejected as repugnant to those parts which state the quantity as about forty-six acres and designate the land as the home estate of their father. The reasons which have inclined us to this opinion are the following: The deed under consideration was made in pursuance of, and to carry into effect, an agreement for partition of the real estate which the parties owned. This real estate consisted of two farms, of which one had belonged to their uncle, the other to their father. The tract in controversy was a strip of land skirting Mashapaug pond and formed a part of the latter farm. No reason has been suggested to us why it should have been desirable for the parties to retain as tenants in common this tract, which was at the time apparently of trifling value. In the absence of such a reason, it is not unreasonable to presume that the parties in making a partition should have included in it all their real estate. Again, the quantity of land conveyed is recited to be "about forty-six acres." Exclude the tract in controversy and the quantity is reduced to forty-four acres. It is doubtless true that the statement of the quantity of the land conveyed cannot always be strongly relied upon as the most certain indication of intention, since it is a matter concerning which the parties may easily be mistaken. Where, however, the number of acres stated accords with the area of the land claimed to have been conveyed, and with the result of a computation made by adding together quantities acquired by several deeds, in different parcels, and deducting therefrom quantities conveyed in different parcels by other deeds, the presumption of the correctness of the statement is strengthened and the weight to be given to it, as indicative of intention, is proportionately increased. But, perhaps, the most significant consideration is the conduct of the parties, following the conveyance, indicating the construction which they themselves put upon the deed. The evidence shows that Nathan entered into the sole and exclusive occupation of the entire farm which had been the home estate of their father, including the tract in controversy, and continued in such occupation, exercising acts of ownership upon it, until his death, a period of more than twenty-five years. Neither William F. nor Sophia, so far as appears, ever asserted any claim to a right in the home estate of their father, or the tract in controversy, but, on the contrary, both acquiesced, as long as they lived, in its exclusive occupation by Nathan.

If, however, notwithstanding the foregoing considerations, the proper interpretation of the deed in question is to be regarded as still doubtful, then under the rule already stated, the deed is to be taken most strongly against the makers.

It follows from the foregoing considerations, that the title to the tract of land in controversy vested, under the deed we have been considering, in Nathan Waterman, and that none of the plaintiffs are entitled to recover so much of that tract as was conveyed by him to the defendants by deed dated May 1, 1861, referred to above.

Upon a motion for the entry of judgment, both plaintiffs and defendant claiming judgment under the above opinion and upon the pleadings, the following opinion was delivered, March 26, 1885:

MATTESON, J. When the former opinion in this case had been announced, the

plaintiffs asked for judgment for the northerly portion of the tract in controversy, being so much of it as had not been conveyed by Nathan Waterman, in his lifetime, to the defendant, by deed dated May 1, 1861. They contended that the deeds, offered by the defendant, from some of themselves, as heirs at law of Nathan Waterman, to his widow, Nancy Waterman, and to Cottrell T. Wilcox, as recited in the former opinion, were insufficient to pass the title to said northerly portion. The descriptions in these deeds were all alike and were, as we remarked in the former opinion, substantially the same as that then under consideration. The language of these descriptions is as follows, viz.: "A certain farm or tract of land with all the buildings and improvements thereon, situate in said town of Cranston, containing by estimation about forty-six acres, more or less, and bounded as follows: Northerly and westerly on the Providence and Pawcatuck turnpike and the Middle road to East Greenwich, so called, easterly partly on land formerly owned by Thomas Grace, partly on land of Robert Grinnell and partly on land of Philip S. Paine, southerly on land of said Grinnell and Paine. For a more particular description, see a quit-claim deed from William F. Waterman and others to said Nathan Waterman, recorded in the town clerk's office in said Cranston, in book No. 14, page 370, of the land records."

The plaintiffs contend, as they did in relation to the deed which we formerly considered, that, as the description expressly bounds the land conveyed northerly and westerly on the Providence and Pawcatuck turnpike road and the Middle road to East Greenwich, so called, it thereby excludes said northerly portion, and that the added clause, referring for a more particular description to the earlier deed named, cannot enlarge the grant beyond the particular description; that, being particular, definite and unambiguous. It will be observed that the reference is, "*for a more particular description*," and not merely the common reference to facilitate the searching of the title, as the plaintiffs have supposed. Such a reference incorporates into a deed whatever is contained in the deed to which reference is made. *Knowles v. Nichols*, 2 Curtis, 571, 573, 574; *Varick v. Smith*, 9 Paige, 547, 567; *Phelps and Stewart v. Phelps*, 17 Md. 120, 134; *McIver v. Walker*, 9 Cranch, 173, 178, 179; also in 4 Wheat. 444, 448, 449; *Allen v. Bates*, 6 Pick. 460, 461. It will be further observed that the conveyance is of "a certain *farm* or tract of land, containing," etc., language broad enough to include the entire farm, as it had been, theretofore, known and occupied. The purpose of the description following these general words is not, therefore, to enlarge the grant, but merely to identify the farm which is the subject of the grant. Parts of this description being irreconcilably repugnant, the question is, as it was with reference to the deed formerly considered, which part is to be rejected and which is to stand as conformable to the intention of the parties. The circumstances, so far as they appear, lead us to think that that intention was to convey the farm, as it had previously been known and occupied, and that the clause bounding it northerly and westerly on the turnpike and Middle road, which is repugnant to such intention, was probably copied by the scrivener from the earlier deed and was inserted therein, as we found in the former opinion, by inadvertence or mistake.

The insertion of the words "by estimation" before the words "forty-six acres," and of "more or less" after them, which were not contained in the earlier deed, instead of indicating a contrary intention, as the plaintiffs insist, are to our minds more naturally explained upon the idea that the makers of these deeds were aware that Nathan Waterman had conveyed the southerly portion of the tract in controversy to the defendant, and therefore deemed it necessary to limit the statement of the number of acres by the word inserted, so that it should not be taken as an exact statement of the quantity of land.

As plaintiffs in ejectment can recover only upon proof of their title to the demanded premises, it follows that none of the plaintiffs, whose interests passed under the deeds in question, can recover any part of said northerly portion. The only remaining plaintiffs are John S. Aborn and his wife, Lydia Aborn, and Thomas L. Stadden and his wife, Elizabeth Stadden, the respective interests of said Lydia and Elizabeth, in said northerly portion, being each an undivided eighth. Are they entitled to recover in the present action?

In ejectment, when two or more persons sue as co-tenants, and it appears upon the trial that one of them has no interest in the property, judgment must be rendered for the defendant. To entitle the plaintiffs to recover, all the plaintiffs must have a right to demand the possession. *De Mill v. Lockwood*, 3 Blatchf. 56, 61; *Toomey v. Pierce*, 42 Cal. 335, 338; *Cheney v. Cheney*, 26 Vt. 606, 608; *Jackson v. Richmond*, 4 Johns. 483. Nor is this rule altered by Pub. Stat. R. I., chap. 230, § 1, which simply permits actions of ejectment, or other actions concerning any estate holden or claimed in coparcenary, common or joint tenancy, where the possession of the estate claimed is the object of the suit, to be commenced by all or any two or more of the coparceners, tenants in common or joint tenants, or to be brought by each one for his particular share of the estate, but does not authorize a judgment in favor of one or more coparceners, tenants in common or joint tenants, having an interest in the estate claimed, when improperly joined as plaintiffs with another person or persons having no such interest.

Pub. Stat. R. I., chap. 204, § 84, however, provide that "no action shall be defeated by the misjoinder of parties, if the matter in controversy can be properly dealt with and settled between the parties before the court, and the court may order any party improperly joined in any action to be stricken out." Under this provision of the statute we not only have authority to order the persons improperly made plaintiffs to be stricken out, but are required to sustain the action, instead of permitting it to be defeated by the misjoinder, if we can properly deal with the matter in controversy and settle it between the parties.

The defendant contends that the statute does not apply to a case like the present, because there is not only a misjoinder of parties, but because the title by which the Aborns and Staddens now claim the northerly portion of the tract in controversy, as heirs of Nathan Waterman, is inconsistent with the title which they asserted to the whole of said tract, adversely to the deed from William F. Waterman, Senior, and Sophia Waterman to said Nathan. We fail to perceive, however, if the Aborns and Staddens have, in fact, title to the portion of the tract now claimed, how the circumstances that they have previously in the suit asserted a different and inconsistent title to a larger tract, including that now claimed, which has been found to be invalid, can prevent us from properly dealing with the rights of the parties in the portion of the tract now claimed and settling the controversy between them.

The defendant also contends that judgment ought not to be given in favor of the Aborns and Staddens, because there has been no proof of ouster. The denial of a right of a co-tenant made to him directly, or brought to his knowledge, is, when accompanied by the exclusive possession, sufficient to warrant a finding of an ouster. *Freeman on Co-tenancy and Partition*, § 235; *Siglar v. Van Riper*, 10 Wend. 414, 418, 419; *Humbert v. Trinity Church*, 24 id. 587, 597, 598. The defendant has filed a plea, in which he alleges, that he and those under whom he derives his title had been, for twenty years before the bringing of the suit, in the uninterrupted, quiet, peaceable and actual seizin and possession of the land demanded, claiming the same as his and their sole and rightful estate in fee-simple. This assertion by plea of a title in himself, grounded upon adverse and exclusive possession, amounts to a denial of the title of the plaintiffs, and dispenses with the necessity of further proof of ouster.

We will, upon motion, permit the suit and declaration to be amended by striking out the names of the persons who have been improperly joined as plaintiffs, on condition that the remaining plaintiffs recover no costs; and will then enter judgment, without costs, in favor of the said Aborns and the said Staddens, for their respective interests in said northerly portion of said tracts.

MATHEWSON v. TRIPP.

December 31, 1884.

AGENCY — CITY BOARD — EMPLOYEES — COMPENSATION — APPROVAL BY CITY COUNCIL.

A statute provided that the board of public works in the city of Providence might hire such employees as it deemed needful, "and agree with them for their compensation, provided, however, that when such compensation shall exceed the sum of \$1,000 per annum, such compensation shall be subject to the approval of the city council . . . which said compensation shall be paid out of the city treasury."

Of the employees so hired, the city council approved the compensation of all except two, who were hired at more than \$1,000 per annum, and in regard to whom the council took no action.

Held, that these two were entitled to the pay agreed on with the board of public works.

Held, further, that the city council could disapprove the compensation agreed on by the board of public works or approve it with a reduction in amount, but could not, by mere non-action, defeat the agreement made by the board.

Bill in equity brought by certain tax payers resident in Providence against the city treasurer and the city auditor asking for an account, an injunction, and an order to compel the treasurer to refund certain moneys paid by him from the treasury.

Charles A. Wilson & Thomas A. Jenckes, for complainants. *Nicholas Van Slyck*, for respondents.

DURFEE, C. J. This is a suit in equity for an injunction to restrain the defendants, the city auditor and city treasurer of the city of Providence, from auditing and paying the salaries of certain employees of the board of public works of said city and for other relief. The question involved arises under the following provision of Pub. Laws R. I., chap. 815, of April 15, 1880, being the act for the establishment of the board of public works, to-wit: "Said board may employ such agents and servants as they may deem necessary and agree with them for their compensation, provided, however, that when such compensation shall exceed the sum of one thousand dollars per annum such compensation shall be subject to the approval of the city council, and provided further, that the aggregate amount paid for such compensation shall not exceed the amount appropriated therefor by said city council, which said compensation shall be paid out of the city treasury."

Previous to January 17, 1881, the board employed several persons under this provision, agreeing with them for a compensation in excess of \$1,000 each per annum. On January 17, 1881, the board presented a list of the persons so employed and of the compensation agreed for with each of them to the city council. The city council by vote approved the compensation agreed for in the case of all these persons but two, namely, Clinton D. Sellew, whose compensation was agreed for at \$2,300, and Philip S. Chase, whose compensation was agreed for at \$1,700 per annum. In the case of these two persons the city council has neither expressly approved nor expressly disapproved of the compensation agreed for. Sellew and Chase have remained in the employment of the board and have been paid out of the city treasury their salaries as agreed for. The complainants, who are tax payers of the city of Providence, maintain that the payments are unlawful and ask that they may be enjoined for the future, and that the defendant Tripp may be decreed to refund.

The complainants construe the provision, above recited, to mean that no person, employed by the board under an agreement for more than \$1,000 per annum, can lawfully be paid out of the city treasury more than \$1,000 per annum, until the larger compensation agreed for has been expressly approved by the city council. We do not so construe the provision. The provision authorizes the board to employ such agents and servants as they may deem necessary and to agree with them for their compensation. It does not declare that the employment shall not begin, or that the agreement shall not be operative, until the compensation agreed for, when it exceeds \$1,000 a year, is approved by the city council, but only that the compensation agreed for, when it exceeds \$1,000 a year, shall be subject to the approval of the city council. Now suppose the board employs a man and agrees to pay him \$2,000 a year, and the employee immediately goes to work under that

agreement. The board reports to the city council and the city council does nothing. Is the employee to have nothing for his services? The complainants say he can have \$1,000 a year. But the board agreed with him for \$2,000, and he has served under that agreement. The answer of the complainants is that the agreement is subject to the approval of the city council and the city council has not approved it. The employee may reply: "It is true the agreement, or rather the compensation agreed for, is subject to the approval of the city council, but, nevertheless, it is an agreement which the board was authorized by the statute to make with me, and, having earned my salary by service under it, there is no reason why I should not be paid. The agreement, as you construe the statute, is not an agreement but merely a negotiation for an agreement." It seems to us that the employee in this would have the better of the argument. If it be asked, what becomes of the right of the city council under such a construction, we answer that the compensation agreed for still remains subject to the right, unless the city council has relinquished it, and it can still exercise it. It can now, if it has not relinquished its right, either approve or disapprove the compensation. We have no doubt, moreover, that it can approve subject to a reduction, and that, if the employee then continue in service, he will thereafter be entitled only to the compensation as reduced. We think, however, that the agreement of the board with him holds until the city council acts and that it cannot defeat the agreement by mere non-action.

The bill is dismissed, with costs.

Decree accordingly.

FOSTER v. BERRY.

December 31, 1884.

EXECUTION — TITLE OF PURCHASER ON — VALIDITY — BURDEN OF PROOF — PRESUMPTION AS TO RETURN.

The return of an execution by a sheriff is, in Rhode Island, not necessary to vest in a purchaser at the execution sale the defendant's interest in realty sold under the execution.

Nor does the validity of the purchaser's title depend on the sheriff's leaving a copy of the execution with the town clerk, as required by statute.

Where a plaintiff's case rested on the invalidity of a sheriff's sale, the burden of proof being on the plaintiff:

Held, that the legal presumption that the sheriff's return set forth all which he did, was balanced by the contrary presumption that the sheriff performed his statutory duty. Hence the plaintiff should have shown, by extrinsic evidence, neglect of duty on the sheriff's part.

Exceptions to the court of common pleas. The opinion states the facts.

A. B. Crafts, for plaintiff. *Nathan F. Dixon*, for defendant.

DURFEE, C. J. This case comes up on exceptions from the court of common pleas. The action is *assumpsit* to recover, with interest, \$100, paid by the plaintiff to the defendant for certain real estate sold and conveyed, or ostensibly sold and conveyed, to the plaintiff by the defendant, as sheriff, under an execution, in March, 1868. At the trial in the court below, the plaintiff adduced testimony to show that the defendant had not returned the execution into court, and also that the proceeds of the sale were more than enough to pay the execution, costs and charges, and that the sheriff had not lodged the surplus in the general treasury; and he claimed that, in consequence of these neglects, he failed to acquire any title to the estate bought by them. The defendant produced the execution with a return thereon, and testified that he had returned it into court, and that it was taken out for examination by the late Judge PORTER, and that he had obtained it from him. The court instructed the jury to render a verdict for the defendant. The question is, was the instruction erroneous? We do not think that any return was necessary to vest the title in the purchaser, for the statute provides that the sheriff's deed, given in pursuance of the statute, shall vest in the purchaser, at an execution sale of real estate, all the estate, right and interest which the debtor had therein. Rev. Stat. R. I., chap. 195, § 13; Pub. Stat. R. I., chap. 223, § 14.

If, then, the sale was legal, the plaintiff acquired by the deed all the right, title and interest of the debtor in the estate sold, and no subsequent neglect of the sheriff could divest it. It is true that a neglect to retain the execution might make it difficult or impossible for the plaintiff to establish his title by the proper record evidence, but a title, which has once vested, does not become extinct when it becomes incapable of proof. It is for the plaintiff to show that he did not acquire any title in order to recover in this form of action. In Massachusetts and Connecticut a return of the execution is necessary to vest the title by the statutes of these States, and therefore the cases cited from these States are not precedents for us.

The plaintiff points out certain defects and omissions in the return, chief among which is an omission to show that the execution sale was duly advertised in some newspaper in the county, and he contends that, in consequence thereof, his title is invalid. The burden of proof, however, is on the plaintiff, and it does not follow that the sale was not advertised because the return fails to show it. The return does not purport on its face to be a statement of every thing that was done in the service of the execution, and we do not find any language in it which implies that the sale was not advertised. It may be argued that the presumption is that every thing that was done appears in the return, because the officer is directed to return the writ with his doings thereon. But it may likewise be argued that the presumption is that the defendant did not sell before advertising the sale, because the statute makes it his duty to advertise before selling. Both presumptions are equally strong, and therefore all we can say is that the return does not show whether the sale was duly advertised or not. Consequently it was for the plaintiff to show the omission to advertise by extrinsic evidence, and he adduced no such evidence. In a proper case, of course the defects and omissions in the return may be supplied by amendment.

The plaintiff makes the point that he acquired no title, because the copy of the execution which the defendant left with the town clerk under Pub. Laws R. I., chap. 268, passed at the January session of the general assembly, in 1858, was grossly inaccurate. We think the validity of the title does not depend on the leaving of the copy. The leaving of the copy is not necessary to perfect the levy, for the levy is to be made before the copy is left. Nor is it required as additional notice of the sale, for the statute does not direct *when* the copy shall be left, and it may be left immediately after the levy, before the sale is ratified, and moreover, if the estate has been previously attached, no copy is required. Evidently the purpose is notice to intending purchasers and incumbrancers. Doubtless it is the duty of the officer charged with the execution to leave the copy, and if he neglects the duty, he may be responsible to any person who suffers by the neglect; but the duty being rather collateral to the proceedings under the levy then a part of them, we do not think the sale will be thereby invalidated.

Exceptions overruled.

[As to rights of purchaser on execution sales, see 28 Eng. Rep. 220; 26 Am. Rep. 627.—Ed.]

LEWIS v. DOUGLASS.

December 31, 1884.

WILL — PATENT AMBIGUITIES — DECLARATIONS OF TESTATOR — DEVISE CONSTRUED.

Patent ambiguities in a will must be solved by construction, not by evidence.

Hence the declarations of a testator to the scrivener of the will are not admissible to explain conflicting provisions of the will itself.

Testamentary disposition as follows:

"1. I give, devise and bequeath to my wife, P. . . . the privilege of the south half of the house and also the south garden, and also the keeping of a cow the year round, and also all the household furniture for her own personal benefit during her natural life or widowhood.

"2. I give and bequeath to my wife, P. . . . after all my just debts and funeral charges are paid, all of my remaining property during her natural life and widowhood.

"3. I . . . do appoint B. . . . executor of my last will and testament, to dispose of all my real and personal property that I am possessed of at my decease, and what

remains of that property to be divided equally between my three sons, M. . . D. .
and B. . ."

Held, that clause 2 did not cover the house and homestead estate mentioned in clause 1.
And that clause 3 was to be construed simply as a general residuary clause affecting
property not disposed of in the preceding clauses.

Plaintiff's petition for a new trial.

Thomas H. Peabody, for plaintiff. *Nathan F. Dixon*, for defendant.

MATTESON, J. This was an action of trespass and ejectment to recover possession of a tract of land, situated partly in Hopkinton and partly in Exeter, being the homestead estate of Moses B. Lewis, deceased. The writ was dated the 2d day of January, 1888. The defendant pleaded, *first*, freehold in himself; *second*, not guilty. The plaintiff joined issue on both pleas.

The plaintiff is the widow of Moses B. Lewis, and claimed title to the tract under his will. The portions of this will material to the present inquiry are the following, viz.:

1. "I give, devise and bequeath to my wife, Phebe L. Lewis, the interest of twenty-six hundred dollars in the First National Bank in Hopkinton, R. I., and also the privilege of the south half of the house, and also the south garden, and also the keeping of a cow the year round and barn room for the cow, and also all the household furniture for her own personal benefit during her natural life or widowhood. . . . Also the wood for one fire prepared for the stove.

2. "I give and bequeath to my wife, Phebe L. Lewis, after all my just debts and funeral charges are paid, all of my remaining property during her natural life and widowhood."

3. I, Moses B. Lewis, do appoint Benjamin T. Lewis executor of my last will and testament, to dispose of all my real and personal property that I am possessed of at my decease, and what remains of that property to be divided equally between my three sons, Moses D. Lewis, Daniel C. Lewis and Benjamin T. Lewis.

The defendant claimed title to the tract sued for under a deed from the above-named Moses D. Lewis and Benjamin T. Lewis, dated the 9th day of December, 1882. This deed reserved "for the use of Phebe L. Lewis, during the term of her natural life, the south half of the dwelling-house on said premises, the south garden and room in the barn to keep a cow, as provided in the last will and testament of said Moses B. Lewis, deceased," and also contained a covenant on the part of the defendant with the makers, and particularly with Benjamin T. Lewis, executor of said will, that he would furnish to Phebe L. Lewis, during her natural life, the fire-wood sufficient for one fire, cut and split and delivered at the door, ready for use, and would also furnish her, for the same time, the fodder and feed for keeping one cow, according to the provisions of said will.

At the trial, the plaintiff claimed, and put in evidence tending to prove, that she was in possession of all the premises described in the writ and declaration on the 16th day of December, 1882, and that on that date she was ejected therefrom and dispossessed thereof by the defendant, who had since been in the occupation and possession of the same, and had kept her out of the possession thereof. It also appeared in evidence, and was not disputed, that the testator at the execution of his will and at his death was the owner in fee of several farms, with houses, gardens, barns and other buildings thereon. The plaintiff offered to prove by Stanton Austin, of Hopkinton, that he wrote the said last will and testament, at the request of the testator, on the day it was executed, viz.: July 20, 1871, and also what the testator meant by the clause therein, as follows: "I give and bequeath to my wife, Phebe L. Lewis, after all my just debts and funeral charges are paid, all of my remaining property during her natural life and widowhood," in the connection in which the same was used in said will, and also to prove by said witness that there was in reality no conflict in the provisions of said will, understanding them as the testator did, so far as the plaintiff was affected thereby; and also to explain by said witness the latent ambiguities in said provision of said will, whereby the interest of the plaintiff in the property of the

testator that was disposed of by said will was affected. But the court ruled such evidence inadmissible and refused to allow the plaintiff to put in such proof.

The defendant claimed, and put in evidence tending to prove, that he had not broken his covenant above recited, and had never dispossessed the plaintiff of the south half of the dwelling-house on the tract of land described in the plaintiff's writ and declaration, nor of the south garden on the same, nor of room in the barn on the same to keep a cow, and had not kept her out of possession of the same, or any part thereof, but admitted that he had been in the possession and occupation of the remainder of said premises ever since the 16th day of December, 1882.

The plaintiff requested the court to instruct the jury : "That under the will of said Moses B. Lewis, the plaintiff is entitled, under the residuary clause in her favor, to a life estate during her widowhood in what remained of the real estate of which he died seized and possessed, not specifically devised or bequeathed, including the homestead farm." But the court declined to instruct the jury in accordance with such request, and did instruct them that the only interest that the plaintiff took under and by virtue of the provisions contained in said last will and testament in said homestead farm, was "the privilege of the south half of the house, and the south garden, and the keeping of a cow the year round and barn room for the cow, and all the household furniture for her own personal benefit during her natural life or widowhood," as expressed in the first clause of said will; and that said residuary clause in her favor did not operate to convey any portion of said homestead farm, however it might be with reference to any other of her husband's real estate.

The jury returned a verdict of not guilty.

The plaintiff, having duly excepted to the refusal of the court to permit the testimony of Stanton Austin to go to the jury, and to the ruling of the court that such testimony was inadmissible, and also to the declination of the court to give the instruction to the jury requested, and to the instruction as given, now petitions for a new trial, basing her petition upon these exceptions.

The ambiguity sought to be aided by the testimony offered was not, as the plaintiff's counsel supposes, a latent ambiguity, that is, one arising upon the evidence, in aid of which extrinsic evidence is admissible, as for instance, where it appears that there are two persons or estates, both answering equally the description in the will, and the question is, whom or which the testator intended, but was an ambiguity arising from the apparent conflict of the provisions of the will itself, and was, therefore, a patent ambiguity, or one appearing on the face of the instrument. Such an ambiguity is to be removed, if at all, by construction and not by averment. To permit parol evidence to be given in aid of such an ambiguity, would not only be in violation of the well-settled rule that the testator's intent is to be ascertained by the will itself, but would also be contrary to the statute, which requires wills to be in writing. The declarations or instructions of the testator to the witness were, therefore, inadmissible for the purpose of showing what the testator meant by the provision of the will, and were properly excluded. *Broom's Legal Maxims*, * * 609, 610, 611, 613, 614; *Richards v. Dutch*, 8 Mass. 508, 515; *Farrar v. Ayres*, 5 Pick. 404, 409; *Crocker v. Crocker*, 11 id. 252, 256, 257; *Brown v. Saltonstall*, 3 Metc. 423, 427; *Tucker v. Seaman's Aid Society*, 7 Metc. 188, 207, 208; *Stevens v. Vanelee*, 4 Wash. C. C. 262, 265; *Mann v. Executors of Mann*, 1 Johns. Ch. 231, 234, 235; *Jackson v. Sill*, 11 Johns. 201, 215, 219, 220; *Miller v. Travers*, 8 Bing. 244, 247-250; *Doe, dem. Gord. v. Needs*, 2 M. & W. 129, 139; *Doe, dem. Hiscocks, v. Hiscocks*, 5 M. & W. 363, 367, 368, 369, 372.

Still less admissible would be the construction given by the witness to such declarations or instructions, which the language of the offer seems broad enough to include.

Nor do we find that the court erred in declining to give the instruction requested, or in the instruction given. The clauses of the will which we are called upon to construe are somewhat obscure in meaning and apparently conflicting. We have endeavored to construe them in such a manner as to render them consistent and to give effect to each. We are inclined to the opinion that the second

clause, above quoted, by which the testator gives and bequeaths to his wife, after all his debts and funeral charges are paid, all his remaining property, did not convey to her the homestead estate; for, although the words "all my remaining property" are broad enough to have passed the homestead estate, it is a little singular, and, indeed, hardly supposable, that the testator should have taken pains to define so particularly in the first clause quoted the privileges which she was to enjoy in that estate, if it had been his intention that she would take the whole estate. It seems to us probable that he intended by these words whatever property he had at the execution of his will, not required for the payment of debts and funeral charges, and not mentioned in or disposed of by previous clauses of the will. By the third clause, above quoted, the testator empowers his executor to dispose of the homestead estate, subject to the rights therein devised to his wife by the first clause, and whatever property he should acquire subsequently to the making of the will, and to divide it among his three sons, as therein expressed. The words, "all of my real estate and personal property that I am possessed of at my decease," taken by themselves, would include his entire property; but they are limited by the following words: "what remains of that property." These latter words were intended, as we think, to take out of the operation of the former the property previously disposed of by the preceding clauses of the will, and to make this clause, in effect, simply a general residuary clause.

The petition for a new trial must be denied.

Petition dismissed.

WELCH v. BOSTON AND PROVIDENCE RAILROAD CORPORATION.

December 31, 1884.

MALICIOUS PROSECUTION — PROBABLE CAUSE — FORMER ADJUDICATION.

In an action for malicious prosecution brought by A. against B., a judicial finding in the former action in favor of B. and against A. by the court of original jurisdiction is conclusive of probable cause, when such finding is not procured by unfair means, even if such finding is reversed on appeal.

Trespass on the case for malicious prosecution. On demurrer to the declaration.

Page & Owen and Amasa M. Eaton, for plaintiff. *Arnold Green*, for defendant.

CARPENTER, J. This is case for malicious prosecution founded on three actions brought by the Boston and Providence Railroad Corporation against John Welch in the justice court of the city of Providence. The declaration sets out these actions, and in each of them states that "upon trial of said action" the justice court gave judgment in favor of the railroad corporation and against Welch. As to two of these actions, the declaration does not charge that the judgment of the justice court has ever been reversed. As to the third, the declaration charges a reversal on appeal. The railroad corporation has demurred to the declaration and argues that the conviction of Welch in the court of first instance is conclusive evidence of probable cause for the actions brought against him. We think the demurrer must be sustained.

It was early decided in *Reynolds v. Kennedy*, 1 Wils. 232, that the finding against the plaintiff by the tribunal before which the complaint was made is conclusive evidence that there was probable cause for the complaint, even although that finding was afterward reversed on appeal. This case is cited with apparent approval by Lord MANSFIELD and Lord LOUGHBOROUGH in *Johnstone v. Sutton*, 1 Term Rep. 510. The same doctrine has been applied in numerous cases in this country. *Whitney v. Peckham*, 15 Mass. 243; *Cloon v. Gerry*, 13 Gray, 201; *Palmer v. Avery*, 41 Barb. 290; *Spring v. Besore*, 12 B. Monr. 551; *Griffs v. Sellars*, 4 Dev. & Batt. 176.

In *Burt v. Place*, 4 Wend. 591, the court carefully examine and expound the doctrine of *Reynolds v. Kennedy*, and sustain the declaration on the clear ground that it goes beyond the declaration in that case, inasmuch as it alleges that the defendant, well knowing that the plaintiff had a good defense, prevented the plaintiff from procuring the necessary evidence to make out that defense by caus-

ing him to be detained a prisoner until the judgments were obtained, and that the imprisonment was for the purpose of preventing a defense to the actions. In this case, however, there is no allegation that the judgments of the justice court were obtained by any unfair means practiced on the part of the defendant. We think the true rule is that a judicial finding by the court of original jurisdiction, not alleged to have been procured by unfair means, must be held to be conclusive on the question of probable cause.

There are, indeed, cases which hold to the contrary, but they are few in number and do not seem to us to be otherwise sufficient to control the general current of the authorities. *Goodrich v. Warner*, 21 Conn. 432; *Mayer v. Waller*, 64 Pa. St. 283. It is to be noted that in Virginia the court were divided in opinion on this question. *Womack v. Circle*, 29 Gratt. 192.

In this view of the case we must say that the declaration conclusively shows that there was probable cause for bringing each one of the three suits. The action, therefore, cannot be maintained. Proof of malice will not sustain the action if it appears that there was probable cause for the prosecution. *King v. Colvin*, 11 R. I. 582. Demurrer sustained.

[See Moak's Underhill on Torts, 166-8.—Ed.]

PIERCE v. KING.

December 31, 1884.

REPLEVIN BOND — BREACH OF — WRIT DISMISSED FOR WANT OF JURISDICTION.

The condition of a replevin bond was that the plaintiff in replevin should prosecute the writ to final judgment, pay such damages and costs as the defendant might recover against him, and restore the same goods and chattels in like good order and condition as when taken, in case such should be the final judgment on the writ. The replevin writ, upon its face good, was dismissed on appeal for want of jurisdiction in the court below from which it issued.

Held, that there had been a breach of the conditions of the bond.

Held, further, that to satisfy the conditions of the bond, the plaintiff in replevin must prosecute the writ to a final judgment on the merits of the case affirming his own right of possession or ordering a return and restoration to the defendant.

Debt on a replevin bond. On demurrer to the declaration.

John J. Arnold, for plaintiff. *Dexter B. Potter*, for defendant.

CARPENTER, J. This is debt on a replevin bond, the condition whereof is that the plaintiff in replevin shall prosecute said writ of replevin to final judgment and pay such damages and costs as the said Byron D. Pierce shall recover against him, and shall return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment on the writ. The declaration alleges that the replevin writ was sued out of the justice court of Coventry, and was entered in that court and such proceedings were had that on appeal to the court of common pleas the case was dismissed for want of jurisdiction in the justice court; and that the plaintiff in replevin has not made return of the goods and chattels replevied. The replevin writ as described in the declaration shows, on the face of it, jurisdiction to the court to which it was returnable. The defendant demurs and argues that the condition of the bond is satisfied by the judgment dismissing the writ for want of jurisdiction. We think, however, that in order to satisfy the condition of the bond the plaintiff in replevin must prosecute his writ to a final judgment on the merits, so as either to determine a right of possession in himself or to direct a return and restoration to the defendant. It seems to us that this construction necessarily follows from a consideration of the purpose for which the bond is given. The writ directs the sheriff to take the chattel from the possession of the defendant and to deliver it to the plaintiff who claims the right of possession. The purpose of the bond is to secure the defendant in his right to the chattel if any he have. The plaintiff assumes the burden of proving a right of possession in himself, and if he fail to establish such right there results from such failure the duty on his part to put the defendant in the same condition in which he was before the suit, by restoring

the chattel, and thence results the corresponding right of the defendant to have such restoration. It, therefore, seems clear that the security of the defendant will not be commensurate with his rights unless it protects him from loss in all such cases in which the plaintiff shall fail to establish his alleged right. The process of replevin, including the substance of the bond to be taken, is prescribed by the statute; and the statute must, if possible, be so construed as completely to carry out the purpose thereof and at the same time so as to do complete justice to all parties concerned. We find no difficulty in making such a construction in this case.

This view of the true intent and meaning of the condition of the bond appears to be well supported by authority. In cases where the condition of the bond is substantially the same as that prescribed in our statute, the language has received the same construction which seems to us both reasonable and necessary. *Flagg v. Tyler*, 3 Mass. 303; *Roman v. Stratton*, 2 Bibb, 199; *McDermott v. Isbell*, 4 Cal. 113; *Mills v. Gleason*, 21 id. 274; *Sherry v. Foreman*, 6 Blackf. 56; *Berghoff v. Herkwoolf*, 26 Mo. 511; *Wiseman v. Lynn*, 39 Ind. 250; *Perse v. Watrous*, 30 Conn. 139.

Demurrer overruled.

BELCHER v. ARNOLD.

January 17, 1885.

A purchaser of real estate at an execution sale may in equity avoid conveyances previously made by the judgment debtor in fraud of his creditors.

Bill in equity to avoid certain conveyances of realty as in fraud of creditors and for an account.

Charles Bradley & George B. Barrows, for complainants. *John D. Thurston*, for respondents.

DURFEE, C. J. The object of this suit is to have certain conveyances of real estate, executed by William W. Arnold to divers persons, defendants, set aside as void under the statute of fraudulent conveyances, because made with the intent to hinder, delay and defraud his creditors. The complainants are purchasers of the estates conveyed under an execution issued on a judgment recovered in their favor against the said William W. Arnold. The objection is raised that the court has no jurisdiction, because there is an adequate remedy at law. In *Beckwith v. Burroughs*, 30 Alb. L. J. 542, we had occasion to remark that there is a conflict of decision on this point and to cite the cases, but without expressing any definite opinion. Now, however, after further consideration, our conclusion is that the suit is maintainable, the jurisdiction in equity and at law being generally concurrent in cases of fraud. See cases and authorities cited for complainants.*

We have come to the conclusion, on the evidence, that the conveyances complained of ought to be set aside for the reason alleged.

* *Snell's Principles of Equity*, 384; 1 *Spence's Eq. Jur.* 625; *May on Fraudulent and Voluntary Conveyances*, 472; 1 *Story's Eq. Jur.*, § 68; *Bennett v. Musgrove*, 2 Ves. 51; *Colt v. Woollaston*, 2 P. Wms. 154; *Evans v. Bicknell*, 6 Ves. Jun. 178; *Slim v. Croucher*, 1 DeG., F. & J. 518; *St. Aubyn v. Smart*, L. R., 5 Eq. 183; also on appeal, L. R., 4 Ch. App. 646; *Ramshire v. Bolton*, L. R., 8 Eq. 294; *Hill v. Lane*, L. R., 11 Eq. 215; *Hartshorn v. Eames*, 31 Me. 98; *Lillard v. McGee*, 4 Bibb, 165; *Dodge v. Griswold*, 8 N. H. 425; *Abbey v. Commercial Bank of New Orleans*, 31 Miss. 434; *Wampler v. Wampler*, 30 Gratt. 454; *Crane v. Conklin*, 1 N. J. Eq. 346; *Lewis v. Cocks*, 23 Wall. 466; *Gray v. Jenks*, 3 Mason, 520; *Brown v. Stewart*, 56 Md. 421; *Bunce v. Gallagher*, 5 Blatchf. 481; *Flint & P. M. R. R. Co. v. Gordon*, 41 Mich. 420; *King v. Carpenter*, 37 id. 363; *Eaton v. Trowbridge*, 38 id. 454; *Methodist Church of Newark v. Clark*, 41 id. 730; *Allen v. Waldo*, 47 id. 516; *Sands v. Codwise*, 4 Johns. 536.

MALONE v. RYAN.

January 17, 1885.

The words "trespass on the case" in the statute apply to actions *ex delicto*, not to actions *ex contractu*.

An action for breach of promise of marriage is an action *ex contractu*.

Trespass on the case. On defendant's motion to dismiss the action.
The writ in this case was as follows:

"THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

PROVIDENCE, SC. To the Sheriffs of the several counties or to their deputies, Greeting:

We command you to arrest the body of Patrick Ryan of the town of Lincoln, county of Providence, State of Rhode Island, if he may be found within your precinct, and in safe custody keep to answer the complaint of Mary Malone, of the town of Cumberland, said county and State, at the next supreme court to be holden at Providence within and for the county of Providence, on the first Monday of October next ensuing the date hereof, in an action of trespass on the case for breach of promise of marriage as by declaration to be filed in court will be fully set forth; to the damage of the plaintiff \$5,000. Hereof fail not, and make true return of this writ with your doings thereon.

Witness Hon. Thomas Durfee, chief justice of our supreme court at Providence, this 11th day of May, in the year 1884.

CHARLES BLAKE, Clerk."

The writ was not indorsed with any affidavit, and was served by arrest. The declaration set out a simple breach of promise to marry. The defendant moved for a dismissal of the action on the ground that there had been no legal service of the writ.

The following are the statutory provisions referred to in the opinion of the court.

Pub. Stat. R. I., chap. 206, § 9, is as follows:

Writs of arrest.

§ 9. An original writ commanding the arrest of any person not exempt by law from arrest may be issued from the supreme court, court of common pleas or any justice court:

First. In any action for the recovery of a debt; or of a State or town tax, the cause of which accrued previous to the first day of July in the year one thousand eight hundred and seventy.

Second. In any action on penal statutes, or in any action of trover, detinue, trespass, trespass on the case, trespass and ejectment, trespass *quare clausum fregit* and *scire facias* against bail in criminal cases.

Third. Whenever the plaintiff in an action to be commenced by such writ, his agent or attorney shall make affidavit to be indorsed thereon or annexed thereto, that the plaintiff has a just claim against the defendant upon which the plaintiff expects to recover, in the action commenced by such writ, a sum sufficient to give jurisdiction to the court to which such writ is returnable; And also, either that the defendant or some one of the defendants is about to leave the State without leaving therein real or personal estate whereon an execution that may be obtained in such action can be served, or that the defendant or some one of the defendants has committed fraud in contracting the debt upon which the action is founded or in the concealment of his property or in the disposition of the same.

Provided, that whenever an arrest shall be made in accordance with the third clause of this section the court to which the writ is made returnable, or any justice thereof, may order upon application of any defendant so arrested, and for cause shown upon hearing the parties therein, release such defendant from such arrest and discharge the bail, if any, taken thereon, but said writ shall not be abated on account of such release and discharge, but may be prosecuted to final judgment in the same manner as if no such release and discharge had been granted.

Chapter 226 "of the relief of poor debtors," sections 1 and 16, are as follows:

Relief of debtors imprisoned.

§ 1. Any person who shall be imprisoned for debt, whether on original writ, mesne process or execution or for non-payment of military fine or town or State taxes, or on execution awarded against him as defendant in any action of trespass and ejectment or trespass *quare clausum fregit*, in which title to the close was in dispute between the parties, may complain to any justice of the supreme court or to any justice of the peace in the county where such person shall be committed that he has no estate, real or personal, wherewith to support himself in jail or to pay jail charges and may request to be admitted to take the poor debtor's oath.

§ 16. No person who shall be committed on execution awarded against him as plaintiff in replevin, or as defendant in any action on a penal statute, or in any action of trover or detinue, or for any malicious injury to the person, health or reputation of the plaintiff in such suit, or for seduction, or for any trespass, excepting on such as are particularly named in section 1, shall be deemed to be within the meaning of the provisions of that section or entitled to be admitted to take the oath as aforesaid.

Chapter 227 "of poor tort debtors," section 1 is as follows :

§ 1. Any person who shall be imprisoned upon an original writ, mesne process, execution or upon surrender or commitment by bail in action for breach of promise of marriage, on a penal statute, or in any action of trover, detinue, deceit, trespass and ejectment, or trespass *quare clausum fregit*, in which the title to the close was not in dispute between the parties, or in any action of the case for libel, or for words spoken, or for any action otherwise arising in tort, and who shall complain on oath to the keeper of the jail in which he is imprisoned that he has no estate, real or personal, wherewith to support himself in jail, or to pay jail charges, shall be entitled to a citation as hereinafter provided.

George J. West, for plaintiff. *Williard Sayles & Henry J. Dubois*, for defendant.

PER CURIAM. We are of the opinion that the action of "trespass on the case" which warrants an arrest under Pub. Stat. R. I., chap. 206, § 9, *second* clause, is the action *ex delicto* or in tort and not *assumpsit*, *assumpsit* being now commonly denominated an action of the case, the word "trespass" being omitted as more appropriate to tort, and consequently that the defendant in *assumpsit* for a breach of promise of marriage cannot be arrested without the affidavit presented by the *third* clause of section 9, notwithstanding that the action may technically be properly denominated trespass on the case. A promise of marriage is simply a contract. The breach of it is not a tort, though it may resemble a tort in its consequences. We are not convinced that it is to be regarded as other than a breach of the contract because it is classed with torts for certain purposes in chapter 227, section 1; for, though classed with torts, it is not classed with them in chapter 226, section 16, as would be natural, if it was intended that it should be generally so regarded.

Motion to dismiss granted.

FOLEY v. GREENE.

January 24, 1885.

DURESS — EMBEZZLEMENT BY SON — MORTGAGE BY MOTHER.

When a son had been guilty of embezzlement and his mother made a note and executed a mortgage to the employer from whom he had embezzled, and the court was satisfied that the mother's controlling motive was to protect her son from exposure and prosecution:

Held, that she was not a free agent and that the note and mortgage should be annulled and canceled. The maxim, *In pari delicto potior est conditio defendentis*, does not apply.

Bill in equity to annul a note and a mortgage of real estate.

Edwin D. McGuinness, for complainant. *Charles E. Gorman*, for respondents.

DURFEE, C. J. The bill shows that, on August 1, 1881, the complainant gave the defendant Hanley a mortgage with power of sale on her real estate in Provi-

dence to secure the payment of her promissory note for \$1,000, of even date with the mortgage, payable to the order of Hanley one year after date, and that on December 30, 1881, Hanley assigned the mortgage to the defendant Greene. The bill alleges that the note and mortgage were given by the complainant to prevent the criminal prosecution of her son for embezzlement, and prays that the mortgage deed and the assignment thereof may be set aside as void and for other relief. It appears by allegation and evidence that, for several years before July 31, 1881, the complainant's son, John B. Foley, was in the employ of Hanley as clerk or collector, and as such had the custody of large sums of money collected for Hanley, who was a brewer and wholesale liquor dealer, and that in the spring of 1881, Hanley discovered that said John B. Foley had embezzled some \$1,500 or more of the money so collected. The bill avers that thereupon it was represented to the complainant, who was a poor and rather ignorant woman, by Hanley and by others, that if she would pay Hanley \$500 and give her note and mortgage for \$1,000 more the whole matter of the defalcation would be kept quiet and no criminal charge would be made against her son, and that, being terrified, she furnished the money and gave the note and mortgage to save her son from prosecution and her family from disgrace. We think the averment is substantially proved. It is true there was no direct threat by Hanley, but there was a pressure exerted which had the effect, and was doubtless intended to have the effect of a threat. Hanley testified that the note and mortgage were given, not to stifle a prosecution, but as security for advances which he was making to the son to set him up in the liquor business, in the hope that he would make enough to repay him the amounts embezzled. The testimony shows that Hanley did make such advances, and undoubtedly if the son, who has failed, had succeeded and repaid the advances and the amounts embezzled, Hanley would have regarded the note and mortgage as satisfied. We think, however, that the complainant did not intend the note and mortgage as security for such advances, but gave them under the compulsion of her fears, with the understanding that they would have the effect to protect her son from exposure and punishment, and in view of the testimony by her and her son as to her conversation with Hanley when they were given, we think that Hanley knew when he accepted them that such was her understanding and acquiesced in it. If the prospect of the advances had any influence, it had only an incidental or subsidiary influence, and did not affect the real character of the transaction. In our opinion, therefore, the note and mortgage are invalid. *Williams v. Bayley*, L. R., 1 H. L. 200.

The defendants contend that it is not the duty of the court to set them aside, if they are invalid, but that the court ought to leave the complainant in the predicament in which she has placed herself. It is doubtless true that the court, acting on the maxim, *In pari delicto potior est conditio defendentis et possidentis*, will not generally interpose for the relief of the parties who are concerned in illegal agreements or transactions. But the maxim is not regarded, if public policy requires that relief shall be given, and where the parties are not *in pari delicto*, as when the complaining party acts under oppression, hardship or undue influence, the maxim does not apply. Story's Eq. Jur., §§ 298, 300. The case of *Bayley v. Williams*, 4 Giff. 638, is exactly in point. There agreements and securities were given by a father to protect his son from criminal prosecution for the forgery of his father's name to certain promissory notes. There was nothing to show that the father was liable to pay the notes, or that the defendants negotiated for the agreements and securities on the footing of his being under any legal liability to pay them. The rule of law is thus laid down by the court, to-wit, p. 659:

"If the fair result of the evidence shows that the agreements were excuted under influence felt by the plaintiff and exercised by the defendants, if the fear of the criminal prosecution against the plaintiff's son, or if the result of the discovery of a criminal act, for which the plaintiff was not liable, was used by the defendants against the plaintiff to operate upon his fears, so as to induce him to give a security which would relieve his son from a criminal prosecution, according to the law of this court a security obtained under such circumstances cannot stand. The inequality of the situation of the parties, the one exacting a security which the other is driven to give in order to save his son from exposure, disgrace and

ruin, taints the security obtained under the influence of such fears. If the main and inspiring purpose was the relief of the son from the consequences of his crime; if this was the main consideration operating on the father's mind, and was the origin and real cause of the transaction, the intervention of other circumstances, or other collateral advantages to the father, will not be enough to justify the court in upholding such a security."

The rule could hardly be expressed in terms more appropriate to the case at bar. In *Bayley v. Williams*, the decree was entered declaring the agreements invalid and ordering them to be delivered up to be canceled, and the securities to be returned. Similar relief will be given here, the defendant, Greene, who took the assignment after the maturity of the note, being subject to the equities.

[See 24 Eng. Rep. 634; 33 id. 708; 37 Am. Rep. 338; 41 id. 190; 29 Alb. L. J. 298.—ED.]

WILSON v. ESTEN.

January 24, 1885.

MORTGAGE—CHattel—GENERAL ASSIGNMENT—INTERPLEADER—RIGHTS OF PARTIES.

A. executed a mortgage to B. of certain personalty. The mortgage was made and received in good faith. The mortgagee never recorded the mortgage nor took possession of the property, but there was no collusion between the parties nor design to give the mortgagor a fictitious credit. A. subsequently made an assignment "of all his estate and property" for the benefit of his creditors.

On a bill of interpleader brought by the assignee:

Held, that the mortgagee was entitled to the proceeds of the mortgaged property.

Held, further, that the creditors were entitled only under the assignment and that the assignee succeeded only to the rights of the assignor.

Held, further, that the statute which provides that "no mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the said mortgage be recorded," must be construed in accordance with the above holding.

Bill of interpleader.

Thomas A. Jenckes, for complainant. *William H. Greene*, for respondent Randall Esten. *Dexter B. Potter & Lemuel H. Foster*, for the other respondents.

DURFEE, C. J. The object of this suit is to have the court decide to whom a sum of \$907.29, now in the registry of the court, belongs. The money was derived from certain goods, fixtures, etc., sold by the plaintiff, as assignee of Alfred A. Esten, under a voluntary assignment executed by said Alfred for the benefit of his creditors, January 14, 1884. It is claimed, not only by the general creditors, but also by Randall Esten, the father of said Alfred, under a mortgage given to him by Alfred, May 5, 1883. The mortgage was given to secure a note for \$3,000, money lent by Randall to Alfred to start him in business. We see no reason to doubt that the mortgage was originally given in good faith. The mortgagee, however, did not take possession and the mortgage was not recorded. The general creditors claim that the neglect to have it recorded has operated as a fraud upon them, because, in consequence of the neglect, they have given credit to Alfred, which otherwise they would not have given, and they therefore contend that, notwithstanding the mortgage, they are entitled to the fund. The allegation on this point in their answer is as follows, to-wit:

"And these defendants further answering, say that said supposed mortgage deed was not recorded as by law required in the office of the recorder of deeds in the city of Providence, State of Rhode Island, where the said Alfred A. Esten resided, and where also the property was at the time of the making of said supposed mortgage; that had said Randall B. Esten taken and retained possession of said property, or if said mortgage deed had been recorded as by law required, the knowledge of the existence thereof would have come to these defendants and they would not any longer have given credit to said Alfred A. Esten, and the debts contracted with these defendants since the time of the making of said supposed mortgage, and which are the larger parts of said debts, would not have been contracted or outstanding, and the conduct of said Randall Esten, in the premises,

has been and become a fraud upon these defendants; and these defendants had no notice of any mortgage, either implied or in fact, until after the time of said assignment."

It will be seen that the answer does not charge that the mortgage was left unrecorded in consequence of any collusion between the mortgagee and the mortgagor, nor of any design to enable the mortgagor to obtain a fictitious credit on the faith that the property covered by the mortgage was unincumbered. And the testimony adduced at the hearing did not show the existence of any such collusion or design. The testimony was that the mortgagee was a farmer, residing in Attleborough, Massachusetts; that he lent the money to his son in Providence on the understanding that he was to have the mortgage, but went home before it was prepared, and that it was sent to him two or three days later by mail, and that he had simply kept it without bringing it back for record. We do not think that in these circumstances the lien of the mortgage can be held to have been lost by the omission to record, whatever might have been the result if it were shown that the omission was collusive or fraudulent.

The creditors contend that they are entitled to the fund, because the mortgage, being unrecorded, is valid only between the parties to it. The creditors, however, show no right to the fund which they can enforce in this case, unless they are entitled to it under the assignment; and the question, therefore, is whether the assignee, as trustee for them, has acquired a right which is superior to the mortgage, or has simply succeeded to the right of his assignor which is subject to it. There can be no doubt that, ordinarily, where there is no statute to add to the effect of the assignment, a voluntary assignee succeeds simply to the right of the assignor. The cases to this effect are numerous, and have always been regarded as law by this court. *Williams v. Winsor*, 12 R. I. 9; *Gardner v. Commercial National Bank*, 13 id. 155, 173; *Bridgford v. Barbour*, 80 Ky. 529; *Housel v. Cremer*, 13 Neb. 298; *Heinrichs v. Woods*, 7 Mo. App. 236. The statute (Pub. Stat. R. I., chap. 237, § 15) alters the law to some extent, but not so as to affect this case. If the fund belongs to the creditors, it belongs to them under Pub. Stat. R. I., chap. 176, § 9, which declares that "no mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the said mortgage be recorded," etc. Under this provision, taken literally, the mortgagee can have no claim under the mortgage against any person but the mortgagor. The statute, however, must receive a reasonable construction. We do not suppose anybody would seriously assert that the mortgage, because unrecorded, would be invalid against a mere donee. In *Pratt v. Harlow*, 16 Gray, 379, it was held, under a statute like ours, that the mortgagee could maintain trover against a mere stranger or intruder tortiously converting the mortgaged chattel. But how, after demand, is the assignee, if he simply succeeds to the right of the mortgagor, in any better position? In this case we should be very glad to yield to the authority of some of the cases cited for the creditors, if we could consistently; but we have reluctantly come to the conclusion that the mortgage is good as against the assignee, the assignee having no better right than the assignor. *Hawks v. Pritslaff*, 51 Wis. 160; *Wakeman v. Barrows*, 41 Mich. 363. If the assignment were made subject to the mortgage, no one would say that the assignee could hold against the mortgage. As we construe it, it is in legal effect made subject to the mortgage. Indeed, the assignment purports to be only an assignment of "all my estate and property," etc., in general terms. It does not specifically convey the assignor's stock in trade. It may be doubted even whether an assignee for value under such an assignment would not take subject to the mortgage. *Adams v. Cuddy*, 13 Pick. 460; *Chaffin v. Chaffin*, 4 Gray, 280; *Cook v. Farrington*, 10 id. 70; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159.

We conclude, therefore, that the mortgagee must have the fund, but considering that his neglect has been the cause of the difficulty, let it be without costs from the creditors and subject to the further costs of the case.

Decree accordingly.

[See Bish. *Insolv. Debtor* (2nd ed.), § 276.]

RHODE ISLAND HOSPITAL TRUST CO. v. COMMERCIAL NAT. BANK.

January 31, 1885.

WILL — DONEE FOR LIFE — POWER OF SALE — ABSOLUTE TITLE — POWER TO MORTGAGE.

When a testamentary gift is expressly limited to the donee, for life, a superadded power given to the donee to sell and appropriate the proceeds will not enlarge his interest into an absolute estate.

A testamentary gift for life with added power in the donee of sale and appropriation of proceeds will not enable the donee to mortgage more than his life interest.

Bill in equity to construe a will, for an account and for an injunction. On demurrers to the bill.

The will of Mary R. Burnside of the city of Providence, dated September 18, 1871, and proven before the municipal court of the city of Providence, April 4, 1876, contains the following provisions :

"I, Mary R. Burnside, of the city and county of Providence, in the State of Rhode Island, wife of Ambrose E. Burnside, make this my last will and testament in manner following, that is to say :

"I give, devise and bequeath to my beloved husband, Ambrose E. Burnside, for and during the term of his natural life the free use and improvement, rents, profits and income of all my estate, real, personal and mixed, wherever or however the same is or may be situated, and including therewith all such other real estate as I may hereafter acquire, of which I shall die seized, possessed of and entitled to at the time of my decease.

"To have and to hold the same to him, the said Ambrose E. Burnside, for and during the term of his natural life, with full power and authority, at his pleasure, to change the investment of any of my personal property and estate, and also with power and authority, at his pleasure, to sell, transfer and convey any portion of my personal property and estate, execute the requisite conveyance and conveyances thereof, receive the proceeds of any such sale or sales, and apply and appropriate the net proceeds thereof to and for his own use, benefit and behoof forever.

"And from and upon the decease of my said husband, Ambrose E. Burnside, I give, devise and bequeath to my mother, Fanny Bishop, if then living, for and during the term of her natural life the free use and improvement, rents, profits and income of all my estate then remaining, real, personal and mixed, wherever or however situated.

"To have and to hold the same to her the said Fanny Bishop for and during the term of her natural life.

"And from, after and upon the decease of them, the said Ambrose E. Burnside and Fanny, I give and bequeath."

(Follow a series of legacies and a residuary devise and bequest, after which come the appointment of executors and a revocation of prior wills.)

Charles Hart & Joseph C. Ely, for complainant. *James Tillinghast*, for respondent, the Commercial National Bank. *Colwell & Barney*, for respondent, Manchester.

DURFEE, C. J. The bill shows that Mary R. Burnside, wife of General Ambrose E. Burnside, late of Providence, died March 9, 1876, leaving a will by which she devised and bequeathed all her property, real and personal, to General Burnside for life, "with full power and authority at pleasure to sell, transfer and convey any portion of my personal property and estate, execute the requisite conveyance and conveyances thereof, receive the proceeds of any such sale or sales and apply and appropriate the net proceeds thereof to and for his own use, benefit and behoof forever." The will gives all the estate of the testatrix remaining at the decease of General Burnside to her mother for life, and then to other persons and charities. The will appoints General Burnside executor, and after his decease the complainant corporation. It was admitted to probate April 4, 1876. General Burnside, having qualified as executor, filed an inventory of the personal estate, which was accepted August 21, 1877, and October 2, 1877, settled his first and only account, wherein he charged himself with the whole amount of the inventory as "taken to myself for life, as per the will of Mary R. Burnside."

The personal property as inventoried was appraised at \$69,506.26 and consisted in part of forty-five eight and a half per cent one thousand dollar bonds, appraised at \$45,000, made by one Simon B. Buckner and secured by a trust mortgage of his real estate in Chicago to the Farmers' Loan and Trust Company of the city of New York. The bonds were issued payable to bearer, but contained the following provision, to-wit: "The holder of this bond may present the same at the office of said The Farmers' Loan and Trust Company, for registration, and the same shall thereupon be registered in conformity with usage in such case, and thereupon it shall become and be payable, both principal and interest, to the order of said holder, or to the bearer, as he may elect." After the probate of the will General Burnside delivered eighteen of these bonds to the Commercial National Bank of Providence, as security for moneys lent. The eighteen bonds were registered under the provision therein by Mary R. Burnside, in her life-time, in her name, and when pledged bore an indorsement under date of November 14, 1872, signed by the transfer agent, indicating that they were then transferred into her name. A copy of one of the bonds, annexed to the bill as a sample of all, likewise bears an indorsement under the date of November 21, 1876, indicating that it was then transferred to the Commercial National Bank of Providence; but the complainant alleges in the bill that it is ignorant of the form of the pledge. The bill, however, alleges that the pledge was made by General Burnside in his own name and to secure his own indebtedness, and that the bank took the bonds with full notice that they were a part of the estate of Mary R. Burnside, and that the general had no right or title in them other than that given him by her will. General Burnside died September 18, 1881, leaving said eighteen bonds still in pledge, and after his death they were paid, the money being received by the bank. On October 21, 1881, the complainant qualified as executor of the will of Mary R. Burnside, and afterward demanded of the bank the money received on the said bonds above the life interest, if any, of General Burnside. The bank refused to comply with the demand, claiming that the general had full power to pledge the bonds. The bill also sets forth that one J. Howard Manchester has been appointed administrator on the estate of General Burnside, and that as administrator he claims the surplus of the money received in payment of the eighteen bonds, beyond what is necessary for the payment of the indebtedness to the bank, as belonging to the estate of General Burnside. The complainant brings this suit against the bank and said Manchester, as administrator, for a construction of the will, a determination of the rights of the several parties, for an account by the bank, and for a decree for such portion of the proceeds of the bonds as is due to it. The defendants have severally filed general demurrers to the bill.

The ground on which the defendant Manchester rests his claim is that the will of Mary R. Burnside bequeaths her personal estate in legal effect absolutely to her husband, the power of disposition given to him being inconsistent with and destructive of the limitations over. Some of the cases cited in support of this view are closely if not exactly in point. *Bean v. Myers*, 1 Cold. 226; *Davis v. Richardson*, 10 Yerg. 290; *May v. Joynes*, 20 Gratt. 692; *Irwin v. Farrer*, 19 Ves. Jun. 86. We think, however, that where in a will the gift to the first taker is expressly limited to him for life, it is not enlarged into an absolute gift by the mere annexation of a power to him to dispose of or appropriate the fee or capital, at least when the power is only a power to dispose of or appropriate the fee or capital during his life. For, as has been well said, "an express bequest of an estate for life negatives the intention to give the absolute property and converts the superadded right of disposition into a mere power." *Denson v. Mitchell et al.*, 26 Ala. 360. Of course we ought, if possible, to construe a will according to the intention of the testator, and, in such a case, we have only to treat the power bestowed as power, and not as property, in order to give effect to the limitations over. And we think this view is best supported not only in reason but by authority. 4 Kent's Com. *435; *Jackson v. Robins*, 16 Johns. 537, 588; *Ayer v. Ayer*, 128 Mass. 575; *Burcell's Executors v. Anderson*, 3 Leigh, 348, 356-358; *Stuart v. Walker*, 72 Me. 145; *McCauley's Appeal*, 93 Pa. St. 102; *Flintham's Appeal*, 11 Serg. & R. 16; *Burleigh v. Clough*, 52 N. H. 267; S. C., 18 Am. Rep. 23; *Pennock v. Pennock*, L. R., 13 Eq. 144; *Herring v. Barrow*, L. R., 13 Ch. Div.

144; *Smith v. Bell*, 6 Pet. 68. Among these cases we direct attention particularly to *Burleigh v. Clough*, where the point is exhaustively examined and discussed. We, therefore, decide that the claim of Manchester as administrator cannot be sustained.

The next question is whether the Commercial National Bank, is entitled to apply the money received on the bonds, beyond the interest accruing thereon during the life of General Burnside, to his indebtedness. We do not think it is necessary to the determination of this question to decide whether the bond of an individual, payable in terms to order or bearer, is negotiable, or whether the eighteen bonds after registration, if originally negotiable, ceased to be transferable by simple delivery; for, as the case stands, we feel bound to suppose that the indorsement of November 21, 1876, was made by the direction of General Burnside, and was as effectual to transfer the bonds, as against the obligor at least, as an indorsement by General Burnside himself would have been, and that the bank took them with notice that they were a part of the estate of Mary R. Burnside, and that he had no other title than was given him by the will, such notice being expressly averred. The bill also avers that the bonds were pledged or transferred to the bank by General Burnside in his own name to secure his own indebtedness, so that we think the bank is precluded from claiming that the transaction was with him as executor. We also think that there is nothing in the bill to show that the complainant has been guilty of *laches*, or even of any unreasonable delay, in making its claim upon the bank. The question, therefore, on the pleadings as they stand is, was the power conferred on General Burnside by the will broad enough to authorize the transfer of the bonds to the bank as security for moneys lent to him.

The complainant has cited numerous cases* in which a power to sell was held not to authorize a mortgage. The cases are mostly cases in which it was manifest, or at least inferable, that an out-and-out conversion of the property was intended, being cases in which the power was bestowed on trustees, agents or executors, the power in several of them being a power to sell for re-investment. Undoubtedly such a power ought to be more strictly construed than a power given to the donee simply for his own benefit. *Norcum v. D'Ench & Ringling*, 17 Mo. 98, 117; *Stokes v. Payne*, 58 Miss. 614; S. C., 38 Am. Rep. 340. One of the cases cited, however, is a case where the power was given simply for the benefit of the donee, and where, notwithstanding, it was held that the donee had no authority to mortgage. *Hoyt v. Jaques*, 129 Mass. 286. We do not find among the many cases cited for the bank any case which holds that a power to sell authorizes a mortgage. There are a few such cases. *Mills v. Banks*, 3 P. Wms. 1; *Wayne, Trustee, v. Myddleton*, 2 Ga. 383; *Williams v. Woodward*, 2 Wend. 487, 492; but in *Stroughill v. Anstey*, 1 De G., M. & G. 635, Lord St. LEONARDS allows a mortgage under a power to sell only where the estate is settled or devised subject to a particular charge and the mortgage is made to raise the charge. In *Bloomer v. Waldron*, 3 Hill, 361, 367, the propriety of this exception to the rule is doubted, and the ground of the rule is stated as follows, to-wit: "There is a substantial difference between raising money by mortgage and sale; and it is enough to say that a power to raise money by one of these methods puts a negative on the other." See, also, *Butler v. Duncomb*, 1 P. Wms. 448, 452; *Icy v. Gilbert*, 2 id. 13; *Mills v. Banks*, 3 id. 1.

The difference between a mortgage and a sale is more marked now than it was formerly, and, therefore, it is more difficult now than formerly to construe a power to sell as including a power to mortgage. Even a chattel mortgage with delivery resembles a pledge more closely than it does an ordinary sale. In *Bloomer v. Waldron*, the court also said: "The most we can say is that when the power is to sell, and something is added over and above, showing that the power of sale is

* *Stroughill v. Anstey*, 1 De G., M. & G. 635; *Haldenby v. Spofforth*, 1 Beav. 390; *Deaynes v. Robinson*, 24 id. 86; *Bloomer v. Waldron*, 3 Hill, 361; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9; *Ferry v. Laible*, 31 N. J. Eq. 566; *Putapsco Guano Co. v. Morrison*, 2 Woods, 895; *Stokes v. Payne*, *Kennedy & Co.*, 58 Miss. 614; *Henderson v. Blackburn*, 104 Ill. 227; *Switzer v. Wilvers*, 24 Kans. 384; S. C., 36 Am. Rep. 259; *Cunningham v. Blake*, 121 Mass. 333; *Hoyt v. Jaques*, 129 id. 286; *Loring v. Brodie*, 134 id. 458; *Wilson, Trustee, et al. v. Maryland Life Ins. Co. of Baltimore*, 60 Md. 150.

not to be taken in its primary sense, but means a power to mortgage, then the donee may act accordingly. The principal may always make his own vocabulary." And to the same effect is the language of the court in *Hoyt v. Jaques*, 129 Mass. 286.

The question then is: Is there any thing in the will of Mary R. Burnside which shows that it was her intention that the power to sell should include the power to mortgage? Undoubtedly the will evinces a generosity on her part toward her husband, which would have led her to give a power to mortgage, if it had occurred to her to give it; but did it occur to her, and if so, did she suppose that a power to sell included it? We find nothing in the will which enables us to answer the question affirmatively. She speaks only of a power to sell and of "such sale or sales." Can we infer a power to mortgage from the character of the property taken in connection with the language of the will? The property consists of bonds, mortgages, shares of stock and money on deposit. It could be as readily sold as mortgaged. We notice only one matter which merits consideration. It consists in part of money on deposit. Undoubtedly General Burnside had authority under the power to draw this money and use it without a sale, for, as the only purpose of a sale is to convert into money, the law will not require a sale when the purpose is accomplished without it. If General Burnside had lived until the Buckner bonds fell due, we have no doubt that it would have been competent for him to receive payment and appropriate the proceeds, so far as he needed, to his own use, without going through the form of selling them, because selling them, in that event, would be but an idle form, which the law would not exact. And so, too, if the eighteen bonds transferred to the bank had fallen due and been collected and applied by the bank to the payment of General Burnside's indebtedness during his life-time, we think the application would have been valid, for it would have been the same in legal effect as if General Burnside had himself collected and so applied them. But why, it may be asked, if this be so, is not the application by the bank after his death equally valid? The answer is, because the application after his death is no longer his application, the pledge or mortgage being ineffectual as such for more than his life interest; and immediately after his death the will carried all of the personal estate bequeathed, which remained unapplied by him to his use, over to the legatees in remainder. This is not the conclusion which, considering the circumstances, would give us the most satisfaction, but we do not see how we can escape it. If only a power be given, then only *the* power given can be used, and not another, the donee having no other.

The demurrer of the defendant, Manchester, will therefore be sustained and the bill dismissed as to him, with costs, and the demurrer of the bank overruled.

Decree accordingly.

[See 23 Am. Rep. 4; 25 Eng. Rep. 793.—Ed.]

FRANKLIN INSTITUTION FOR SAVINGS v. PEOPLE'S SAVINGS BANK.

January 31, 1885.

DEED — TRUSTEES TAKE AS JOINT TENANTS.

Courts incline to hold trustees joint tenants rather than tenants in common to avoid inconvenience in administering the trust.

Conveyance by deed to A., B. and C. in trust for them "or other the trustees hereunder for the time being to take charge and possession of said trust estate and to hold the same for the sole use" of the *cestui*, with power to them "or the survivors or survivor of them or other the trustees or trustee hereunder for the time being, at any time and from time to time, in their or his discretion and as soon as reasonably and profitably may be, to sell, let or lease the same," and in further trust for them, "or the survivors or survivor of them, or other the trustees or trustee hereunder for the time being to receive the proceeds of all sales or leases" to pay taxes, etc., "and the surplus to pay whenever and so often as it can conveniently be done to" the *cestui* :

Held, that A., B. and C. took as joint tenants.

Bill in equity for the partition of realty, with an alternative prayer for the appointment of a new trustee.

In April, 1873, Josiah Chapin executed a mortgage deed of certain lands in Providence to trustees in order to secure his notes held by certain savings banks.

After default in the conditions of the mortgage, the trustees sold these lands, and Robert Knight became the purchaser in the interest of the holders of the notes. January 1, 1877, Knight executed an indenture conveying the lands to three trustees in trust for the holders of the notes, *i. e.*, the Franklin Institution for Savings or its receiver, the Cranston Savings Bank or its receiver, the People's Savings Bank, the City Savings Bank, and the Union Savings Bank. Two of these trustees died, and the third wished to resign the trust. Whereupon the Franklin Institution for Savings and its receiver filed a bill in equity against its fellow *cestuis*, and the surviving trustee asking that the trust be terminated and the trust realty be divided, with an alternative prayer for the appointment of a new trustee. One of the respondents objected to the bill on the ground that under Pub. Stat. R. I., chap. 172, § 1, Knight's indenture of trust conveyed an estate in common, not a joint tenancy, and that the heirs and devisees of the deceased trustees were, therefore, necessary parties to the bill and were not made parties respondent.

Pub. Stat. R. I., chap. 172, § 1, is as follows:

"§ 1. All gifts, grants, feoffments, devises and other conveyances of any lands, tenements and hereditaments which shall be made to two or more persons, whether they be husband or wife, or otherwise, and whether for years, for life, in tail or in fee, shall be taken, deemed and adjudged to be estates in common and not in joint tenancy, unless it is or shall be therein expressly said that the grantees, feoffees or devisees shall have or hold the same lands, tenements or hereditaments as joint tenants or in joint tenancy, or to them and the survivors or survivor of them, or unless other words be therein used manifestly showing it to be the intention of the parties to such gifts, grants, feoffments, devises or other conveyances, that such lands, tenements and hereditaments shall vest and be holden as joint estates and not as estates in common."

So much of Knight's deed as is involved in the respondent's objection is recited in the opinion of the court.

Thomas C. Greene & Raymond G. Mowry, for complainant. *James Tillinghast & Benjamin N. Lapham*, for respondents.

DURFEE, C. J. We do not think it is necessary for us to decide, in this case, whether the statute (Pub. Stat. R. I., chap. 172, § 1) extends to deeds of trust; for, granting that it does, we think the deed here contains words "manifestly showing it to be the intention" to have the three grantees take as joint tenants. The deed here is to the grantees, their heirs and assigns, to have and to hold "unto and to the use of them, their heirs and assigns," in trust. The words which we think manifestly show an intention to have the grantees take as joint tenants follow, to-wit: "In trust for the parties of the second part," *i. e.*, the grantees, "or other the trustees hereunder for the time being to take charge and possession of said trust estate, and to hold the same for the sole use," etc., of the *cestuis que trustent*. . . . With power to the parties of the second part, or the survivors or survivor of them, or other the trustees or trustee hereunder for the time being, at any time and from time to time, in their or his discretion, and as soon as reasonably and profitably may be, to sell, let or lease the same, together or in parcels, and by public or private sale. . . . And in further trust for the parties of the second part, or the survivors or survivor of them, or other the trustees or trustee hereunder for the time being to receive the proceeds of all sales or leases," etc., "and to pay therefrom all the taxes," etc., "and the surplus to pay whenever and so often as it can conveniently be done to" the *cestuis que trustent*.

Perhaps the clause first quoted affords no inference, but the words that succeed do, in our opinion, manifestly show an intention to have the trustees take as joint tenants, for otherwise the powers and the estate over which the powers are to be exercised may be partly disjoined, a result which, in the case of an estate conveyed in trust for others for whose benefit the powers are conferred, it is utterly unreasonable to suppose can have been intended. Moreover, the language, "the parties of the second part, or the survivors or survivor of them, or other the trustees or trustee," plainly indicates that it was in the mind of the settlor that the sole survivor might be the sole trustee. No reason can be conceived why the settlor should have wished not to have the estate and the powers survive together. Slighter indications will suffice in a trust deed than in other deeds to amount to

a "manifest showing," because the courts are inclined to hold that trustees are joint tenants on account of the inconvenience resulting from their holding as tenants in common. Perry on Trusts, § 343. Our conclusion is that the estate is in the surviving trustee, and that, therefore, the heirs of the deceased trustees are not necessary parties.

[See Boone on Real Prop. §§ 849, 854.]

JENKS v. SMITH.

January 31, 1885.

PARTITION—DECREE FOR ACCOUNTING—ACTION AT LAW—ELECTION OF REMEDIES.

In equity, proceedings for an account, all the parties, both complainant and respondent, are after decree for accounting, actors.

A. sued B. in account. B. afterward filed a bill in equity against A. for partition and for an account of the matters involved in the action at law. A. answered the bill and joined in the prayer for an account; whereupon a decree was entered referring the cause to a master. Pending the master's hearing, A., in the action at law, sued out and served a writ of attachment against B. by mesne process. On motion of B. in the equity cause: *Held*, that A. should be restrained from prosecuting the action at law and be required to discharge the attachment.

Bill in equity for partition and an account. On motion for an injunction.

James M. Ripley & John F. Lonsdale, for complainants. *Hopkins & Potter*, for respondents.

DURFEE, C. J. This is a suit in equity for partition and account. It comes before us now on a motion, the ground and object of which may be stated thus: On August 25, 1881, the defendants in this suit commenced an action of account against the complainant William Jenks and the complainant Royal Lee, executor of the will of Pardon Jenks, deceased, to hold them to an account, on the charge that the said William and Pardon, and, since the decease of said Pardon, the said Royal Lee, as his executor, had had the care and management of certain lands and water-rights and privileges, belonging to the parties, and had received more than their proportion of the rents, issues and profits thereof, and had refused to account therefor when requested. Pending said action the defendants therein and others commenced this suit in equity for a partition of the common rights and estates and for an account covering the matters involved in the action at law, and for an injunction to restrain the suits at law. The defendants answering joined in the prayer for the account. Thereupon a decree was entered referring the cause to a master for him, among other things, to take the account. After the hearing under this decree was begun, the defendants sued out a writ of mesne process in the action at law and attached thereon by garnishment certain moneys belonging to said William Jenks and the said Royal Lee, as executor. The motion is that the defendants may be restrained from further prosecuting the action at law and be ordered to discharge the attachment.

It is the practice in chancery, where a party is suing for the same matter, both at law and in equity, to compel him to elect in which court he will proceed. Story's Eq. Jur., § 889; *Rogers v. Vosburgh*, 4 Johns. Ch. 84. Where a party so suing has obtained a decree in equity for an account he will be deemed to have made his election without any order therefor and will not be permitted afterward to proceed at law. *Mocher v. Reed*, 1 Ball & B. 818; *Wilson v. Wetherherd*, 1 Meriv. 406; *Conover v. Conover*, 1 N. J. Eq. 403; *Wedderburn v. Wedderburn*, 2 Beav. 208. "When a decree has been pronounced," say the court in *Mocher v. Reed*, "and the party obtains the relief he prayed, it is a contempt of court to proceed at law." In *Quidnick Company v. Chaffee*, 13 R. I. 367, 389, this court decided that after a complainant has carried his suit in equity to a decree, the court will presume that he has made his election and will stay suits at law for the same matter and order the discharge of attachments in them. The case does not differ, in this respect, from the case at bar, except that in the case at bar it is the defendants and not the complainants who are proceeding at law. But the suit here is for an account, the defendants joined in the prayer for the account, and

the decree has been entered accordingly. In such a suit after a decree all the parties are actors, and the court will not permit a complainant to dismiss his own bill unless upon consent. 1 Daniell's Chan. Plead. & Prac. *793. In such a suit, if a balance be found for the defendant, he is entitled to a decree for it against the complainant. If the complainant dies after decree for an account, the defendant can revive the suit against the personal representatives of the complainant, and if he himself dies his personal representative may revive it. 1 Story's Eq. Jur., § 522. We think, therefore, that at least after a decree to account in a suit for an account, the same presumption of election which applies to the complainant must be held to apply to the defendant praying for the account, and the same rule must be enforced. Clearly, since both suits cannot go on, the suit in equity, in which both parties have joined in obtaining the interlocutory decree for an account, is the one which is entitled to proceed.

The defendants will, therefore, be required to discharge the attachment. Order accordingly.

HARRIS, Petitioner.

February 8, 1885.

DECEDENT'S ESTATE — PUBLICATION — NOTICE OF SALE — ADJOURNMENT.

The sale of a decedent's realty to pay the debts was advertised by the administrator in a newspaper issued daily, the advertisement being inserted twice a week during two weeks and in each issue during the two following weeks preceding the time of sale.

Held, that the notice given complied with the provisions of Pub. Stat. R. I., chap. 179, § 16, which required notice "in some public newspaper for four successive weeks."

The day before that appointed for the sale notice of a postponement for a week at the same hour and place was added to the notice of the sale, and the notice of sale and postponement appeared in each issue of the paper up to and including the day of sale.

Held, that the notice of the postponement was sufficient under Pub. Stat. R. I., chap. 179, § 17, which required notice of "such adjournment in the same manner in which notice of the sale was given, as soon as may be after such adjournment and up to the day of the adjourned sale, unless the adjournment shall be from day to day only, and then by making public proclamation thereof at the time and place of the sale and by setting up a notice thereof at such place."

Case stated for the opinion of the court under Pub. Stat. R. I., chap. 192, § 23.

Stephen Harris, administrator with will annexed, of the estate of Caleb F. Harris, after obtaining permission from the probate court to sell the realty of the estate for the payment of debts, had the same sold at public auction. The purchaser, Stephen H. Arnold refused to accept the administrator's deed, alleging that the advertisement of the sale had not been such as was required by statute. The will of Caleb F. Harris made his wife sole devisee. She died before his death and left no issue.

On the purchaser's refusal the administrator, the heirs at law of Caleb F. Harris, and the purchaser Arnold, joined in presenting this case to the court.

The public statutes of Rhode Island provide (chap. 179, §§ 16, 17.)

§ 16. Before making any such sale at auction, the executor, administrator or guardian shall give thirty days' public notice thereof, by posting up at least three notifications of such sale in three public places in the town where the real estate or other property to be sold lies, and at least one in each of the adjoining towns, and in the town where the ward dwells, or where the testator or intestate last dwelt, or shall publish the same in some public newspaper for four successive weeks, or shall give notice thereof in such other manner, instead of or in addition to the above, as the court may direct.

§ 17. The executor, administrator or guardian may, in his discretion, adjourn any such sale to any future day whenever he may deem the same advisable, giving notice of such adjournment in the same manner in which notice of the sale was given, as soon as may be after such adjournment and up to the day of the adjourned sale, unless the adjournment shall be from day to day only, and then by making public proclamation thereof at the time and place of the sale and by setting up a notice thereof at such place.

Chap. 180, § 4:

§ 4. In all cases not specially provided for, in which notice is required, it may be given in either of the following modes, at the discretion of the court (*i. e.*, the court of probate):

1. By causing a citation to be served by some sheriff, deputy sheriff, town sergeant or constable upon all known parties interested, at least seven days previous to proceeding, which citation shall give notice of the subject-matter of the proceeding, and of the time and place thereof, and shall be served by reading the same to the parties, if to be found, or by leaving an attested copy thereof at the last and usual place of abode of each of them.

2. By advertisement of such notice for fourteen days, once a week, at least, in some newspaper published in the State.

3. By causing the clerk of the court to post up such notice in some conspicuous place in his office or in the place at which the court usually meets, and in three other public places within the town, at least fourteen days before proceeding.

Samuel Ames, for the administrator and heirs of Caleb F. Harris. *James Tillingham*, for Stephen H. Arnold.

DURFEE, C. J. The first question is whether the notice given was notice "in some public newspaper for four successive weeks" within the meaning of the Pub. Stat. R. I., chap. 179, § 16. The notice was published twice a week during the first two weeks, and during the last two weeks in every issue. The contention is that the newspaper being a daily, the notice ought to have been published in every issue during the entire four weeks. The statute would be open to that implication if it required the notice to be published in some daily newspaper, but since it does not require it, we do not think the implication is necessary. The statute was made to be executed by plain men who would be likely to understand it according to its plain and obvious meaning, and we think, therefore, that the court ought to interpret it, as far as possible, in the same manner. It is conceded that a notice published in "a weekly" for four successive weeks would be good, and if so we can see no reason why a notice published weekly in "a daily," for four successive weeks, the daily being a proper vehicle of notice, would not also be good. It is urged that the notice ought to be continuous, and that a person reading the notice in his daily paper one day, and missing it another, might suppose that the sale had been abandoned. The notice is continuous from week to week, which is all that the statute requires, and it is so common for notices in a daily paper to appear at intervals that we do not think the rest of the argument is of much weight. In Pub. Stat. R. I., chap. 180, § 4, it is provided, in regard to certain important probate notices, that they may be by advertisement for "fourteen days, once a week at least, in some newspaper published in the State." It is urged that there would be a literal compliance with the statute by a publication of the notice every week, for four successive weeks, in a different newspaper, which could not be permitted, and that, therefore, a literal compliance is not enough. It seems to us that this is introducing a subtlety of interpretation which is unwarranted, for the language is not "some newspapers," but "some newspaper," which men of plain minds would not construe to mean four different newspapers. We do not mean to say, however, that a literal compliance with the statute is all that is necessary; for the statute might be literally complied with in bad faith, with the intention of violating the spirit while observing the letter, as for example, if the notice of a sale in the city of Providence were published in some village newspaper in a remote part of the State. We are far from wishing to encourage any remissness in the giving of notices; on the contrary we think it would be well if courts of probate would, more frequently than they do, direct the form of notice with a view to insure its sufficiency, and that executors or administrators would more frequently obtain the direction of the courts for their own guidance. But here there is no suggestion of bad faith or of any lack of publicity, but the only question is whether the notice given was a compliance with statute. We think it was. *Johnson v. Dorsey*, 7 Gill, 269; *Bowen v. Argall*, 24 Wend. 496; *Brewer v. City of Springfield*, 97 Mass. 152.

We are also of the opinion that the notice of the adjournment was sufficient under chapter 179, section 17. The objection is that the adjournment was not made by proclamation or posting at the place and time appointed for the sale. The statute

does not direct any form of adjournment, unless the adjournment is from day to day. When the adjournment is for a longer period, the statute requires that the notice thereof shall be given as the notice of the sale was given, "as soon as may be after the adjournment and up to the day of the adjourned sale." Here the adjournment was made and the notice given in the manner following, to-wit: On November 12, 1884, the day before the day appointed for the sale, notice that the sale was postponed until November 20, 1884, at the same hour and place, was added to the former notice of sale, and in that form the notices of the sale and of the adjournment thereof were published on and from November 12, 1884, in every issue of the paper, until and including the issue of November 20, 1884. It is admitted that sales of real estate, particularly mortgage sales, have been quite commonly adjourned in this manner. We think such an adjournment is sufficient, though doubtless it may be wise often to supplement it by posting a proclamation.

Order accordingly.

NOTE.— See *Thurston v. Miller*, 10 R. I. 358; *Barrows v. National Rubber Company*, 12 R. I. 173, Ed. lt. I. Rep.

MAXON v. GRAY.

February 14, 1885.

MARRIAGE—DOWER—CHOSE IN ACTION—PAYMENT OF DEBTS—FRAUD ON CREDITORS.

A widow's right of dower is before assignment of dower a mere *chose* in action.

Courts of equity have, in the absence of statutory provisions, no power to subject a widow's right of dower before assignment to the payment of her judgment debts.

The mere neglect or refusal of the widow to have assignment of dower made is not such a fraud upon her creditors as to give jurisdiction to a court of equity.

Bill in equity to satisfy a judgment debt out of a right of dower. On demurrer to the bill.

Thomas H. Peabody, for complainants. *Crafts & Tillinghast*, for respondents.

MATTESON, J. This is a bill by judgment creditors to subject a right of dower to the payment of their judgment debt. It sets forth that the respondent, Nancy C. Gray, was the wife of Jirah I. Gray, late of Hopkinton, deceased. That said Jirah died intestate, on or about the 21st day of June, 1879, and that said Nancy as his widow is entitled to dower in certain lands, particularly described in the bill, with the improvements thereon, situated in Hopkinton, of which he died seized in fee. That he left surviving him his widow, said Nancy, and five children, who are still living and are his heirs at law, and that said real estate is now owned by said heirs subject to the dower therein of said Nancy. The bill also recites the obtaining of a judgment of the justice court of Westerly against the respondent Nancy by the complainants, the taking out of execution thereon, its levy upon, and the sale in pursuance thereof, at public auction, to the complainants, of all her right, title and interest in and to said real estate, being her dower right therein, the appropriation of the sum paid toward the expenses of the levy and sale, the return of the execution for want of other goods, chattels and real estate of the said Nancy to be found by the officer within his precinct, unsatisfied for the balance of such expenses and the amount of said execution, the recording of the execution and of the officer's doings thereon in the land records of Hopkinton, and the making and delivery to the complainants by the officer, prior to the return of the execution, of a deed of all the right, title and interest of said Nancy in said real estate, being her said dower right therein, and the recording of such deeds in said land records.

The bill further alleges that the said Nancy has been since the death of her husband, and still is, in the possession and occupation of all of said real estate, and in the receipt of the rents and profits thereof, by the agreement with and consent of the children and heirs of her deceased husband, without taking any steps to have her dower therein set off or assigned to her, and that she has neglected and refused, and still neglects and refuses, to pay said judgment, or any part thereof, or to apply any part of said rents and profits toward the satisfaction

of said judgment which remains in full force and has not been annulled, reversed or satisfied. That said heirs have at all times since the death of said Jirah neglected and refused, and still do neglect and refuse, to assign and set off to said Nancy her said dower right in said real estate.

The bill prays for an answer, the oaths thereto being waived, that the dower right of said Nancy in said lands may be subjected to the payment of said judgment, expenses and the costs of this suit, and for general relief.

The respondents have demurred to the bill on various grounds, not necessary to be stated.

A widow's right of dower in the real estate of her deceased husband, before assignment, is not an estate, but a mere *chose* or right in action. *Weaver v. Sturtevant*, 12 R. I. 537, 539, 540. Being a *chose* in action, it is not subject to levy and sale on execution. Freeman on Executions, § 185; *Nason v. Allen*, 5 Me. 479, 481, 482; *Gooch v. Atkins*, 14 Mass. 378, 381; *Waller v. Mardus*, 29 Mo. 25, 27; *Shields' Heirs v. Batts*, 5 J. J. Marsh. 12, 15; *Petty v. Malier*, 15 B. Monr. 591, 604. The proceedings set forth in the bill did not, therefore, confer any title to the right of dower of the respondent Nancy upon the complainants, or create any lien thereon in their favor, which can afford a basis for relief in equity.

The only cases in which a right of dower before assignment has been subjected in equity to the payment of debts, cited by the complainants, or which have come to our notice, are, *Davison v. Whittlesey*, 1 MacArthur, 168; *Tompkins v. Fonda*, 4 Paige, 448, and *Payne v. Becker*, 87 N. Y. 153, 158. The first and last of these rest upon the authority of the second, *Tompkins v. Fonda*. In this case the chancellor says, that if the widow is in possession or is entitled to an assignment of dower immediately, the want of a mere formal assignment of dower is not considered material. The only authority cited by him to sustain this statement is the remark of the lord chancellor in *Duke of Hamilton v. Lord Mohun*, 1 P. Wms. 118, 122, which was a suit by the heir against the widow, as the guardian of the heir, for an account of the rents and profits of real estate; and it was held just, that a court of equity, in taking the account, should allow to the widow one-third of the profits for her right of dower. For this purpose, the taking of the account, the lord chancellor did not deem the want of a formal assignment of dower material, the right of the widow to one-third of the profits being the same in conscience, whether her dower had or had not been assigned. The question in the present case, however, is not one of account, but of jurisdiction. In *Greene v. Keene*, 14 R. I. this court held, that in the absence of fraud, trust or other ground of equitable jurisdiction, and in the absence of statutory provisions conferring it, courts of equity have no jurisdiction to subject a *chose* in action of a debtor to the payment of a judgment. We have no such provision in our statutes as existed in New York when *Tompkins v. Fonda* was decided, upon which the decision of the chancellor in that case apparently rests. 2 N. Y. Rev. Stat. 174, § 39. Unless then there is some distinction to be drawn between a right of dower, before assignment, and other *chooses* in action, or unless the bill sets forth some fact, or facts, of equitable cognizance, the suit cannot be maintained.

It has been suggested that a distinction between a right of dower and other *chooses* in action may be found in the fact, that courts of equity have concurrent jurisdiction with courts of law in the assignment of dower. We do not think so. The jurisdiction in equity for this purpose was originally auxiliary only, to that at law. It was resorted to for a discovery of title deeds, or of dowerable lands, or to remove some impediment to the widow's recovery at law, or for an account of the meane profits before assignment, or to ascertain the comparative values of different estates, in which the widow might be entitled to dower, and which might be in the possession of various purchasers. Though the jurisdiction in equity has become an independent jurisdiction, concurrent with the jurisdiction at law, it appears to be based upon the fact that the remedy which it affords, is in many cases a better and more convenient remedy than that which exists at law, rather than upon any essential difference in nature between dower rights and other *chooses* in action. Such rights still continue to be *legal* rights, and courts of equity in exercising jurisdiction over them professedly act upon them as legal rights.

The allegations in the bill upon which the complainants apparently rely to main-

tain it are that the widow has been in the possession and occupation of the real estate described, by consent of, and agreement with, the heirs, without taking any steps to have her dower assigned, and has neglected and refused, and still neglects and refuses, to pay the judgment in favor of the complainants against her, or to apply any part of the rents and profits toward the payment of that judgment. In *Tompkins v. Fonda*, 4 Paige, 448, 449, cited above, the chancellor remarks: "She," the widow, "has no right, in conscience or in equity, to deprive her creditors of the benefit of her right of dower, for the satisfaction of their debts, by continuing in possession with the heirs and neglecting to ask for a formal assignment, which assignment and entry under it, would enable the creditors to reach it by execution." Doubtless the chancellor uses this language in view of the equity jurisdiction, modified by the statute, then existing in New York; but, if not although it may be conceded that a widow, like every other debtor, is bound in conscience to pay her creditors and to devote her right of dower and other *chooses* in action to that purpose, it by no means follows that courts of equity have power to subject this species of property to the payment of debts. Unless it can be said, that neglect or refusal to have dower assigned amounts to a *fraud* upon creditors, which we are not prepared to hold, we know of no head of equitable jurisdiction to which the case is referable.

The argument concerning the hardship which must result to creditors, unless *chooses* in action can be reached for the payment of debts, is to be addressed to the legislature rather than the court.

The bill must be dismissed for want of jurisdiction.

Demurrers sustained.

SUPREME JUDICIAL COURT OF MAINE.

HUSSEY v. DANFORTH.

October 28, 1884.

EXECUTION AGAINST PERSON—BOND FOR RELEASE—INSOLVENCY.

A debtor while in custody on execution for debt, filed his petition in insolvency.

Held, that he was not thereby entitled to release from arrest.

Defendant, having been arrested on an execution for debt, the next day filed his petition in insolvency, and two days later gave the usual statutory bond to procure his release from arrest. Having thereafter obtained his discharge in insolvency, with the intention of releasing his bondsmen on said bond, he presented himself to the jailor, and was locked up a short time, and then released. In an action of the bond,

Held, that the discharge in the insolvency proceedings operated to discharge the debt, but that the arrest was unaffected thereby.

Held, also, that by giving the bond, a new contract was entered into, but that defendant, having complied with one of its conditions, his bondsmen were not liable.

FOSTER, J. The defendant, Danforth, was arrested September 18, 1882, on execution, the next day, September 19, filed his petition in insolvency, and two days later, on the 21st of September, gave the bond in suit to procure his release from arrest. He obtained his discharge from the court of insolvency, March 14, 1883.

The regularity of the proceedings in the court in which judgment was rendered and execution issued, as well as those in the court of insolvency, and that the bond is a regular statute bond duly executed, is admitted.

The defense sets up: (1) That the debt, represented by the judgment and execution on which the defendant was taken into custody, originated since the insolvent law of 1878 went into effect, and although the arrest on the execution was legal, the commencement of proceedings in insolvency by the debtor during the time he was in custody, and before the bond in suit was given, vacated the arrest, legally entitled him to release from the custody of the officers, and that the bond which he afterward gave for his release was executed under duress; (2) That the debt on which the execution was obtained has been discharged by proceeding in insolvency, and that the bond, although executed after the arrest and after the

filing of the petition in insolvency, must fall with the debt; (3) That he has performed one of the conditions named in said bond by delivering himself into the custody of the keeper of the jail to which he was liable to be committed under said execution.

I. Upon the first and second propositions set up in defense, defendant cannot prevail. To what extent the privilege of exemption from arrest may be lawfully claimed by a debtor who has been legally arrested on execution prior to filing his petition in insolvency, so far as we have been able to learn, has never been determined by any decision of the court in this State.

By the common law, the creditor had the absolute right to arrest his debtor upon an execution for debt. When the debtor was committed on execution in a civil action, he could not be discharged without paying the debt even on taking the poor debtor's oath, if his creditor would pay for his support in jail. 3 Bl. Com. 416; Anc. Chart. 650. While the common law was modified by statutory enactment as early as 1787 (chap. 29), in the Commonwealth of Massachusetts, in relation to discharge from imprisonment, yet to the present time, under the various changes which the law has undergone, the debtor has always in this State been liable to arrest upon execution. As the statutes now stand, provision is made for the arrest and imprisonment upon execution of the debtor for the purpose of obtaining a discovery of his property wherewith to satisfy the execution on which he is arrested. Provision is likewise made whereby he may obtain his release by complying with certain conditions,—in this day generally well understood by those who, with sincere motives, have occasion to resort for protection thereto, as by those who thereby have like occasion to lament the loss of honest debts. One of those conditions is in executing a bond like the one in suit.

This debtor was arrested in accordance with the provisions of the law, and while in custody, filed his voluntary petition in insolvency. Was he thereby entitled to release from arrest? We think not.

So much of section 47 of the insolvent act of 1878 (R. S., chap. 70, § 51) as relates to this question provides that.....“no debtor against whom a warrant of insolvency has been issued shall be liable to arrest on mesne process or execution, where the claim was provable in insolvency during the pendency of the insolvency proceedings, unless the same shall be unreasonably protracted by the fault or neglect of such debtor.”

This provision is very nearly identical with the general bankrupt act of 1867, § 26 (U. S. R. S., § 5107), which was in force at the time of the enactment of the present insolvent law. The language of both, in the provision referred to, taken in connection with the objects to be attained, possesses that degree of similarity by which a construction given to one would equally apply to the other. And it has been decided by other courts that this section of the general bankrupt law would not relieve from arrest one who was in lawful custody when the petition was filed, though for a debt provable and dischargeable under the act; that it applied only to arrests that were made after the commencement of proceedings in bankruptcy; and if the arrest had been made before that time the bankrupt was not entitled to a release by virtue of any provision of the bankrupt law. Bump (7th ed.), chap. x, pp. 166, 606; Hamlin's Insolvent Law, 70; *In re Walker*, 1 Lowell, 222; *In re Devoe*, id. 251; *Hazleton v. Valentine*, id. 270; *Minor v. Van Nostrand*, id. 458; *Stockwell v. Silloway*, 100 Mass. 298. And see *Storer v. Haynes*, 67 Me. 422; *Wilmarth v. Burt*, 7 Metc. 257, 261.

The arrest contemplated by the statute, and to which no debtor “shall be liable,” is manifestly a new arrest for the benefit of the creditor, as was held by GRAY, J., in *Stockwell v. Silloway*, *supra*, where he says: “And this very section has been adjudged by the district court of the United States in this district not to extend to the case of a debtor who, before the commencement of bankruptcy proceedings, had been arrested on mesne process, giving bail, and surrendered himself in discharge of his bail, and was charged on an *alias* execution taken out after his bankruptcy; upon the ground that this act of the creditor was not in law or fact a new arrest during the pendency of the proceedings, but only a lawful continuation of the old arrest according to the terms and for the purposes for which it was originally made.”

In the case at bar the officer was in the faithful performance of his duty, at the time the arrest was made, obeying the mandate of a court whose jurisdiction in relation to the matter was unquestioned, and in the execution of that duty he was bound only to see that the process which he was called upon to execute was in due and regular form, emanating from a court having jurisdiction of the subject. He was justified in obeying his precept, and it is highly necessary to the due, prompt, faithful and energetic execution of the mandates of the law that he should be thus protected. No action of trespass could lie against him in the faithful execution of that duty while thus obeying a precept regular upon its face. *Wilmarth v. Burt*, 7 Metc. 257; *Clark v. May*, 2 Gray, 413; *Connor v. Long*, 104 U.S. 238.

II. The bond in suit having been executed and delivered after the debtor had instituted proceedings in insolvency, was properly given, and is not affected by any discharge which he has since obtained. *Corliss v. Shepherd*, 28 Me. 551, 552. The arrest having been legally made, and the bond given while the debtor was in the custody of the officer, in accordance with the statutes of this State, the rights of the creditor for further proceedings for the purpose of obtaining a discovery of the debtor's property had attached before the filing of his petition, and that provision of the insolvent law relating to exemption from arrest does not apply to the case at bar, whatever may have been the effect of the debtor's discharge upon the debt represented in the execution. It is a new contract entered into by the parties defendant, and in accordance with the provisions of the statutes, after the commencement of insolvency proceedings, and cannot, therefore, be affected by those proceedings. Treating the debt as effectually discharged and the remedy of the creditor, existing at the time the discharge was granted to recover his debt by suit as forever barred, the debt cannot be said to be paid, but discharged. The moral obligation of the insolvent to pay it remains. It is due in conscience although discharged in law, and this moral obligation, united with a subsequent promise in writing by the insolvent to pay the debt, would form a sufficient consideration, even though the promise be not under seal, and would support a right of action upon such promise. *Dusenbury v. Hoyt*, 53 N. Y. 523; *Corliss v. Shepherd*, 28 Me. 552; *Otis v. Gazlin*, 31 id. 568.

III. But this bond is not a promise to pay the debt absolutely. It is subject to three conditions, defeasible upon the performance of either, and the only remaining inquiry relates to the question of performance.

These conditions are in the alternative, and the debtor must show that he has performed one of them within the six months, if he would expect protection to himself and his sureties. Here the defense, assuming the burden, claims performance of the last condition by "delivering himself into the custody of the keeper of the jail," March 14, 1883. If he has done that, he has performed what he obligated himself to do, and his defense is sustained. *Rollins v. Dow*, 24 Me. 124; *White v. Estes*, 44 id. 21; *Jones v. Emerson*, 71 id. 405.

We are satisfied, from the testimony as reported, that the debtor delivered himself into the custody of the jailer within the time.

His purpose was, as he testifies, to release his bondsmen. He says he presented himself to the jailer some time in the forenoon, was locked in, but "did not remain in jail but a little while, an hour or so. I could not really tell whether it was afternoon when I was released, I don't remember the time. The jailer released me upon the presentation of that paper. He put me into the jail and turned the key, and I paid him for it." "I paid the turnkey's fee in going in and coming out. He asked me forty cents and I gave him half a dollar." The testimony of the debtor is corroborated by that of the jailer himself, who says he "could not give the hour he came there; some time in the forenoon; he was discharged some time in the afternoon." The jailer's entry upon the jail register, made at the time, confirms the statement of the witnesses; it is this: "Surrendered to jail, March 14, 1883, to save conditions of a six months' poor-debtor's bond, dated September 21, A. D. 1882. Released, March 14, 1883, on presenting discharge from court of insolvency." This evidence is not only uncontradicted but is supported by the other facts in the case.

The plaintiff, however, interposes objections which relate to the validity of the surrender.

It is claimed that the debtor, as soon as he delivered himself up and was committed, exhibited his discharge in insolvency and demanded his release; that he produced no copy of the bond or execution when he surrendered himself to the jailer; and that inasmuch as his intention was to be released upon his discharge in insolvency when he entered, it was not such a delivery into custody as is contemplated by the statutes.

But the conditions of the bond relate to the acts, rather than the intentions of the party. If the debtor, in fact, delivered himself into the custody of the jailer, whatever may have been his intentions or expectations as to his release, or as to the manner in which it was to be effected, we should not be warranted in saying that the intention should overrule the act and that he had not complied with the condition named in the bond.

Moreover, upon this question the testimony standing uncontradicted shows that his intention in delivering himself up was to comply with one of the conditions of the bond and release his sureties. He so informed the jailer; and the paper which he handed him before he was committed, sets forth the amount of the judgment, the court at which it was rendered, date of the execution, the arrest, the date of the bond, and the object of delivering himself into custody. This was accepted and filed by the jailer.

It has been the practice for the debtor to deliver to the jailer, when he surrenders himself into custody, either an attested copy of the execution and return thereon, or of the bond, and he would not be obliged to receive him without one or the other, but there is no statute requiring these as prerequisites, as in the case of bail surrendering their principal before a trial justice, and in commitment after judgment in such cases (R. S., chap. 85, § 15), or, as when the delinquent tax payer is committed to jail for non-payment of his taxes (R. S., chap. 6, § 171); the production of this attested copy of the execution and return, or of the bond, may be waived, and if the jailer receives the debtor without either, or upon the production of such data as may be satisfactory to him, the delivery is undoubtedly sufficient. *Jones v. Emerson*, 71 Me. 407.

Having submitted himself to the control of the jailer, and gone into actual confinement, as the evidence shows, he had done all that was in his power, and the penalty of the bond was saved. He had done what was incumbent upon him to do, and whether the jailer, upon any representations of the debtor or otherwise, after his custody had commenced, neglected the performance of his duties, or, with no intention of neglect on his part, improperly discharged the debtor, is not before us for our consideration. *Rollins v. Dow*, 24 Me. 124; *White v. Estes*, 44 id. 24; *Ryan v. Watson*, 2 id. 382.

The learned counsel for the plaintiff has called our attention to the case of *Jones v. Emerson*, *supra*. But it will be noticed that the facts in that case differ considerably from those here. There, all that the debtor did was to "offer to deliver himself to the jailer," and asked for information, but was not received into custody or committed; here he not only offered himself, but was actually received into custody and committed to jail, and after remaining therein for some time was released by the jailer, who received his fees for commitment and release.

In accordance with the stipulation in the report the entry should be Judgment for defendants.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

FRIEND IN EQUITY v. GARCELON.

January 5, 1885.

PENSION MONEY — EXEMPTION FROM ATTACHMENT.

Pension money, after it is received by the pensioner, is not exempt from attachment.

PETERS, C. J. The section of the R. S. U. S. (§ 4747), affecting the case is this: "No sum of money due or to become due to any pensioner shall be liable to attachment, levy or seizure, by or under any legal or equitable process what-

ever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

The question is whether this provision furnishes any protection to or exemption of the money after it comes into the pensioner's hands. A careful examination inclines us to the conclusion that it does not. The meaning of the section seems to be that the protection is extended so long as the money remains in the pension office, or its agencies, or is in course of transmission to the pensioner. It is money "due" or to "become due," and not money collected, that is protected by the law. By another provision of the Federal statutes a pensioner is not allowed to pledge or sell any right or interest in his pension. The extent of all the interference of the government seems to be to insure the actual reception of its bounty by the person entitled to it. When the money is actually in the possession of the pensioner the protection is gone.

With the money in his hands as his own unincumbered property, the pensioner stands upon the same footing for its protection as would any other man. He may, no doubt, purchase with his money any property which our State laws exempt from attachment, and hold it as such. Further than that the guardianship does not extend. He is accountable to his creditors precisely as any other debtor possessing money would be. The counsel for the defendants contend that it does not defraud a creditor for his debtor to give away property which the creditor cannot attach. There can be no doubt of that proposition. The answer is the money is exempt from attachment before it is received and not afterward.

Nor would it be very practicable to extend a protection further than before indicated. Certainly, the money could not be protected in its transitions from property to property. The moment its identification is gone, the protection confessedly ceases. If the money goes into attachable real estate, such estate may be taken for the pensioner's debts. *Knapp v. Beattice*, 70 Me. 410. There would surely be some grounds for saying that there might be an unfairness in extending the protection to the limit contended for. If the money be exempted against any debts, it would be against all attachments and all debts. And the pensioner may have obtained credit from the very fact of the possession of property acquired in this way.

There are decisions favoring our view of the question. The Iowa court has twice affirmed the same view. *Triplett v. Graham*, 58 Iowa, 136. In *Webb v. Holt*, 57 id. 712, it was said that "the exemption applies only to money due the pensioner, while in course of transmission to him, and that there is no exemption after it comes into his possession." In *Jardain v. Fairton Sav. Fund Assn.*, 44 N. J. L. 376, the same conclusion was reached, where it is said by the court: "The fund is not placed in the hands of a pensioner as a trust, but it is to inure wholly to his benefit. When it comes to him in hand or personal control, it is his money as effectually and for all purposes as the proceeds of his work or labor would be, and whether he expends it in new contracts, or it be taken to pay the consideration due from him for those of the past, it equally inures to his benefit."

In *Spelman v. Aldrich*, 126 Mass. 113, it was held that "even if, by the laws of the United States, the pension was exempt from attachment while it remained in the form of a pension check, the exemption ceased after the money was drawn upon the check." *Crane v. White*, 27 Kans. 319; S. C., 41 Am. Rep. 408 and note, is to the same effect. In *Hayward v. Clark*, 50 Vt. 612, a case not directly calling for a decision of the question, a different view is intimated.

It follows that the bill may be sustained upon either of the grounds named in the report.

Case to stand for hearing.

DANFORTH, VIRGIN, FOSTER and HASKEIN, JJ., concurred.

NOTE.—Contrary in N. Y. under Code, *Burgott v. Fancher*, 35 Hun, 647.

INHABITANTS OF FAYETTE v. INHABITANTS OF CHESTERTVILLE.

January 6, 1885.

PAUPER — MENTAL CAPACITY — SETTLEMENT — MEDICAL EXPERT.

To render a pauper capable of acquiring a settlement, he must have sufficient mental capacity to be able to perform intelligently the business ordinarily involved in taking up a residence.

A doctor who was not an attending physician, and had made but a single examination *pendente lite*, was asked, "from your examination at that time, what in your judgment was his mental condition? This was excluded, and plaintiff excepted.

Held, that whether or not the witness was qualified to testify as an expert, was a question of fact for the trial judge, and his decision was final.

PETERS, C. J. Whether the pauper had mental soundness sufficient to render him capable of being emancipated from parental control by arriving at the age of twenty-one years, and of acquiring a settlement for himself after that time, was one of the questions at the trial of the cause to the jury. No doubt, it should be mental soundness amounting to sanity—sanity in respect to the matter to be investigated. The test must be one peculiar to the question to be decided. It is adapted to circumstances.

The judge submitted to the jury this test: "To find that a person has capacity to acquire a settlement, within the meaning of the statute, you must find in the first place, that he had intelligence enough to form and retain an intention with respect to his dwelling-place; that he had sound mind enough to give him will and volition of his own, and such power and control over his mind and his action as to enable him to choose a home for himself; that he must have mental capacity sufficient to act with some degree of intelligence and some intelligent understanding with respect to the choice of his dwelling-place, and to form some rational judgment in relation to it." Different judges may give different definitions varying in the letter, in substance the same. We do not see why the rule framed by the judge in the present case is not a correct one.

It was further said by the judge: "And he must be able to perform with some degree of intelligence the simple and common kinds of business usually and ordinarily involved in the act of taking up a new residence." This additional explanation of the test is well enough, and certainly is not exceptionable.

The plaintiffs were not entitled, upon their requests, to any other or more favorable instructions than those given.

An exception is taken to the exclusion of this question proposed by the plaintiffs to their witness, Dr. Martin: "From your examination at that time what in your judgment was his (the pauper's) mental condition?" From the manner in which the point is presented to us by the case, we think the ruling must stand.

We infer that the witness was not allowed to answer the question for the reason that the judge did not think him qualified to testify as an expert. Such must be the implication of the refusal, unaccompanied with explanation. Undoubtedly many physicians are qualified to testify as experts upon questions of insanity. They may not be as a rule of the most eminent class of experts. Whether this witness was qualified to testify as an expert was a question of fact for the presiding judge, and his decision of such a question is usually final. In extreme cases, where a serious mistake has been committed through some accident, inadvertence, or misconception, his action may be reviewed. This is not such an instance.

The plaintiffs contend that, if not admitted as a professional or practical expert, the witness should have been allowed to express his opinion as a physician who had made a personal examination. The rule excluding persons not experts from testifying to their opinions upon questions where insanity is alleged, has admitted, either as an illustration of the rule itself, or as an exception to it, skillful and reputable physicians to testify to the mental condition of their patients, when they have had adequate opportunity of observing and judging of their mental qualities. That is not this case. Here Dr. Martin was not an attending physician. He made a single examination, *pendente lite*, in order to inform himself as a witness. He stood in a position to be tempted to participate in the prejudices of the party calling him as a witness. See *Gardiner v. Farningdale*, 45 Me. 537.

Finally, it is contended that the rule which excludes opinion evidence by witnesses acquainted with the person whose sanity is questioned should be abrogated altogether. We are not prepared to admit the propriety of so radical a change in the practice of our courts, although we are aware that many courts are at the present day inclined that way. It is easy to see, and experience teaches us, that there are advantages upon either side of the question — to either mode of practice. It is correctly said by those who advocate the admission of such evidence, that witnesses who have not some aptitude in narrating events and ability for describing details and particulars, although possessing good judgment in forming estimates and conditions, are very often not fairly appreciated; that it is not easy to draw a line between matters of observation, and what is a matter of judgment founded on observation.

On the other hand, such evidence is exceedingly apt to carry a force and impression which the real facts are not deserving of. Opinions are easily and unconsciously to the possessor of them, colored by feeling and prejudice.

Every judge experienced at *nisi prius* knows how common a thing it is to see a cloud of witnesses arrayed at the witness stand to testify in a matter of opinion, and how difficult it is to contend against the pressure, however ill-founded the testimony may be. Where it is a collateral question, or where a plain case, the objection to such testimony is not so meritorious, and in such circumstances the objection is not often interposed. But where the issue, sanity or insanity, is directly raised, and the question is a doubtful one, the rule which excludes the opinions of non-professional witnesses works favorably. The issue is not generally simple enough for a witness to pass his judgment upon. There are various forms and kinds of insanity, of mental unsoundness, many of which cannot be easily or accurately defined, the subject itself in some of its aspects being beyond the reach of human investigation. The popular sentiment upon the subject of insanity differs from the legal standard in most cases.

The tendency in our practice has been to allow witnesses who are not experts a good deal of latitude in the expression of opinion, short of declaring their judgments upon the point mainly and directly in issue. As was said by KENT, J., in *Robinson v. Adams*, 62 Me. 410: "Certainly nothing less than a distinct expression of the opinion of the witness, given as such opinion directly, comes within our rule." A witness, under the direction of the court, may be permitted to describe peculiarities, conditions and situations, conduct and changes. In *Robinson v. Adams*, *supra*, it was deemed not objectionable for a witness to say that she did not observe any failure of mind and nothing peculiar in a person. In *Stacy v. Portland Pub. Co.*, 68 Me. 279, it was held admissible for a witness to testify that a person was intoxicated at a time named.

The motion cannot justly be sustained. There is much to show that the pauper was a man in body and a child in mind.

Motion and exceptions overruled.

WALTON, DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

DOUGLASS v. TRASK.

January 6, 1885.

SALE — WARRANTY — INSTRUCTION TO JURY.

In an action for breach of warranty of soundness of a horse, a "curb" which lamed the horse, made its appearance the day after the sale. Experts were examined as to the nature and cause of "curbs," the judge gave an instruction which authorized the jury to find from such personal knowledge as they might have of the nature, cause, &c., of a curb.

Held error, that the subject was not one of general knowledge and observation, but one of science, and the jury not being experts, the instruction left them at liberty to disregard the evidence, and the verdict they rendered would not be "according to evidence."

LIBBEY, J. This is an action for breach of warranty of the soundness of a horse bought by the plaintiff of the defendant, May 1, 1883. The alleged unsoundness was a curb which caused the horse to be lame.

The plaintiff introduced evidence tending to prove that on the next day after

the purchase the horse showed some lameness, and had an enlargement on its hind leg, which proved to be a curb. The defendant contended that the horse was sound at the time of the sale, and introduced evidence tending to prove that it had shown no lameness, and had no enlargement on its leg prior to, and at the time of the sale, so that the real issue was, not whether a curb was an unsoundness, but whether the unsoundness existed at the time of making of the warranty, or came upon the horse afterward.

This made it material to inquire into the nature and cause of a curb, and the length of time in which the enlargement and lameness would appear, after the injury which caused it was received; and upon this point witnesses, who were experts in such matters, were called by the parties and testified in regard to them.

Upon this point the judge instructed the jury as follows: "Now, then, upon the evidence of these experts and such explanations as you have had from counsel, what is a curb? You may infer from this evidence, or from such personal knowledge as you may have in relation to matters of this kind, which, in cases of this character you are obviously authorized to apply to the investigation, that such an injury is a result of a sprain or wrench of the ligaments binding the tendon of the joint, or it may be a mechanical injury to the covering, known as the sheath of the tendon around that joint, which results in an enlargement which impairs the free action of the joint (which has been described to you by the witnesses as being, primarily, somewhat soft), and you may infer, therefore, that some deposit has taken place."

This instruction authorized the jury to find the nature, cause, and time of development of a curb from such personal knowledge as they might have in relation to matters of that kind. We think this was error. The judge may have intended to tell the jury that, in considering the evidence, they might bring to its consideration, in determining the weight to be given to it, such general, practical knowledge as they might have upon the subject, which would not transgress the rule of law applicable to the case, but he failed to do so. The subject under consideration was not one of general knowledge and observation, but one of science, upon which no witness, not specially qualified as an expert, could testify. It does not appear that any juror upon the panel was qualified as an expert to testify or give his opinion upon the subject under consideration; and still each juror may have thought he was, and under the instruction given, may have based his conclusion solely upon what he thought his personal knowledge was, disregarding the evidence submitted by the parties. The verdict thus given would not be "according to the evidence given" them, but according to their own personal knowledge of the subject-matter under consideration.

We think the case is clearly within the authority of *State v. Bartlett*, 47 Me. 388, and *Schmitt v. N. Y. M. Fire Ins. Company*, 1 Gray, 529.

It is unnecessary to consider the motion to set aside the verdict.

Exceptions sustained.

PETERS, C. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

Low v. Low.

January 6, 1885.

WILL — LEGACY — RELEASE — CONSTRUCTION.

A general legatee, who after payment of the testator's debts and other legacies, was entitled to share in the residuum, executed an instrument releasing the estate from paying the "legacy named in said will."

Held, that both the general legacy, and the interest under the residuary clause of the will were released.

LIBBEY, J. Francis Low, the appellant's father, made his will July 1, 1871, by which, after providing for maintenance of his wife and giving her a legacy of \$5,000, he gave to each of his four children a general legacy, and the rest, residue and remainder of his estate, if any, after payment of his debts and the legacies, was given to his four children, or such of them as might survive him, and to the legal representatives of any deceased child, to be shared in equal proportions.

August 2, 1879, the appellant, wishing to receive his share of his father's estate in anticipation of his death, made a settlement with his father, by which, with the advancements previously made to him, he received \$15,000, and gave him the instrument which is in evidence.

The only question for the decision of the court is whether that instrument or release is sufficient, or furnishes sufficient evidence to bar the appellant from recovering any portion of the estate of his father under his will. It is admitted by his counsel that the legacy of \$4,000 to the appellant is adeemed or satisfied by the payment and release; but it is claimed that the terms of the instrument are not sufficiently comprehensive to embrace his interest under the residuary clause of the will. We think they are. In ascertaining the meaning of the parties as expressed in the instrument, all of its language is to be considered together in the light of the subject-matter to which it applies and the situation of the parties, their surroundings and relation to each other, so far, at least, as they are disclosed by the instrument itself. It refers to the will of the father by its date. The more important clauses to be considered in deciding the question are as follows: "Whereas said Francis Low, in said will gave, devised and bequeathed to me certain property; now, therefore, in consideration of \$15,000 paid to me and for me by said Francis Low during his life-time, the receipt whereof I hereby acknowledge (and which said sum is my full share, and more, of my father's estate), do for myself, my heirs, executors and administrators hereby remise, release and discharge my said father, his executor or administrators, or legal representatives from paying the legacy named in said will to me.....and I release all my right, claim and title as heir to any and all estate and property which my said father may die seized or possessed of, and I will make no claim for any portion of the same."

It is claimed that the meaning of the words "legacy named in said will" is fully answered by applying them to the general legacy of \$4,000; that the word "legacy" is in the singular, and does not embrace both the general legacy and that under the residuary clause.

It is a general rule for the interpretation of contracts as well as statutes, that the singular may be read as plural, and the plural as singular, when the context requires it. Here the purpose of the testator appears to have been to anticipate his death by paying to his son his full share of his estate that would go to him under his will (and by the settlement of his estate in probate it appears much more than his share), in extinguishment and satisfaction of the provisions which he had made for him therein, and this purpose was fully participated in by the son; among other things, he agreed in his release, under seal, to make no claim to any portion of the estate of which his father might die seized and possessed. Considering this clause in connection with the preceding, we think the words "the legacy named in said will" should be held to include all the provisions of the will in favor of the appellant, and that they were fully adeemed and satisfied. *Allen v. Allen*, 13 S. C. 512.

While the instrument in evidence cannot be treated as a technical release of the appellant's interest in his father's estate for the reason that when given there was no existing legal right or interest to be released (*Fitch v. Fitch*, 8 Pick. 480; *Trull v. Eastman*, 3 Metc. 121); still having obtained more than his share by it, he is estopped by his covenant in it from claiming any thing more under the will. *Quarles v. Quarles*, 4 Mass. 680; *Kenney v. Tucker*, 8 id. 143.

The same result would be reached by treating the \$15,000 as an advancement by the father.

Decree of the judge of probate affirmed, with costs.

PETERS, C. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

SWIFT RIVER IMPROVEMENT CO. v. BROWN.

January 8, 1885.

CORPORATION — TOLLS — CHARTER CONDITIONS — BURDEN OF PROOF.

Plaintiffs charter provided that "from and after it shall have constructed the dams, side booms, side dams, sluices and other improvements *contemplated by this act*, may demand and receive a toll 'of twenty-five cents per M' for all logs and lumber that shall pass over or by its dams and improvements."

In an action against defendant to recover "tolls,"

Held, the burden rests upon the plaintiff to show that the improvements made are sufficient to comply with the condition upon which toll may be demanded. The evidence failing to prove that the plaintiff had complied with the conditions of their charter at the time when defendants drove their logs, defendants were not liable.

HASKELL, J. *Assumpsit* to recover on account annexed, "toll on 316,000 feet of logs, \$79." The plea of "never promised" was interposed with a brief statement of special matter of defense. This plea admitted the capacity of the plaintiff corporation to sue (*Penobscot Railroad Co. v. Mayo*, 60 Me. 306), but put in issue all other facts necessary to sustain the action. *Nye et als. v. Spencer*, 41 Me. 272; *Moore v. Knowles et al.*, 65 id. 498; *Endicot v. Morgan*, 66 id. 456. To recover, the plaintiff must prove either an express promise, or facts from which the law will imply a promise from the defendants to pay the debt sued for. It is not contended that an express promise has been shown, but if the defendants were liable to pay the toll demanded from driving the river, and did drive the river, the law in this State implies a promise upon their part to pay the established tolls, even though the plaintiff's charter created a lien upon the lumber to secure them, and the action of *assumpsit* may well be maintained. *The Bear Camp River Co. v. Woodman*, 2 Me. 404; *The Central Bridge Cor. v. Abbott*, 4 Cush. 473.

The plaintiff's right to demand tolls depends upon the authority with which it is clothed under its charter from the legislature, approved March 8, 1864 (chap. 343). The powers and privileges thereby granted are in derogation of the public right and must receive a strict construction. *Sprague v. Birdsall*, 2 Cow. 419; *Cayuga Bridge Co. v. Stout*, 7 id. 33. Ordinary charters, granting to individuals or corporations the rights to demand tolls from all persons using a public stream, suppose that substantial benefit is to be accorded from improvements specified in the charter, that will facilitate and benefit the public use of the stream and thereby work a consideration for the toll that may be exacted.

The plaintiff's charter is silent as to where upon the stream the improvements are to be made, but empowers the plaintiff to "construct and maintain dams and side dams with side booms and sluices, and all other improvements on Swift river and Black brook and their branches, *which facilitate* the transportation of logs and other lumber down said river and brook," and provides that the plaintiff, "from and after it shall have constructed the dams, side booms, side dams, sluices and other improvements *contemplated by this act*, may demand and receive a toll 'of twenty-five cents per M' for all logs and lumber that shall pass over, or by its dams and improvements," and shall have a lien to secure it.

The improvements authorized by this charter are those *which facilitate* the transportation of logs and lumber, and these are to be constructed and maintained as a condition upon which toll can be demanded. They are of interest to every one who has occasion to float lumber upon the stream. The legislature could never have intended that toll should be exacted without the performance of those acts by the plaintiff which must have been deemed a consideration for the enjoyment of its franchise. If duties imposed by law upon a corporation are merely directory, an individual cannot dispute the enjoyment of its franchise by reason of their being disregarded or violated. So it was held, that when a corporation was required to build its toll bridge of a specified width, and built it narrower, the traveler could not avoid the payment of toll for that reason. *South-west Bend Bridge v. Hahan*, 28 Me. 300; *Middle Bridge Prop. v. Brooks*, 13 id. 391; *Kellogg et als. v. Union Co.*, 12 Conn. 7.

But, if the violation of the provision of the charter be of such a character,

that the individual called upon to recognize the validity of the franchise is injured, or deprived of any right which he might demand, then he may dispute the demand made for him, on the ground that no liability attached until those rights, which the charter accorded him, have been provided, as a traveler is not bound to pay toll, unless the rates of toll are exposed to his view, as required by the charter of the company demanding it. *Bridge v. Hahan*, 28 Me. 300; *Bridge Props. v. Brooks*, 13 id. 391. So the plaintiff is not entitled to demand of the defendants toll, unless it has provided them with the facilities for driving the river contemplated by its charter. Upon a careful consideration of the evidence, it appears that the plaintiff, prior to 1869, made certain improvements upon Swift river, but to what amount, and of what cost, the evidence fails to give any very clear information. It is conclusively shown, that in the year 1869, all the improvements made by the plaintiff upon that part of Swift river driven over by the defendants, so far as the same were structures of any kind, were carried away by the freshet, and have never been rebuilt or replaced. That at the time defendants drove their logs, the only improvements of the plaintiffs, passed by the drive, were a side draw at "Kimballs" made with logs laid up very high with polls put across, so that the water would run through it, and a few sticks put across the entrance of an old starch factory flume lower down the river at a cost of about \$50. That the plaintiff has not pretended to demand toll from the public using the river, and that the improvements made were of no use, and did not facilitate the transportation of logs upon the stream.

The plaintiff fails to show such an improvement of the river, as the legislature must have intended to require, as a consideration to the public, for the exercise and enjoyment of the right to demand tolls. Its charter imposes, as a condition to the enjoyment of tolls, that the improvements authorized should facilitate the transportation of lumber, and the burden rests upon the plaintiff to show that the improvements made are sufficient to comply with the condition upon which toll may be demanded. In this case the evidence fails to prove that the plaintiff has constructed and did maintain, at the time when defendants drove their logs, any improvements that facilitated the transportation of the logs down the river, and therefore it must fail. In accordance with the agreement of the parties, there must be judgment for the defendants.

PETERS, C. J., WALTON, DANFORTH, VIRGIN and EMERY, JJ., concurred.

BANTON v. SHOREY.

January 10, 1885.

STATUTE OF FRAUDS — GROWING TIMBER — MORTGAGE — REPLEVIN.

Simple contracts for the sale of growing timber, *as such*, to be cut and severed from the freehold by the vendee, being executory contracts for the sale of chattels, are not contracts for a sale of an interest in lands, and are not within the statute of frauds.

Plaintiff claiming under a mortgage of real estate, which it was admitted was recorded after defendants had severed the chattels in suit from the freehold, sought to replevin the same.

Held, that the title to the chattels was in defendant and plaintiffs could not recover.

FOSTER, J. This is an action of replevin, in which the plaintiff claims title to the property in dispute as mortgagee under a mortgage of real estate from one Haticil Gott, dated November 10, 1881, but not recorded till January 12, 1883.

The defendants claim title to the same property from said Gott by virtue of an instrument, or writing, in the following words:

"ALTON, September 24, 1882.

"This is to certify that Frank Porter, of Alton, has bought four hundred knees, more or less, of me, Haticil Gott, on Lot No. 25, and has paid me in full (\$70) seventy dollars.

HATICIL GOTT.

"And this is to certify that I, Haticil Gott, do defend the above writing.

"HATICIL GOTT."

It is admitted that the knees therein named had been severed from the soil, re-

moved from the land, and the stipulated price paid for them by these defendants before the plaintiff's mortgage was recorded and before they had any notice of the same.

As both parties claim title from the same source, the one who has the superior right must prevail.

The defendants claim to be purchasers without notice of any adverse interest in any other party till long after their title had become perfected by means of the above writing and by the severance and removal of the knees from the land and payment of the price stipulated; and they invoke, as against the plaintiff's asserted title, the following provision of the statute (R. S., chap. 73, § 8): "No conveyance of an estate in fee-simple, fee-tail, or for life, or leased for more than seven years is effectual against any person except the grantor, his heirs and devisees, and persons having actual notice thereof, unless the deed is recorded as herein provided."

On the other hand, the plaintiff says that the defendants have obtained no title to the knees, inasmuch as the trees from which they were taken were a part of the realty, that the defendants' writing was not such an instrument as would convey any interest in real estate, and that while the statute would protect an innocent purchaser of the land, or any interest in it, it is no protection to those who purchase as in this case.

We are not prepared to admit this doctrine as correct, either upon principle or authority. The language of the statute is plain and positive, and has been regarded as prohibitory. *Houghton v. Davenport*, 74 Me. 593.

"The provision of the statute for registering conveyances is to prevent fraud, by giving notoriety to alienations." *Norcross v. Widgery*, 2 Mass. 508.

The record of a mortgage is constructive notice of its contents to all subsequent purchasers. As to them the mortgage takes effect, not because of its prior execution, but by reason of its prior record. "The whole object of the registry acts is to protect subsequent purchasers and incumbrancers against previous conveyances which are not recorded, and to deprive the holder of previous unregistered conveyances of his right of priority, which he would have at common law." 1 Jones on Mort. §§ 557, 576; *Curtis v. Deering*, 12 Me. 499.

The statute is for the benefit and protection of all persons who have any interest in examining the record title to property to which they may thereafter become owner, either in whole or in part, absolutely or otherwise.

The court in Massachusetts, in considering the provisions of a similar statute, in a recent case, says: "But for the protection of *bona fide* creditors and purchasers, the rule has been established, that although an unrecorded deed is binding upon the grantor, his heirs and devisees, and also upon all persons having actual notice of it, it is not valid and effectual as against any other persons. As to all such other persons, the unrecorded deed is a mere nullity. So far as they are concerned, it is no conveyance or transfer which the statute recognizes as binding on them, or as having any capacity to affect their rights, as purchasers or attaching creditors. As to them, the person who appears of record to be the owner is to be taken as the true and actual owner, and his apparent seizin is not divested or affected by any unknown and unrecorded deed that he may have made." *Earle v. Fiske*, 103 Mass. 492.

It appears that the record title of the premises, from which this timber was taken, at the time of the purchase and removal by these defendants, was in Hatcliff Gott. They had a right to look to the record for their protection as against any outstanding title.

It is a principle too well settled to need any citation of authority, that standing trees, and such as were the subject of purchase in this case, are part and parcel of the real estate. Yet they may be, and very frequently are, the subject of sale and removal as distinct from the remaining parts of the realty, and title thereto may be obtained otherwise than by deed, where the same have, in connection with an executory contract of sale, been severed from the soil and removed by the vendee. And the rule, as settled by modern decisions in reference to this question, is this: That parol or simple contracts for the sale of growing timber, to be cut and severed from the freehold by the vendee, with reference to the statute

of frauds, and to give effect to them, have been construed as not intended by the parties to convey any interest in land, and therefore not within the statute of frauds. They are held to be executory contracts for the sale of chattels, as they may be afterward severed from the real estate, with a license to enter on the land for the purpose of removal. *White v. Foster*, 102 Mass. 378; *Clafin v. Carpenter*, 4 Metc. 583; *Poor v. Oakman*, 104 Mass. 316; *Parsons v. Smith*, 5 Al. 578; *Erskine v. Plummer*, 7 Me. 451; *Davis v. Emery*, 61 id. 141; S. C., 14 Am. Rep. 553; *Freeman v. Underwood*, 66 id. 233, 1 Wash. R. P. *3, § 7; Benj. on Sales, § 126, and notes, and cases there cited; *Marshall v. Green*, 1 C. P. Div. 44; S. C., 15 Eng. Rep. 218; *Nettleton v. Sykes*, 8 Metc. 35; *Ellis v. Clark*, 110 Mass. 391.

In this case the defendants, it is true, entered under an executory contract for the sale of growing timber, and which, in accordance therewith, they severed from the land and carried away, paying the consideration named. As to such timber thus cut and removed the contract became executed, and the title to which vested in the defendants as soon as it was severed from the land. *Erskine v. Plummer*, 7 Me. 451; *Buck v. Pickwell*, 27 Vt. 157. They became purchasers then, and so far as any record title at that time disclosed, there was nothing to indicate that Gott was not the real owner. Nor can it make any difference with the plaintiff whether their title to the timber which was cut and removed by them came to them by this executed contract, or by deed. They became purchasers of it as much in the one case as they would have in the other, and have the same right to the protection of record title. The contract was no longer executory, but executed. A severance, in fact, had been made by the vendees in the cutting and removal. Supposing, instead thereof, Gott had executed a deed of the timber to these defendants. The counsel for the plaintiff in that case assumes that the defendants would have obtained title to the timber and been protected as purchasers by the statute hereinbefore named in relation to recording titles. There are very respectable authorities that hold a conveyance by deed of growing trees to be a severance in law from the land so that they become personal property without an actual severance. Upon this doctrine Prof. Washburn (1 R. P. *3, § 7) remarks, in speaking of title derived from an executed contract: "The same effect, however, of passing property in trees may be accomplished by conveyance of them by deed as growing trees if done by the owner of the freehold. It is so far considered a severance of the property in the trees from that in the soil, that the vendee may, after that, sell and pass title to them by a mere writing, though they have not been actually severed from the soil." *Kingsley v. Holbrook*, 45 N. H. 322; *Gooding v. Riley*, 50 id. 407; *Holt v. Stratton Mills*, 54 id. 110; S. C., 20 Am. Rep. 119; *Warren v. Leland*, 2 Barb. 613. However this may be it does not become material here, for in this case the severance was actual and we can see no reason why the vendee did not obtain the same title as they would have by a deed. If the record would protect them in one case, it certainly ought to in the other.

As between the vendor, the party in whom the title of record appeared, and the vendee of this timber, the title thereto became vested in them when it was severed from the soil; to be sure, as to so much as might remain uncut, the seller had the right, at any time before severance, to revoke the license to enter, sever and remove it, and thereby prevent the vesting of the title to so much as might remain uncut; but as to this timber which had been cut or severed from the soil, the contract had been executed, the license irrevocable, and the purchaser's title thereto valid. As to such they were more than mere licensees; they were purchasers of property with license incidental to an executed contract. *Giles v. Simonds*, 15 Gray, 443. In speaking of the rights of purchasers in reference to contracts of this nature, the court, in the last case, says that the license "is subsidiary to this right of property;" and this right in the property "is not derived from the license, but exists in the owner by virtue of a distinct and separate title."

The authorities cited by the counsel for the plaintiff, defining the rights and liabilities between mortgagor and mortgagee, do not conflict with any principles of law herein stated. It will be found that those cases were decided upon facts entirely different from those in the case at bar; there the mortgages had been properly recorded prior to the acts complained of, and the mortgagor was either the primary agent or efficient hand in the commission of injury against the estate

of the mortgagee. Here the mortgagee could have protected himself as against any and all parties, whether as purchasers or tort-feasors, by complying with the provisions of the statutes before the rights of the parties intervened.

In accordance with the stipulation in the report we are of the opinion that the defendants have the better title to the property in question and that the entry should be judgment for defendants.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

[See 15 Eng. Rep. 225; 17 Am. Rep. 593. Ed.]

MORSE v. INHABITANTS OF BELFAST.

January 10, 1885.

NEGLIGENCE — DEFECTS IN HIGHWAY — WANT OF RAILING — SETTING ASIDE VERDICT.

Neither ditches properly constructed for the drainage of the highway, nor the want of a railing between them and the highway, can be declared "defects" by the court as matter of law.

In an action to recover for injuries received from being thrown from a carriage, the evidence showed that one of the occupants of the carriage, who was driving the plaintiff's horse at the time, had frequently passed over this road, and was well acquainted with its location and condition. He saw the lights from a carriage, which was coming from the opposite direction, some time before the carriage passed, but "supposed it was a light in a house" till the carriages were very near each other. The night was so dark that one witness testified he could not see his horse's head, and it appeared that the plaintiff's horse was driven at a trot from the time the light was first seen till the carriage was overturned.

Held, that whether the party driving the plaintiff's horse was at the time in the exercise of due care, owing to the darkness of the night, the liability of meeting other teams, the degree of speed, the nature of the vehicle, and the number of persons it contained, was a question for the jury, and their verdict would not be set aside.

FOSTER, J. The statute upon which this action is founded provides that a person receiving any bodily injury or suffering damage in his property "through any defect or want of repair or sufficient railing, in any highway, townway, causeway or bridge, may recover for the same in a special action on the case," etc.

The court is asked to set aside the verdict in this case, which was for the defendants, as being against law and evidence.

That the plaintiff received an injury while traveling over the highway in question is not denied. The defense to this action at the trial was that the way was not defective, and that a want of due care on the part of the person who was driving the plaintiff's horse contributed to the accident.

The road was one leading from Belfast to Searsport; the place where the accident occurred was about a mile from the city, where the road passes by what is known as the "stock farm," and that place it was smooth, very nearly level, and the surface of the wrought portion at the narrowest point was seventeen feet, and at the place of the accident nineteen feet in width, with shoulders at the side sloping off somewhat abruptly and forming ditches about two and one-half feet deep.

Over this way the plaintiff was riding with two other persons in the carriage, which was a piano-box top buggy with end springs, about ten o'clock in the evening of October 14, 1883; the night was very dark and foggy; the horse was trotting, and at this place the plaintiff's carriage passed another team coming in the opposite direction having a light in front of the dasher, and in passing, the plaintiff's carriage bore so strongly to the right that the off wheels, leaving the level portion of the way, passed out over the edge of the shoulder and along and part way down the same, and after having proceeded a distance of sixty-four feet, the carriage, with its occupants, was overturned into the ditch on the southerly side, causing the injuries of which the plaintiff complains and for which this action was brought.

It is not denied that the entire surface and traveled portion of the road was smooth and nearly level, but it is claimed that it was of insufficient width, and it is alleged that the injury complained of arose from the want of sufficient railing along the sides of this way.

The road at the place of accident was of sufficient width for three such teams

to pass each other with safety and convenience, under ordinary circumstances, if driven with proper care.

It has been held by this court, and such has been the law for many years, that towns are not required to render a road passable for the entire width of the whole located limits, but that when it has prepared a way of sufficient width, smooth and convenient for travelers, the duty of the town was accomplished. *Johnson v. Whitefield*, 18 Me. 286; *Perkins v. Fayette*, 68 id. 152; *Farrell v. Oldtown*, 69 id. 72. And in determining the question whether the way is safe and convenient within the meaning of the statute, we must say, as has been said before, that it is enough that the way is safe and convenient in view of such casualties as might reasonably be expected to happen to travelers.

But the law has not prescribed what imperfections in a road will be construed as constituting a defect or want of repair, such as the statute refers to, so as to render a town liable if an injury is occasioned thereby. These are questions of fact, generally, for the jury to settle under proper instructions in reference to the particular circumstances of every given case.

The same may be said in regard to what constitutes due care. The law is unquestioned that in actions of this kind the jury must be satisfied as an affirmative fact to be established by the plaintiff, and as a necessary part of his case, that at the time of the accident the party, or, as in this case, the driver, was in the exercise of ordinary care.

In this case the evidence before us shows that Dr. Pierce, one of the occupants of the carriage, who was driving the plaintiff's horse at the time, had frequently passed over this road, and was well acquainted with its location and condition. He saw the light from the carriage, which was coming from the opposite direction, some time before the carriages passed, but "supposed it was a light in a house" till the carriages were very near each other. The night was extremely dark and foggy — so dark that one witness testified he could not see his horse's head — and it appears that the plaintiff's horse was driven at a trot, and this continued from the time the light was first seen till the carriage was overturned. Whether, under all the circumstances of the case, as developed in evidence, the party driving the plaintiff's horse was at the time in the exercise of due care, owing to the darkness of the night, the liability of meeting other teams, the degree of speed, the nature of the vehicle, and the number of persons it contained, was a question proper for the jury to consider and determine.

At the trial the jury had a view of the way. To be sure it was a year from the time of the accident, but the testimony shows that there had been no material change in it since that time. Whether the way was of insufficient width, or there was want of "sufficient railing" at the place, was also a question which was properly addressed to the judgment of the jury and under proper instructions from the court. The plaintiff's carriage required but five and one-half feet space upon this way, which was nineteen feet in width; and while the defect complained of is not only the want of sufficient railing, but also ditches at the sides of the way, it may be proper to notice the fact, uncontradicted in evidence, that the wheels upon one side of the carriage were only a part of the way down the bank at the time the accident occurred. It cannot, therefore, be reasonably claimed that the remaining depth of the ditch outside and below the wheels contributed to the overturning of the carriage.

Our statutes require that highways shall be made reasonably safe and convenient for travelers. But in the construction of such ways it oftentimes becomes necessary, as well as proper, to construct ditches along their sides, and, when this is properly done, it is not the province of the court to declare them defects. This is in accordance with the principle laid down in *Macomber v. Taunton*, 100 Mass. 256, in which CHAPMAN, C. J., says: "On each side of this way there may be ditches. These are so necessary for the proper drainage of the carriageway that they are held not to be defects, if properly constructed, though travelers may be liable to fall into them in the dark."

The plaintiff also claims there should have been a railing between these ditches and the traveled way. If it were necessary in this instance for the purpose of rendering the road reasonably safe and convenient, we have no doubt there are

very few roads, then, in our State which would not require it. As remarked by PETERS, J., in the recent case of *Spaulding v. Winslow*, 74 Me. 537: "There are many thousands of such places within this State. If railings were required for them, towns would have extraordinary burdens to maintain their roads."

To justify setting aside the verdict in this case, the court must feel that it is clearly, manifestly wrong. We cannot assume that the jury have acted dishonestly, or perversely, or have been governed in their conclusions by such bias or prejudice as would warrant us in disturbing the verdict. Experience teaches us they would be as liable to be influenced in favor of the plaintiff, in this case, as they would in favor of the defendants. Nor can we say that the verdict is so clearly, manifestly wrong, either in respect to the alleged defects, or the exercise of due care on the part of the driver, that we should be justified in setting it aside.

Motion overruled.

Judgment on the verdict.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

ATLANTIC NATIONAL BANK v. DEMMON.

June 19, 1885.

LANDLORD AND TENANT — OPTION OF RENEWAL — EVIDENCE.

In an action to recover rent on a lease for one year, with privilege of two more at lessee's option,

Held, that although the fact of holding over, raised a presumption that defendant had exercised his option and was, therefore, liable for the rent, yet that evidence that the fact was otherwise, as it did not contradict the lease, was admissible.

Action on a lease to recover rent of certain rooms in a building owned by it, from January 1, 1879, to January 1, 1880. The lease was for a term of one year, from its date January 1, 1877, with the privilege of two years more at the lessee's option. There was nothing in the lease providing how the option should be manifested. The plaintiff claimed that the defendant had exercised his option to take the premises for two additional years, by continuing to occupy them after the first year stipulated in the lease. This the defendant denied, and claimed that after the first year he was only a tenant at will, and in support of this position he was permitted, at the trial in the superior court, to testify that prior to the execution of the lease and during the negotiations therefor and after the terms of the lease had been arranged, a conversation took place between him and the president of the plaintiff bank, to the effect that, if the defendant wanted the premises longer than the first year, he would let the plaintiff know, and, if he did not let him know, the plaintiff could turn him out on the usual notice, and that he was to be tenant at will. The jury returned a verdict for the defendants, and the plaintiff alleged exceptions to the admission of this evidence.

A. E. Denison, for plaintiff. Hutchins & Wheeler, for defendant.

C. ALLEN, J. The fact of holding over and paying rent would undoubtedly raise a certain presumption that a tenant has elected to hold over for the further term, stipulated for in the lease. This, however, is not a conclusive presumption of law, but it is rebuttable by evidence. In the absence of any thing to show the contrary, a court or jury would properly infer such election from these acts; but this is merely because such would be the natural inference from the conduct of the parties, if unexplained. It is no part of the terms of the written lease in the present case, that holding over and paying rent shall be considered as of themselves an election to continue to occupy under the lease, or conclusive evidence of such election. The written lease merely reserves to the tenant the option; and whether he has exercised that option or not, is a matter of fact to be determined independently. His holding over accompanied with payment of rent is a piece

of evidence sufficient of itself, if unexplained and uncontrolled, to raise a fair inference and presumption that the option has been exercised, and thus to make out a *prima facie* case.

But this is the most that can be said of it, and it is still competent for the tenant to offer opposing evidence. 1 Greenl. Ev., § 33. Such evidence contradicts no terms of the lease. It simply shows that the option secured to the tenant by the lease has not been exercised.

This doctrine is in full accord with the decision in *Kramer v. Cook*, 7 Gray, 550. See, also, *Bradford v. Patten*, 108 Mass. 153.

Exceptions overruled.

COLBY v. DUNCAN.

June 18, 1885.

WILL — DEVISE — CONTINGENT REMAINDER :

Testator bequeathed to each of his seven children, who might survive him, \$3,000 in money, or real estate equivalent to that sum, deducting therefrom what may have been charged to either, as an advancement, said legacy to be paid to them severally on their arriving at the age of twenty-one years, or on their marriage, without interest. He gave his wife the income of the remainder of his estate for life.

"And after the decease of my said wife, I give, devise and bequeath all my estate, both real, personal and mixed, to my children, *who may then be living*, in equal shares; and in case either of them shall have died, leaving legal heirs, then such heirs shall be entitled to the share which their deceased father or mother would have been entitled to if living, to hold to them and their respective heirs and assigns forever."

Petitioners asked for the partition of the real estate claiming an undivided third by virtue of a deed, from the widow, one son and a daughter who are still alive.

Held, that no interest passed by the deed, for until the widow was dead, it was not known who would take, the interest being a contingent remainder.

Petition for the partition of real estate, situated in Haverhill. The petitioner claimed an undivided third part of the estate by virtue of a deed dated April 30, 1884, from Mary W. Duncan, widow of James H. Duncan, deceased, Samuel W. Duncan, son of James H. Duncan (and his wife), and Margaret D. Phillips, daughter of said James H. Duncan (and her husband). James H. Duncan died in 1869, leaving a will. There were living at the death of the testator seven children. No child of the testator had then deceased, leaving issue, surviving the testator.

By the second clause of the will, the testator bequeathed to each of his seven children, who might survive him, \$3,000 in money, or real estate equivalent to that sum, deducting therefrom what may have been charged to either, as an advancement, said legacy to be paid to them severally on their arriving at the age of twenty-one years, or on their marriage, without interest no one, however, to be paid unless in case of his or her marriage, until two years after his decease, nor then, if living with, and supported by, their mother.

By article third he gave to his wife, Mary W. Duncan, "the use, improvement and income, for and during her natural life, of his dwelling-house, with the land thereto belonging, and the income of all his other estate, both real and personal, after payments of debts and legacies, enjoining upon her to keep the family together and to educate and bring up the children as if I were living, until such time as they may marry, or are of age to provide for themselves."

Article fourth is as follows:

"And after the decease of my said wife, I give, devise and bequeath all my estate, both real, personal and mixed, to my children, *who may then be living*, in equal shares; and in case either of them shall have died, leaving legal heirs, then such heirs shall be entitled to the share which their deceased father or mother would have been entitled to if living, to hold to them and their respective heirs and assigns forever."

Rebecca W. Duncan, one of the testator's daughters, died unmarried and intestate in 1871; George W. Duncan, a son, died intestate February 24, 1884, leaving a widow, who is still alive, and two minor children. All the grantors in the deed to the petitioner are still alive. Mary D. Harris, a daughter, and her husband;

Elizabeth D. Munger, a daughter, and her husband; Caroline Duncan, a daughter, and the widow and children of George W. Duncan, a son, denied the efficacy of the petitioner's deed, to convey to him any interest whatever in the premises. The case was submitted to the judgment of the superior court upon agreed facts, and judgment was rendered for the respondents. The petitioner appealed.

S. H. Phillips, for petitioner. *J. D. Bryant & I. H. Sweetser*, for respondents.

C. ALLEN, J. It is conceded that this petition cannot be maintained, if the interest which the children of James H. Duncan took under his will in his real estate, was a contingent remainder. The devise is clearly limited to the children who may be living at the decease of the testator's wife, and until that event happens, it cannot be ascertained who will take. Were any thing necessary to fortify this construction, it would be found in the earlier bequest to each of the testator's children who may survive him. He thus draws a clear distinction between those who are to take under these two different clauses. The interest in the real estate was a contingent remainder. *Denny v. Kettell*, 135 Mass. 138; *Smith v. Rice*, 130 id. 441; *Thomson v. Ludington*, 104 id. 193; *Olney v. Hull*, 21 Pick. 311. Judgment affirmed.

BISHOP v. WEBER.

June 19, 1885.

NEGLECT — CATERER — FURNISHING UNWHOLESOME FOOD — PLEADING.

One who holds himself out to the public as a caterer is liable to one who is injured by partaking of unwholesome and poisonous food and drink prepared and furnished by him, irrespective of any question of privity of contract, and it is unnecessary to aver that defendant knew of its injurious quality.

Action of tort or contract, to recover damages for injuries alleged to have been received by plaintiff by partaking of unwholesome and poisonous food and drink furnished by the defendant, as a *caterer*, to the plaintiff for a compensation. The plaintiff's declaration contained three counts. The defendant demurred to the declaration upon the grounds:

First. That the declaration does not state a legal cause of action in the manner and with the substantial precision and certainty required by the statutes and rules of law and practice in this Commonwealth;

Second. That counts in contract and counts in tort are improperly joined in the declaration;

Third. That the declaration does not allege any relation or duty of the defendant to the plaintiff, for the breach of which the plaintiff's action will lie, nor does it allege any breach of any such relation;

Fourth. That the declaration does not anywhere allege any wrongful act or omission of duty of the defendant for which he can be held responsible to the plaintiff;

Fifth. That the declaration does not allege knowledge on the part of the defendant of any defect in any food or drink alleged to have been supplied by the defendant, or any negligence in the selection of either. The superior court sustained the demurrer and entered judgment for the defendant. The plaintiff appealed.

Moulton, Loring & Loring for plaintiff. *J. D. Bryant & I. H. Sweetser* for defendant.

C. ALLEN, J. If one who holds himself out to the public as a caterer, skilled in providing and preparing food for entertainments, is employed as such by those who arrange for an entertainment, to furnish food and drink for all who may attend it, and if he undertakes to perform the service accordingly, he stands in such a relation of duty toward a person who lawfully attends the entertainment and partakes of the food furnished by him, as to be liable to an action of tort, for negligence in furnishing unwholesome food, whereby such person is injured. This liability does not rest so much upon an implied contract, as upon a violated or neglected duty, voluntarily assumed. Indeed, where the guests are entertained

without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to his guests. The latter have a right to assume that he will furnish for their consumption provisions, which are not unwholesome or injurious, through any neglect on his part. The furnishing of provisions, which endanger human life or health, stands clearly upon the same ground as the administering of improper medicines, from which a liability springs, irrespective of any question of privity of contract between the parties. *Norton v. Sewall*, 106 Mass. 144; *Longmeid v. Holliday*, 6 Exch. 767; *Pippin v. Sheppard*, 11 Price, 400.

The plaintiff's action was originally entitled "in an action of tort." The plaintiff obtained leave to amend by adding the words "or contract, the plaintiff being doubtful to which class of actions this action belongs." This amendment was unnecessary and may be disregarded, all the amended counts upon which the plaintiff relies being in tort. It is not necessary to sustain the demurrer on account of this lack of literal precision in entitling the action.

The defendant relies upon several other extremely fine points of objection, but without dwelling on them in detail it may be said in general terms that the several counts sufficiently set forth the facts, from which the duty of the defendant toward the plaintiff springs, and it is not necessary to state formally and in terms that the defendant occupied such a relation toward the plaintiff that the law cast upon him the duty; they also sufficiently aver that the defendant neglected that duty, and that the plaintiff was injured by reason thereof. It is not necessary to aver that the defendant knew of the injurious quality of the food. It is sufficient if it appears that he ought to have known of it and was negligent in furnishing unwholesome food, by reason whereof the plaintiff was injured.

Judgment reversed

JONES v. TILTON, PICKARD and others, trustees.

June 18, 1885.

ASSIGNMENT — ATTACHMENT — INSOLVENCY — EFFECT OF DISCHARGE.

T., being insolvent, made a general assignment to defendant, P., a creditor, agreeing among other things to convey to any assignee of T. in insolvency who thereafter might be duly appointed in Massachusetts, to which assignment plaintiff verbally assented.

After the bringing of this action T. was adjudged insolvent and obtained his discharge. *Held*, that the assignment was valid, the discharge of T. defeated the attachment, and P., the trustee, was properly discharged.

The writ was dated December 19, 1883. Service was made on Pickard as trustee, December 20, 1883. It appears that on November 5, 1883, the principal defendant, being insolvent, assigned "all his property and estate real and personal, including all the property of which he was possessed, or interested in, or entitled to, on that day, except such as by law was exempt from attachment, together with all deeds, books and papers relating thereto," to Edward L. Pickard, one of his largest creditors, in trust, first, to convey to any assignee of Tilton in insolvency, who might thereafter be duly appointed in Massachusetts, all the property in this Commonwealth to which such assignee would have been entitled if the assignment to Pickard had not been made; second, to convert said property into money and apply the proceeds, first, to the payment of debts of Tilton preferred under Pub. Stat., chap. 157, and then to pay the balance equally and ratably without preference or priority upon all Tilton's debts and liabilities of November 5, 1883, and if any balance remained after payment of Tilton's debts, to pay it over to him.

At the same time that the plaintiffs brought this action against Tilton, and summoned Pickard as trustee they filed a petition in insolvency against Tilton upon the ground that the assignment to Pickard was fraudulent and was made for the purpose of preferring certain creditors. When the plaintiffs' writ was served upon Pickard, he called upon the plaintiffs and explained to them the nature of the assignment and the reasons why it had been made. The plaintiffs said the assignment was entirely satisfactory to them, but that they desired the amount due to them from Tilton to be settled and agreed upon before they assented to the assignment or discontinued their action.

No written assent to the assignment was ever made by the plaintiffs, but they assented verbally thereto. Pickard afterward requested Tilton to file a petition in insolvency. Tilton filed such a petition and was adjudged insolvent; the first publication of notice of the issuing of the warrant of insolvency was more than four months after the service of the writ upon Pickard, the trustee. The superior court, after a full hearing, discharged Pickard as trustee, and gave judgment for the defendant solely by reason of his discharge in insolvency. The plaintiffs appealed from the judgment discharging the trustee.

W. A. Herrick, for plaintiffs. *J. H. Benton, Jr.*, for trustee.

C. ALLEN, J. The answers of Pickard, which under the statute must be taken as true, show a verbal assent by the plaintiffs to the assignment and a presentation of their claim and an allowance of it by Pickard at the sum agreed on before them. No written assent was called for by the assignment. An oral assent, therefore, was sufficient. *May v. Wannemacher*, 111 Mass. 207; *Pierce v. O'Brien*, 129 id. 314. Such assent, if given before the commencement of an action, would debar the plaintiff from making an attachment, and being given afterward, must defeat the attachment. The fact that the plaintiffs did not assent to the debtor's discharge is immaterial. No such assent was called for. The provision that the assignee should convey the property to an assignee in insolvency, in case the debtor should be adjudged insolvent, did not render the assignment invalid or incapable of enforcement in case the debtor should not be adjudged insolvent. The assignment being valid and the plaintiffs having assented to it, the trustee was properly discharged.

Judgment affirmed.

HINCKLEY v. GERMANIA FIRE INSURANCE COMPANY.

June 18, 1885.

INSURANCE — TEMPORARY ILLEGAL USE — REVIVAL OF POLICY.

The temporary illegal use of property merely suspends a policy of insurance thereon during the continuance of such illegal use, and if before a loss occurs, the illegal use has ceased, in an action on the policy, the plaintiff is entitled to recover.

Contract upon a policy of insurance against fire. The policy declared on was in the Massachusetts Standard form, prescribed by Pub. Stat., chap. 119, § 139. The property covered by the policy consisted of billiard tables, bowling alleys and their furniture and fixtures. It appeared that the property described in the policy was owned by Warren R. Spurr and Edward W. Spurr, until February 28, 1882, when they agreed to sell the same to Herbert A. and Edwin R. Hinckley, at which time they received from Herbert A. Hinckley, a brother of the plaintiff, a written instrument, called a furniture lease of the property. The plaintiff ran the bowling alleys and pool tables for hire and had no license after May 1, 1883, when a previous license running in the name of Herbert A. and Edwin R. Hinckley expired. The property was destroyed by fire August 6, 1883. At the conclusion of the plaintiff's evidence, the superior court ruled that the plaintiff was not entitled to recover and directed a verdict for the defendant, and reported the case for the consideration of the supreme judicial court.

J. M. & T. C. Day, for plaintiff. *M. & C. A. Williams*, for defendant.

C. ALLEN, J. The report does not state the grounds upon which the ruling rested, that the plaintiff was not entitled to recover. The defendants, in their brief, rely on various objections which we have considered.

In the first place, the defendants suggest there is certainly great doubt whether the license under which the plaintiff was doing business on the day when the policy was dated and delivered was of any validity, since this license ran to both brothers, Edwin and Herbert, though Herbert had ceased to have any interest in the place before the license was dated and issued. No authority is cited or reason assigned for so strict a construction, and we are of opinion that a license, duly granted to two persons under Pub. Stat., chap. 102, § 111, to keep a billiard or pool table or a bowling alley, for hire, is available to each of them.

It is then urged that, after the license had expired, the plaintiff kept the insured property in violation of law from May 1, 1883, till the last week in June, 1883. The policy was dated March 15, 1883, and the license then existing expired May 1, 1883. The fire occurred on August 6, 1883, and it was conceded that there was no illegal use of the property after the last week of the preceding June, at which time the plaintiff ascertained that his license would not be renewed. The defendants rest their objection on two grounds, first, that the illegality and criminality of the plaintiff's act in respect of the injured property vitiates the policy by operation of law, independently of any express provisions contained in the policy; and secondly, that under a provision of the policy the right to recover was taken away. The authorities cited in support of the first proposition do not support it. *Kelly v. Home Ins. Co.*, 97 Mass. 288; *Johnson v. Union Marine Ins. Co.*, 127 id. 555; *Lawrence v. National Ins. Co.*, id. 557; *Cunard v. Hyde*, 2 Ellis & Ellis, 1.

In the present case, the plaintiff had a license at the time when the policy issued, and the policy, therefore, was valid when obtained. If it be assumed without discussion that the policy would cease to be operative during the time when the property was kept in use without a license, the question remains whether such temporary illegal use of the property has the effect to avoid the policy altogether or merely to suspend it during the continuance of such illegal use. There is nothing in the case to show that it was found as a matter of fact that the plaintiff, at the time of taking out the policy, intended to make it cover any illegal use of the property. He may have expected to get his license renewed, or, failing in that, he may have intended to close the place where the property was used, as, according to his own testimony, in point of fact he did. Under this state of facts, we are of opinion that the temporary use of the property without a license, if un contemplated at the time of taking out of the policy, would not of itself and as a matter of law render the policy void during the whole of the rest of the time which it was to run. If there were any special or peculiar reasons why such absolute invalidity should be declared, they should be made to appear. In the absence of such reasons, such temporary and un contemplated illegal use of the property should not be visited with so severe a penalty as the absolute avoidance of the policy. It does not appear that the defendants were or would be in any way injuriously affected thereby after such illegal use had ceased. They have the benefit of the temporary suspension of the risk without any rebate of the premium. There is no hardship to the defendants in requiring them to show an actual injury, or else to avail themselves of the clause of the policy, giving them a right to cancel it upon notice and a return of a ratable proportion of the premium. There is no rule of law preventing the revival of a policy of insurance after a temporary suspension. 1 Phil Ins., § 975. Accordingly temporary unseaworthiness, if the ship has become seaworthy again, will not defeat the policy. Id., § 730. So as to other stipulations as, e. g., that of neutral character and conduct. Id., § 975; *Worthington v. Bearse*, 12 Allen, 382. As between the insurer and the assured, there is no reason why the former should be allowed to avail himself of a temporary illegal use like that which existed in the present case, unless it can also be shown that the subsequent risk was thereby increased, or the position of the insurer otherwise injuriously affected. And, as a matter of general policy, it does not seem reasonable to impose upon the assured so severe a consequence as the forfeiture of his policy in addition to the penalty of \$100, which the legislature have considered adequate as the maximum punishment for his offense against the public. Pub. Stat., chap. 102, § 111.

It is further contended by the defendants that, however it might be under the general rule of law, the policy contained a provision making it void. In the standard form of policy established by the legislature, which was used in the present case, the matters avoiding a policy are enumerated. Omitting matters not here material, the provision is: "The policy shall be void if the insured shall make any attempt to defraud the company, either before or after the loss, or, if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law; or, if camphene, benzine, naphtha or other chemical oils or burning fluids, shall be kept or used by the

insured on the premises insured, except that what is known as refined petroleum, kerosene or coal oil may be used for lighting." In this Commonwealth, under the statutes for the regulation of trade and providing for licenses and municipal regulations of police, there are a great many articles, which in a certain sense may be said to be "subject to legal restriction," dogs, fish, nails, commercial fertilizers, hacks and horses in cities, may be referred to as examples.

It may well be questioned, whether under the maxim *noscitur a sociis* the clause in the policy above quoted ought not to be limited in its application to other articles of a similar character to gunpowder, the keeping of which may have a natural tendency to increase the risk. It would be rather a strained construction of this clause to hold that a policy should be void, because an unlicensed dog was kept upon the premises, and yet such a dog, being subject to legal restrictions, would be kept in a manner different from that allowed by law. It would not be sensible to give to these words the broadest construction of which they are susceptible.

But irrespectively of this consideration, it is not the necessary meaning of the word "void" as used in policies of insurance that it shall, under all circumstances, imply an absolute and permanent avoidance of a policy, which has once begun to run, but the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being. In Phillips on Ins., § 975, it is said: "After it (*i. e.*, the policy) has begun, so that the premium is become due, it surely is but equitable that a temporary non-compliance should have effect only during its continuance. To carry it further is to inflict a penalty upon the assured and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he merited but part of it. A forfeiture certainly ought not to be extended beyond the grounds on which it is incurred." And there does not appear to be any good reason why, in the absence of all fraud and all prejudice to the underwriter, the same doctrine should not be applicable to express conditions in the nature of warranties or conditions, unless by the circumstances of the express provisions of the policy, such application is excluded.

In accordance with this doctrine, a provision in a policy that it should be void and be surrendered to the directors of the company to be canceled in case of alienation of the property by sale, or otherwise, was held to mean inoperative for the time being; and the assured, upon acquiring title, after a sale of the property by him, was held entitled to recover. *Lane v. Maine Ins. Co.*, 12 Me. 44. So where a policy provided that "in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent (*i. e.*, of the company) this policy shall from thenceforth be void and of no effect," it was held that after such sale the policy revived upon the assured acquiring again the title, and holding it at the time of the fire. *Power v. Ocean Ins. Co.*, 19 La. 28. The same rule of construction has been applied to provisions against other insurance. *Obermeyer v. Globe Ins. Co.*, 43 Mo. 573; *New England F. & M. Ins. Co. v. Schettler*, 38 Ill. 166; *Mitchell v. Lycoming Ins. Co.*, 51 Pa. St. 402. The court in Illinois has gone so far, as to apply it also to a provision against an increase of risk, which ceased before the loss. *Schmidt v. Peoria Ins. Co.*, 41 Ill. 295; *Ins. Co. of North America v. McDowell*, 50 id. 120, 129. Without at present going beyond what is called for by the circumstances of the present case, we are of opinion that, assuming the temporary use of the property insured, without a license to come within the prohibition of the policy, in the clause above quoted as to gunpowder or other articles subject to legal restriction, yet that clause is not to receive such a construction as to prevent the policy from reviving after such temporary use has ceased.

The only remaining objection urged by the defendants is that the statements of loss rendered to them by the plaintiff were insufficient in failing to state that the plaintiff had no legal title to the insured property and that the Spurr had an interest in it. But there is no finding as a matter of fact that the plaintiff was not the owner of the property, and upon the report of the case, we cannot say, as a matter of law, that it appears that he was not such owner. *Bailey v. Hervey*, 135 Mass. 172; *McCarthy v. Henderson*, 138 id. Moreover no attempt to defraud the defendants being found or charged, the provision of the policy that a statement shall be rendered, setting forth the interest of the insured therein, was suffi-

iently complied with. There was no provision calling for an exact statement of his title or interest in detail and a general statement of ownership was sufficient. *Fowler v. Springfield Ins. Co.*, 122 Mass. 191.

New trial granted.

NEW YORK COURT OF APPEALS.

PEOPLE v. LYON.*

June 2, 1885.

CRIMINAL LAW — INDICTMENT — ACCESSORY BEFORE FACT — PECULATION ACT, 1875.

Where a felony is committed through the agency of a guilty instrument, or participant, the instigator thereof is an accessory before the fact and must be indicted and tried as such.

Defendant was convicted under the "Peculation Act" (Laws 1875, chap. 19), upon an indictment charging him with having fraudulently and feloniously obtained and received from the treasurer of the city of Buffalo, funds belonging to said city. A second count charged the conversion of the funds to the defendant's own use. In both counts he was charged as a principal. Defendant had no knowledge of the transaction for which he was indicted; did not in fact receive the money personally, but it was deposited by the city treasurer, or by his direction, with a banking firm of which defendant and the treasurer were members. The city treasurer had, with knowledge of defendant, used the city funds in the firm business.

Held, that the offense charged was a felony; that as he was not either actually or constructively present, he could not be convicted as a principal; the evidence tending to prove that he was accessory before the fact, he could not be convicted under an indictment charging him as a principal.

History of the term "felony" in this State discussed.

Samuel Hand, for appellant. *Edward W. Hatch*, district attorney, for respondent.

RAPALLO, J. The defendant was convicted in the court of oyer and terminer of Erie county, under chapter 19 of the Laws of 1875, upon an indictment charging him with having, on the 14th of September, 1875, fraudulently and feloniously obtained and received from Joseph Bork, then treasurer of the city of Buffalo, the sum of \$2,200 of the funds of that city, held by said Bork as such treasurer.

The second count of the indictment charged the defendant with having feloniously and wrongfully obtained said money and converted it to his own use. In both counts the defendant is charged as a principal, and there is no count charging him as an accessory.

The money was not received by the defendant personally; it was deposited by Bork, or by his direction, with the banking-house of Lyon & Co., of the city of Buffalo, of which firm Bork and the defendant were members, and was used by that firm in its business. The defendant had no knowledge of the particular transaction upon which he was indicted, he being at the time in the Territory of Utah, where he had been for about a month before, and he did not return to Buffalo until about ten days after the transaction. The prosecution, to make out their case against him, relied upon evidence that on prior occasions Bork had, with the knowledge of the defendant, used the funds of the city, in his hands as treasurer, in the business of the firm, and it was claimed that this evidence established that an understanding existed between Bork and the defendant that the city funds should be so used whenever required. The conviction rests upon this theory.

On the part of the defendant the point is taken that the offense of which the defendant was convicted is a felony; that there is no evidence upon which his conviction, as a principal, could be sustained, he not having been either actually or constructively present at the commission of the offense; that the most that could be claimed is that the evidence tended to prove that he was accessory before the fact, and that, as such, he could not be convicted under an indictment charging him as a principal.

* 33 Hun, 623, reversed.

On this ground, among others, the defendant moved in the court of oyer and terminer for a new trial, and that being denied, he appealed to the general term of the supreme court. Both of those tribunals conceded that if the offense was a felony the conviction could not stand, and we concur in that view.

Where a crime of the grade of felony is committed through the agency of a *guilty* instrument or participant, the instigator is regarded as an accessory before the fact and must be indicted and tried as such. *People v. Irwin*, 4 Den. 129; *Irwin v. Wood*, 51 N. Y. 224; *People v. Wixon*, 5 Park. Cr. 121; Russell on Crimes, 27; Wharton's Crim. Law, § 114; *McCarney v. People*, 83 N. Y. 409, 412, 413.

In cases of misdemeanor, however, there are no accessories. All who aid or participate in the crime are principals, and the conviction was sustained in the court below on the ground that the offenses created by the act of 1875, chapter 19, was a misdemeanor only.

The act itself does not define in terms the grade of the offense, but it does prescribe the punishment, which is imprisonment in a State prison for a term not less than three years nor more than ten years, or a fine not exceeding five times the loss resulting from the fraudulent act, or by both such fine and imprisonment.

Statutes creating new offenses do sometimes declare that they shall be felonies, but the instances, although numerous in England, are here rare. As a general rule, the grade of the offense is determined by the nature of the punishment prescribed. The term "felony" in the general acceptance of the English law comprised every species of crime, which at common law, occasioned a total forfeiture of lands or goods, or both, and to which might be superadded capital or other punishment, according to the degree of guilt. 4 Bl. Com. 94, 95.

In England, the rule with regard to felonies created by statute seems to be that not only those crimes which are declared in express words to be felonies, but also those which are decreed to undergo judgment of life and member by any statute, become felonies thereby, whether the word "felony" be omitted or mentioned. 1 Russell on Crimes, 44 (78, 4th ed.); Hawk. Pl. of Cr., chap. 40, § 1.

The word "misdemeanor" is applied to all crimes less than felonies, comprehending all indictable offenses less than felonies. Among these are included, in England, perjury, battery, libel, conspiracies, public nuisances, etc. 1 Russell on Crimes, 45 (79, 4th ed.).

In this State, forfeitures of property on conviction of crime have been abolished, and the common-law definition of felony is applicable, but the principle of determining the grade of the offense by the character of the punishment is recognized in the clearest manner. Many crimes which, at common law, were only misdemeanors are here felonies, and no instance can be found in which an offense, which is declared to be a misdemeanor, can be visited with the punishment prescribed for a felony.

Part IV of the Revised Statutes, entitled "An act concerning crimes and punishments, proceedings in criminal cases, and prison discipline," covered, at the time of its enactment, the whole subject referred to in its title.

Chapter 1, entitled, "Of crimes and their punishment," is divided into seven titles, in which crimes are classified as follow: The first title is entitled "Of crimes punishable by death;" the second, third, fourth and fifth titles relate to offenses "punishable by imprisonment in a State prison;" the sixth title is "of offenses punishable by imprisonment in a county jail and by fines, and under this title are enumerated all offenses of the grade of misdemeanors. The maximum term of imprisonment for any of the misdemeanors enumerated in this title, with but a single exception in section 36, is one year's imprisonment in a county jail, while in many cases a much milder punishment is prescribed, and by section 40, 2 R. S. 697, it is provided that "every person convicted of any misdemeanor, the punishment of which is not prescribed in this or some other statute, shall be punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding \$250, or by both such fine and imprisonment."

Every one of the offenses enumerated in this sixth title of chapter 1, part 4, with the solitary exception of petit larceny, is therein declared in terms to be a misdemeanor, but there is not a single offense enumerated in the second, third, fourth or fifth titles, relating to offenses punishable by imprisonment in a State prison,

which is in terms declared to be a felony, although among these offenses there are but few which were felonies at common law, the greater part of them, such as forgery, perjury, false pretenses, and many others, having been only misdemeanors at the common law.

Forgery was made a felony by statute in the reign of George II, first by a temporary and afterward by a permanent enactment, but, unless there has been some very recent change, perjury and false pretenses are still misdemeanors, while petit larceny, though a felony at common law, is only a misdemeanor in this State, notwithstanding that the degree of the crime is not expressly declared in the statute. It is obvious that the degree of the offense, according to the common law, does not afford any guide for the determination of that question in this State.

The seventh title of chapter 1, part 4 of the Revised Statutes, however, furnishes the rule by which the degree of the offense can be ascertained. This title contains "general provisions concerning crimes and their punishment." Section 30 of this title (2 R. S. 702) provides that the term "felony," when used in this act, or in any other statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in a State prison."

Although, as has been already remarked, the term "felony" is not used in any of the provisions of the Revised Statutes which declare the offense punishable by imprisonment in a State prison, yet it is used in many other provisions relating to persons convicted of such offenses. For instance, sections 13 and 14 of article 8 of title 4, chapter 1, part 4 (2 R. S. 683) provide that any person conveying into any place of confinement any disguise or other thing, with intent to facilitate the escape of any prisoner, detained for any felony whatever, or on a charge for any felony, or by any means aiding such a prisoner to escape, shall be punished by imprisonment in a State prison not exceeding ten years. Section 15 of the same title provides that similar assistance to a prisoner confined for any criminal offense, *other than a felony*, shall be punished by imprisonment in a county jail not exceeding one year, or by fine, or both.

Section 6 of title 7 (2 R. S. 698) provides that every person who shall be an accessory to any felony before the fact shall, upon conviction, be punished as a principal in the first degree. By section 19 (2 R. S. 701), a sentence of imprisonment in a State prison for any term less than life suspends all the civil rights of the person so sentenced, and forfeits all public offices and private trusts or powers during the term of such imprisonment.

By section 28, before its repeal, no person sentenced upon a conviction for *felony* was competent to testify in any cause unless pardoned, but no sentence on a conviction for any offense other than a felony rendered the convict incompetent. In all these cases there is no escape from the statutory definition of the term "felony."

The same rule for determining what is a felony is preserved by the Penal Code, which went into effect December 1, 1882. It declares, section 4, that a crime is either a felony or a misdemeanor; section 5, that a felony is a crime which is or may be punishable by either death or imprisonment in a State prison; section 6, that every other crime is a misdemeanor.

If this Code established any new rule or increased the degree of guilt, it could not of course affect the defendant, as it would be an *ex post facto* law, the offense with which he was charged having been committed before its passage, and we do not refer to it for any such purpose, but simply as throwing light upon the meaning of the previously existing statutes, of which the provisions last cited are a mere condensation.

The claim now made on the part of the prosecution, that notwithstanding the clear and harmonious provisions of the Revised Statutes, which are aptly condensed in sections 4, 5 and 6 of the Penal Code, the offense for which the defendant was tried and convicted, an offense for which he was liable to punishment by imprisonment in a State prison for not less than three nor more than ten years, and for which he was in fact sentenced to imprisonment in a State prison at hard labor for a term of four years, was a simple misdemeanor, strikes us as so monstrous that

we should not have deemed it justifiable to go into such an extended discussion of the subject were it not that the conclusions at which we have arrived come in conflict with a decision of this court rendered in the year 1861 in the case of *Fassett v. Smith*, 23 N. Y. 252, in which it was held in the prevailing opinion of JAMES, J., that the offense of obtaining goods, etc., by false pretenses, which at common law was a mere misdemeanor, was not changed by the Revised Statutes into a felony. That decision is the main reliance of the prosecution to support the judgment here appealed from. *Fassett v. Smith* was a civil action to avoid a satisfaction-piece of a mortgage and restore the lien of the mortgage on the ground that the satisfaction-piece had been obtained by fraud. The defendants claimed to be *bona fide* subsequent purchasers or incumbrances of the mortgaged premises for value without notice of the fraud. It was conceded in the prevailing opinion that if the fraud amounted to a felony they would not be protected.

Section 53 of article 4, title 3, chapter 1, part 4, provided that "every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property or valuable thing, upon conviction thereof shall be punished by imprisonment in a State prison not exceeding three years, or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money, property, or thing so obtained, or both such fine and imprisonment.

Section 54 provides that if the false token shall be a negotiable instrument purporting to have been issued by a bank not in existence, the punishment shall be imprisonment in a State prison not exceeding seven years.

The article containing these provisions comes between article 2, which treats of forgery and counterfeiting, and article 4, which treats of robbery and embezzlement.

The head-note to the case of *Fassett v. Smith*, states the result of the decision to be that the definition of the term "felony," in the Revised Statutes, has not so changed the common law as to prevent a purchaser in good faith and for value, obtaining title to goods which the original vendee procured by false pretenses. If this is the extent of the decision, and its only effect is to protect a *bona fide* purchaser of goods obtained by a felony of the description referred to, the decision has no particular bearing on the present case and may be of little practical importance, inasmuch as the Penal Code (§ 528) now makes obtaining goods by false pretenses, larceny. But the opinion in *Fassett v. Smith* goes further and holds that section 30 does not assume to define the term "felony" except when used in a statute, and that that term not being used in the statute relating to false pretenses, the common-law character of the crime of obtaining goods, etc., by false pretenses was not changed.

This interpretation of the statute is at variance with all previous decisions on the subject in criminal and other prosecutions, and if applied to criminal cases would destroy the harmony and intelligibility of the system established by the Revised Statutes as has already been shown. Even giving to the definition in section 30 the restricted meaning attributed to it by the learned judge, there could be no possible doubt of its application to the term "felony" in the statutes, before referred to, relating to the offenses of aiding a prisoner to escape, of subjecting an accessory before the fact to the same punishment as a principal in the first degree, suspending the civil rights of one sentenced to State prison, of rendering one convicted of the offense incompetent as a witness, etc., etc. Thus for some purposes the offense would have to be treated as a felony, while for others it would not. The consequences of a conviction would be those visited upon a conviction for a felony, while the indictment for trial would be governed by the rules applicable to misdemeanors, and it might be competent, under the provisions of section 26, article 6 of the Constitution, to make the offender triable in a court of special sessions without a common law jury. See article 6, section 26, which is as follows:

"Courts of special sessions shall have such jurisdiction of offenses of the grade of misdemeanor as may be provided by law." *People v. Dutcher*, 83 N. Y. 240 ; *People v. Finn*, 87 id. 538.

Prior to the case of *Fassett v. Smith*, the decisions were, both in civil and criminal cases, uniformly in accord with the view which we have taken as to the effect of the statutory definition of the term "felony."

In *Mowry v. Walsh*, 8 Cow. 238, which was decided in 1828, before the Revised Statutes were enacted, it had been held that one who had obtained goods by fraud, not amounting to a felony, could convey a good title to a *bona fide* purchaser for value, though it was conceded that, if the goods were obtained by a felony, no title would pass; but the effort of the original vendor was to establish that the fraud by which the goods were obtained from him was such that the person obtaining them was guilty of larceny. The fraud consisted of a forged recommendation and guaranty and amounted only to a false pretense. But the court, SAVAGE, C. J., delivering the opinion, held that as they were obtained only by a fraud, which, at that time, did not constitute felony, the *bona fide* purchaser from the fraudulent vendor acquired a good title. But in the subsequent case of *Andrews v. Dieterich*, 14 Wend. 31, decided in 1835, the same eminent judge delivered the opinion, holding that by the Revised Statutes, obtaining goods by false pretenses was made a felony, and the law was, therefore, changed from what it was when *Mowry v. Walsh* was decided, and he held that no title passed even to a *bona fide* purchaser from one who had obtained the goods by false pretenses. He construed section 30 as defining what constituted a felony, and held that as, by 2 R. S. 787, § 53, every person obtaining goods by false pretenses was liable to be punished by imprisonment in the State prison, he was guilty of a felony, and that the courts were bound to say that when the legislature altered the law as to what constituted a felonious taking, they intended that such alteration should have its full effect and the principle should be extended and carried out in all its ramifications.

In *Peabody v. Fenton*, 3 Barb. Ch. 451, 462, decided in 1848, Chancellor WALWORTH says: "There can be no doubt, from the evidence in this case, that Fenton obtained the mortgage from the complainant by false pretenses, amounting not only to a gross fraud, but also to a felony under the Revised Statutes." The doubt, which he is stated, in *Fassett v. Smith*, to have expressed, was not as to whether the false pretenses amounted to a felony, but as to the correctness of the holding in *Andrews v. Dieterich*, 14 Wend. 36, that the operation of the Revised Statutes in making such frauds felonies, was such that the power of a fraudulent vendee of goods to transfer a valid title to a *bona fide* purchaser no longer existed, and on this point he declined to express an opinion.

In *Robinson v. Dauchy*, 3 Barb. 20, 29, the court treated the obtaining of goods by false pretenses as a felony.

In *People v. Van Steenburgh*, 1 Park. Cr. 39, it was held that an offense as to which there was a discretion in the court to punish either by imprisonment in the State prison or by fine, or imprisonment in a county jail, was within the statutory definition of felony. Accordingly one who, without design to effect death, killed a human being, while engaged in the violation of an act punishable as above, was held to have been engaged in the commission of a felony, and was on that ground convicted of murder, and sentenced to be executed. This view of the law was approved by the supreme court, to whom the question was submitted by the governor.

In *Shay v. People*, 22 N. Y. 317, it was held that one who had been convicted of petit larceny as a first offense, was a competent witness, inasmuch as that offense was not punishable by death or imprisonment in the State prison, and therefore was not convicted of a felony within the definition in 2 R. S. 702, § 30.

In *People v. Park*, 41 N. Y. 21, it was held that burglary in the third degree was a felony under the definition in 2 R. S. 702, § 30, being punishable by imprisonment in the State prison, although the term "felony" is not used in the statute defining the offense. The opinion was delivered by the same learned judge who delivered the opinion in *Fassett v. Smith*, and he says that this conclusion is not in conflict with *Fassett v. Smith*, but he reconciles the cases by placing his opinion upon a new ground, different from that taken in 23 N. Y., and in the later case says that *Fassett v. Smith* related to obtaining goods by false pretenses, the punishment for which was the alternative, State prison, county jail or fine, and hence not within the statutory definition of felony.

This last ground we are quite unable to adopt, inasmuch as the language of section 80 is that the term "felony" shall be construed to mean an offense for which the offender is *liable* to be punished by death or by imprisonment in a State prison.

It is not confined to cases in which he *must* be so punished. The maximum punishment to which he is *liable* to be subjected is the test by which the degree of the crime must be determined. *People v. Van Steenburgh, supra.*

In the case now before us there is no alternative of punishment by imprisonment in a county jail. If there is any imprisonment, it must be in a State prison, though a fine may be substituted. This we apprehend, however, is not very important

In *People v. Bragle*, 26 Hun, 878; affirmed, 88 N. Y. 586; S. C., 42 Am. Rep. 269, the offense created by the very act now under consideration (Laws of 1875, chap. 19) was treated as a felony, though the point was not expressly decided. The points raised were of no importance unless the offense was a felony. But in overruling them the court did not intimate any doubt as to the grade of the offense, and overruled them on other grounds.

The case of *Fussett v. Smith*, if construed as holding only that the statutory change which converted the offense of obtaining goods by false pretenses into a felony did not change the former rules of law in respect to the rights of a *bona fide* purchaser of goods from a fraudulent vendee, need not be further discussed here. Chief Judge SAVAGE, in *Andrews v. Dieterich*, 14 Wend., *supra*, was of opinion that the statutory change in the grade of the offense should be carried out in all its ramifications. Chancellor WALWORTH doubted whether that was a correct view of the legislative intention and of the effect of the statute, and even now under the Penal Code, making the offense larceny, the same question is presented. We do not propose to consider it here. All that it is necessary to say now is, that notwithstanding the views expressed in the prevailing opinion in *Fussett v. Smith*, we are of opinion that under the Laws of 1875, chap. 19, and 2 R. S. 702, § 80, the offense for which the defendant was indicted was a felony, and, for the reasons stated, the conviction cannot be sustained.

The conceded facts being such that under the present indictment no conviction could be had, it seems useless to direct a new trial.

Judgment of supreme court and of oyer and terminer reversed.

All concur.

CAYUGA INDIANS RESIDING IN CANADA v. STATE OF NEW YORK.

June 2, 1885.

INDIANS — CAYUGA NATIONS — ANNUITIES UNDER TREATIES OF 1789, 1795.

The annuities promised the "Cayuga Nation of Indians," under the treaties of 1789, 1795, cannot be recovered except by the tribal organization as a nation, and no individual member thereof has any interest separate from the tribe.

Mr. Strong, for appellants. *Mr. O'Brien*, attorney-general, for respondent.

DANFORTH, J. This proceeding was instituted before the board of audit in February, 1883, and afterward by statute transferred to the board of claims. The facts stated were substantially the same as those in *The People, ex rel. "That portion of the Cayuga Nation of Indians residing in Canada, v. The Board of Commissioners of the Land Office,"* just decided by this court. The appellants claimed to recover: 1, \$448,000 as their share of all the annuities promised by the State to "the Cayuga Nation of Indians" by the treaties of 1789 and 1795 falling due since 1810; or, 2, for a share of those accruing since June 1, 1849; or failing in that, 3, for a share of the annuities accruing since June 1, 1877; or that being denied, then 4, for a share of the annuity becoming due June 1, 1883, and thereafter forever according to the stipulations of those treaties.

The board of claims had no choice. They rejected the whole and each part of the claim, and among many serious obstacles in the way of a recovery, they pointed out one so obvious and insurmountable as to be justified without argument. The title to the proceedings indicates that whoever the claimants are, they have no

personal nor even associate character; they assume to represent no one, and it is not pretended that they are authorized by statute to sue.

If we look below the title we find the cause of action is a treaty stipulation between "the State of New York" and "the Cayuga Nation of Indians." Its purpose was the acquisition of the Indian title to lands within this State by the payment of a certain sum of money annually to that nation. It concerned on one side the general interests of the State, and on the other the whole body of the Cayuga Nation. Within any meaning of the words, therefore, the transaction was public, and in no sense private. The treaties were made by competent authority, and are obligatory upon both parties. But if violated by either, the other contracting party can alone demand satisfaction, and neither a citizen of the State, nor a member of the Indian "Nation," nor any portion of those members, unless recognized by the State as such, can complain. *Same Plaintiffs v. Commissioners, supra.* If, as the learned counsel for the appellant contends, the relators have "neither a country nor a government, nor independent functions or powers," they do not thereby acquire individual or general rights. If they have separated from their tribe, it is immaterial. So long as the State recognizes the tribal organization as existing and deals with it as a nation, the courts and officers of the State must so regard it.

The relators, however, still claim to be a portion of the nation, and so admit its actual existence. The claim they put forward has no color except from that fact, nor have they any title or interest separate from that of their tribe. If the claim exists at all, it is not a private one, and consequently the board of claims properly dismissed it. Laws of 1876, chap. 444, § 2.

The order appealed from should be affirmed.

All concur; FINCH, J., in result.

PEOPLE, *ex rel.* COLLINS, *v.* SPICER, Comptroller.

June 2, 1885.

MANDAMUS — BILLS FOR CITY ADVERTISING — CITY OF TROY — CURATIVE LEGISLATION.

A fair and honest claim against a municipal corporation is entitled to the application of the same rules of construction which would obtain in the case of a similar claim against an individual, and neither should be subjected to a strained or technical interpretation of the law for the purpose of defeating them.

The charter of the city of Troy provides as follows:

"The common council shall designate not to exceed four newspapers having the largest circulation in the city in which the city advertising shall be done only on the order of the common council;" on March 11, 1879, the *Troy Observer* was among others legally designated as one of such newspapers.

The relator procured a *mandamus* to compel the comptroller of the city to countersign two bills for services rendered between June 13, 1881, and June 5, 1883. The rendition of the services was not disputed, but the defense was, that the *Troy Observer* was ineligible for the legal performance of such work after February, 1880, by reason of not possessing the qualification of membership the Associated Press required by chapter 80 of the Laws of 1880.

In October, 1881, and April, 1883, the common council again designated the *Observer* as one of such papers, ignoring the provision of the act of 1880.

Held, that the curative acts of 1881 and 1884 should be so construed as to support the relator's claim.

Lewis E. Griffith, for appellant. *Wm. J. Roche*, for respondent.

RUGER, C. J. This is a proceeding by *mandamus* to compel the comptroller of the city of Troy to countersign two certain bills containing items of account accruing between the dates of June 13, 1881, and June 5, 1883, for advertising and publishing official proceedings and notices for the municipal government of Troy, by the *Troy Observer*.

No question is made but that the services in question were actually rendered by the relator, nor but that the city of Troy had the benefit of them in the performance of a duty imposed upon it by law. It is, however, urged as a defense that the *Troy Observer* was ineligible for the legal performance of such work after February, 1880, by reason of not possessing the qualification of membership the

Associated Press required by chapter 30 of the Laws of that year, and as a consequence thereof, that the performance of any printing required to be done by an official newspaper after that period, could not lawfully be performed by the *Troy Observer*. Under the authority of the city charter as amended by section 8 of chapter 813 of the Laws of 1872, reading as follows: "The common council shall designate not to exceed four newspapers having the largest circulation in the city, in which the city advertising shall be done only on the order of the common council," on March 11, 1879, the *Troy Observer* was among others legally designated as one of such newspapers.

No period was prescribed by the law or by the act of appointment as appears herein, for the termination of the official character of the papers designated, and the inference must be that it was intended to continue until legally terminated either by some provision of law, the act of the appointing power naming a successor thereto, or by a repeal of the authority under which the designated paper was acting.

It is not claimed that any other paper has at any time been legally designated to succeed the *Troy Observer* as an official newspaper, or that the common council have by any legal act attempted to terminate its official existence. The claim is that by virtue of section 4 of chapter 30, Laws of 1880, amending section 3 of title 2, chapter 598 of Laws of 1870, and providing that the common council shall, on the second Tuesday of March, 1880, and at its second regular meeting after the general election in each year, designate not to exceed four newspapers published in said city and having the largest circulation within the corporate limits, and whose proprietors, or firms or newspapers shall be members of the Associated Press of the State of New York, in which all municipal advertisements, etc., shall be published, and which shall thereupon be known as official newspapers, the official existence of the *Troy Observer* was terminated and publications made in it thereafter were unauthorized and did not create a legal liability on the part of the city therefor.

In the absence of legislative interpretation implied from confirmatory statutes subsequently passed there would seem to be some doubt whether the act of 1880 would of its own force terminate the official existence of the papers theretofore named; but in view of the effect of such legislation we do not think it profitable or necessary to discuss that question. The question presented depends mainly upon the construction to be given to chapter 319, Laws of 1884, and incidentally to that of chapter 144 of 1881, and while not entirely free from doubt we think considerations of justice favor such an interpretation as will support the relator's demand. The claim seems to be a meritorious one, and its collection should not be defeated unless some insuperable objection exists to its enforcement. A fair and honest claim against a municipal corporation is entitled to the application of the same rules of construction which would obtain in the case of a similar claim against an individual, and neither should be subjected to a strained or technical interpretation of the law for the purpose of defeating them.

The papers on the appeal show that on March 11, 1879, the common council duly appointed four newspapers, viz., the *Troy Times*, *Troy Press*, *Northern Budget* and *Troy Observer* as official newspapers for the city. No successful attempt was made after the enactment of chapter 30 of the Laws of 1880, to comply with the provision of that act requiring a new designation of papers of prescribed qualifications until the 7th day of October, 1881, when the same papers were again designated by the common council to act as the official newspapers of the city. It is not disputed but that the *Observer* was ineligible to appointment under the law of 1880 as not having the qualification of being a member of the Associated Press. Notwithstanding this fact, that paper, both before and after the 7th October, 1881, was employed by the city officers to publish official notices and advertisements, and continued to perform this duty down to the 5th day of June, 1883. Again on the 5th day of April, 1883, the common council attempted to name official papers for the city, and by a vote of a majority of its members designated the *Troy Times*, *Standard*, *Telegram* and *Observer* as such papers.

It is claimed, on the part of the defendant, that neither the *Standard* nor the *Observer* possessed the legal qualifications to entitle them to be named by the

common council, and this fact may be assumed as established by the case. As may be supposed, controversies soon arose over the validity of the publication of illegal notices in the papers named, and over the claims of such papers to compensation for such services, owing to the omission by the common council to make any designation after February, 1880, and to the lack of statutory qualifications possessed by some of the papers printing the municipal proceedings and notices. To determine these controversies the legislature on April 25, 1881, passed chapter 144 of the laws of that year. This act in terms assumed to validate the publication of all municipal advertisements, notices and proceedings printed in the four newspapers previously designated by the common council as official newspapers, and directed the payment of the claims of said four newspapers for such printing and services upon proof that they had been rendered upon the direction or authority of the proper officers of the city government. This act was in terms retroactive in its effect and was intended to be so by its authors. The claims arising previous to its passage have all been settled in accordance with its terms. The act, however, assumed to lay down no rule for the future, and left the door wide open for a new crop of controversies and claims to spring up out of the neglect of the common council to obey the requirements of the act of 1880. In the spring of 1883, application seems to have been made for legislation to remedy the evils growing out of the continued disobedience of their duty by the common council. The act of April 26, 1883 (chap. 319), was the result. By its title it professed to be "An act to legalize and confirm the printing and publication of municipal advertisements, official notices, and the common council proceedings of the city of Troy, in certain newspapers in the city of Troy, and to audit and pay claims in connection therewith." It will be seen that the title refers only to passed transactions and existing claims, and its principal object and design obviously was to settle and legalize pending controversies and existing legal embarrassments. Its first section assumes the legal existence of four official newspapers in the city of Troy up to April 25, 1881, the date of the passage of the confirmatory act, and by necessary implication confirms the official status of the *Troy Observer* to that date. It then proceeds to confirm the legality of all subsequent publications of official notices, etc., in such official newspapers up to the 7th day of October, 1881, and authorizes the payment of the claims of said newspapers for compensation for such services. Section 2 is in this language: "Whenever the common council shall neglect or fail to designate official papers in and for the said city of Troy, at the time and in the manner provided by law, then, and in such case, the newspapers appointed and designated as official papers for said city at the last preceding designation shall hold over and continue to act as the official newspapers of said city until such common council shall designate their successors in accordance with the provisions of law, and shall be paid for the services rendered as such official newspapers as other claims against said city are audited and paid." We think the plain intent of this act was to furnish a rule by which all pending or future controversies arising out of claims for printing public notices in said city, growing out of any neglect of the common council to perform its duty of making designations, should be settled and discharged. All publications by whomsoever made previous to October 7, 1881, when the common council first attempted to comply with the requirements of the act of 1880, stood substantially upon the same footing, and were supposed to require express validation in order to render any of their publications lawful and received it in the first section of this act, after that time a portion of the newspapers, authorized to be designated by the common council, stood upon a different footing and were supposed not to be so named, and the second section of the act seems to have been passed, for the purpose of providing for such a contingency. The distinction existing between the condition of affairs before and after October 7, 1881, repels any inference which might otherwise be drawn from the express and limited confirmation provided by the first section of the act, that the legislature did not intend to legalize the publication of any other municipal notices and proceedings. The intention of the act when construed in the light of surrounding circumstances seems to have been to provide a scheme for the settlement of all existing controversies by affirmative confirmation, as to some, and the establishment of a rule by which

other claims growing out of a different state of facts might be determined. Any other construction would leave the existing controversies for a period of time unsettled, and deny the relator compensation for his services after October 7, 1881, while allowing it before that time without any apparent equitable reason for such a distinction. The assumption in the first section of the effect of the confirmatory act of 1881, in making the *Observer* an official newspaper, and the further confirmation of that character by the act of 1883, considered in connection with other provisions, was equivalent to a legal designation of that paper by the common council, and authorized the publication in such paper of legal notices until a termination of its official existence by some subsequent affirmative act of the common council.

The conclusion of the general term that after the passage of the act of 1883, the *Observer* held over and continued its character as an official newspaper seems to be inconsistent with the idea that such character had previously been, in fact, terminated. The words "to hold over and continue" used in the act imply a continuance of an existing term, and are at war with the idea that the official existence had previously expired. The effect ascribed to this act in endowing the *Observer* with an official character after its passage by virtue of a hold-over clause would seem by relation to legalize its intermediate official existence. This act like all other statutes should be so construed as to give effect to the intention of the law-makers, and if its plain meaning requires that it should be given a retroactive effect, and neither vested rights, existing contracts, or causes of action are thereby destroyed, no reason or rules of construction prohibit it. The general rule which, in the absence of express language, authorizing retroaction, requires a statute to be so construed as to have a prospective effect only, is not, except as to a certain class of statutes, an inflexible one. It is said in 1 Kent's Com. 455, that "this doctrine is not understood to apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations." Legislation of this character is of frequent occurrence in this State, and when restrained within proper limits, is of great public benefit and convenience. When the plain object and design of a statute seems to be to obviate controversies between innocent parties arising out of defective legislation, or the negligent or improper conduct of public officers, it would seem to be the plain duty of a court as well as the requirement of a wise public policy to adopt such a construction, if not inconsistent with its terms, as will accomplish the purpose of the act. For the purpose of discovering the intent of the legislature, not only the language of the statute may be resorted to, but also the circumstances which occasioned its enactment, and the object professed in its title.

And if by these aids the intent of the act can be clearly ascertained, effect may be given to such intent although no retrospective words are contained in the law. *People v. Molyneaux*, 40 N. Y. 113; *People v. Supervisors of Columbia Co.*, 43 id. 132; *Ayers v. Lawrence*, 59 id. 196; *People, ex rel. Witherbee, v. Supervisors*, 70 id. 286; *Cook v. Wood*, 71 id. 371; *People, ex rel. v. Davenport*, 91 id. 585; *Danks v. Quackenbush*, 3 Denio, 594. Resort to these sources of information seems to us to indicate the intention which we have referred to on the part of the law-making power. To hold otherwise would require us to disregard the avowed declaration of its object embraced in the title and limit its remedial provisions to a comparatively insignificant portion of time when the necessity of the law covered a long period, and the expressed opinion of the law-makers indicated the need of comprehensive legislative relief. The terms employed in the acts of 1881 and 1883 in their subject-matter authorized the presumption that the legislature had knowledge of the public and notorious facts and circumstances surrounding the situation which called for their action in the premises. *Brown v. Mayor*, 63 N. Y. 244.

The conclusion we have reached on the principal question in the case renders an examination of the question as to the necessity of an approval by the mayor of the audit of the common council unnecessary.

The judgment of the general term, so far as it modifies that of the special term, should be reversed, and that of the special term affirmed, with costs.

All concur.

HEGERICH, Administratrix, v. KEDDIE, Executor.*

June 9, 1885.

ACTION—NEGLIGENT KILLING—DOES NOT SURVIVE AGAINST REPRESENTATIVE OF WRONG-DOER.

A cause of action given by statute to the personal representatives of a deceased person, to recover damages for the negligent killing of such person, does not survive the death of the wrong-doer. *Yertore v. Wiswald*, 16 How. Pr. 8, overruled.

Appeal from judgment of general term, first department, reversing a judgment of the special term, entered upon an order sustaining a demurrer to the complaint.

John L. Lindsay, for appellant. *Geo. V. N. Baldwin*, for respondent.

RUGER, C. J. A brief reference to some of the elementary principles applying to civil actions will serve the purpose at least of defining the terms used and the modifications introduced into the law by the statutes hereinafter referred to. Such actions were primarily divided into two classes, distinguished as actions *ex contractu* and *ex delicto*. The actions known as *detinue*, trespass, trespass on the case, and replevin were those used in causes of action arising from torts and were described as actions *ex delicto*. Trespass on the case was the appropriate form of remedy for all injuries to person or property which did not fall within the compass of the other forms of action. 3 Stephens' Com. 449. At common law originally all actions arising *ex delicto* died with the person by whom, or to whom the wrong was done. Thus, when the action was founded on any malfeasance or misfeasance, was a tort, or arose *ex delicto*, such as trespass for taking goods, etc., trover, false imprisonment, assault and battery, slander, deceit, diverting a water-course, obstructing lights, escape, and many other cases of the like kind where the declaration imputes a tort done either to the person or property of another, and the plea must be "not guilty," the rule was "*actio personalis moritur cum persona*." 1 Williams Exrs. 668. It was, however, held in *Hambly v. Scott*, Cowper, 371, Lord MANSFIELD delivering the opinion, that "If it is a sort of injury by which the offender, acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., then the person injured has only a reparation for the *delictum*, in damages to be assessed by a jury. But when beside the crime property is acquired which benefits the testator, then an action for the value of the property shall survive against the executor." "So far as the tort itself goes an executor shall not be liable, and, therefore, it is that all public and private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor, therefore, shall be charged." By the statute of 4 Edward III, chapter 7, actions "*de bonis asportatis*," were given to the executors of a deceased person, for personal property taken from their testator and carried away, but for all other causes of action arising out of wrongs done either to the person or property, the rule of "*actio personalis moritur cum persona*" applied. 1 Williams Exrs. 672. Under the clause of the Constitution making the rules of the common law the law of the State, it must be held that these rules still determine the survivability of actions for torts, except where the law has been specially modified or changed by statute.

It had been held in this State prior to the enactment of the Revised Statutes, that an action against the representatives of a postmaster for money feloniously abstracted from a letter by his clerk did not survive, *Franklin v. Low*, 1 Johns. 402, and against a sheriff's representative for an escape occurring during his life-time, *Martin v. Bradley*, 1 Cal. 124, did not lie against such representatives. In the case of *People v. Gibbs*, 9 Wend. 29, decided in 1832, it was held that an action against the executors of a sheriff for the default of his deputy in returning process, notwithstanding an action in *assumpsit* for money had and received, was by statute defeated therefor, did not lie, inasmuch as the cause of action was founded in tort.

As no reference is made in this case to the Revised Statutes, it is inferred that it arose previous to their enactment, although the case does not disclose that fact.

*S. C., 82 Hun, 141, reversed.

Still the date of the trial, November, 1880, would not necessarily lead to such an inference. The Revised Laws, Vol. 1, p. 311, had, therefore, enlarged the scope of the statute of 4 Edw. III, and provided for actions by and against executors and administrators for property taken and converted by the testator or intestate during his life-time. Under this condition of the law, the provisions of the Revised Statutes were enacted in 1828, and contain the rule by which this controversy must be determined. Section 1 reads as follows: "For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought *by the person injured*, or after his death, by his executors or administrators against such wrong-doer, and after his death, against his executors or administrators in the same manner and with the like effect in all respects as actions founded upon contract." Section 2. "But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator." It cannot be successfully claimed that the language, "actions on the case for injuries to the person" up to this time did not include, according to the universal classifications, all actions without regard to the person or persons to whom they accrued, which had as their cause, or were founded upon injuries to the person of another arising from the negligent or careless conduct of a wrong-doer. It must also, upon well-settled principles of construction, be conceded that these terms were used by the law-makers according to their legal and well-understood signification at the time of their employment. If the language of the statute applicable to this case be collocated and read according to its plain meaning and intent, the following sentence would seem to be the result: Actions by and against executors and administrators for wrongs done to the property, rights or interests of their intestate or testator, are hereby authorized, but so far as such wrongs have heretofore been remediable by actions on the case for injuries to the person of the plaintiff, or to the person of the intestate, or testator of any executor or administrator, they shall not survive the death of the person to whom or by whom the wrong is done. The wrongs referred to in these sections are such only as are committed upon the "property, rights or interests" of the testator or intestate, and to a cause of action for which the executors and administrators acquire a derivative title above. The whole scope and design of the statute is to extend a remedy already accrued to the representatives of a deceased party, and provide for the survival only of an existing cause of action.

Among the questions which have arisen over the construction of these sections, the most prominent are probably those relating to the signification of the words "property, rights or interests," as used in the first section, and the effect of the enumeration in the second section of certain specific actions as being excepted from the operation of the prior section. It is inferable from the opinions expressed in *Haight v. Hayt*, 19 N. Y. 464, that the court supposed that the words "property, rights or interests" as used in the statute covered and included all injuries tortiously inflicted by one person to the detriment of another, whether affecting his person or property, and also that the mention of certain actions in the second section manifested an intention on the part of the law-makers to exempt all others founded on tort from abatement by death. The views expressed on those questions seem to have been unnecessary, as the action there was for a fraudulent representation with respect to incumbrances whereby a purchaser of land at a public sale was induced and the purchaser was compelled to pay an incumbrance which he was led to believe did not exist. The injury thus seems clearly to have been one to rights of property alone, and was saved from abatement by the first section of the statute. The language and structure of these sections would seem to repel the idea that the exemptions provided by the second section, were intended to authorize the survival of all other actions for torts. In the view implied by the language used in that case, the first section would be quite unnecessary, as any provision specifying the classes of actions which did survive would be superfluous if conjoined with one enumerating all actions not surviving. Such a construction gives the first section no office to perform, and the courts have practically rejected this interpretation in numerous cases, holding

that causes of action abated by death, which were not named in the second section. Thus it has been held that a cause of action by a master for the seduction of his servant does not survive, *People, ex rel. Tioga Com. Pleas*, 19 Wend. 73; or for a fraudulent representation by a third person in reliance upon which credit is given to an irresponsible person, *Zabriskie v. Smith*, 13 N. Y. 322; or for a breach of a promise to marry, *Wade v. Kalbfleisch*, 58 id. 286; S. C., 17 Am. Rep. 250; or for damages occasioned by the negligent killing of another, *Whitford v. Panama R. R. Co.*, 23 id. 465; or for a penalty incurred by trustees under the general manufacturing act, *Stokes v. Stickney*, 96 id. 323; and for fraud in inducing one to marry another. *Price v. Price*, 75 id. 244; S. C., 31 Am. Rep. 463.

The provisions in question obviously created a great change in the law, and applied to a numerous class of cases which had not before been held to survive. Thus it enlarged the rights created by the act of 4th Edward III, so as to include actions for trespass *de bonis asportatis* against representatives as well as by them, and removed the limitation which authorized other actions for wrongs against representatives only when the estate of their testator or intestate was benefited by the act complained of. The change is illustrated by the case of *Benjamin's Exrs. v. Smith*, 17 Wend. 208, where it was held that the cause of action accruing to a party against a sheriff for a false return did not abate by the plaintiff's death. This had previously been held otherwise. *People v. Gibbs, supra*. In the *People v. Tioga Com. Pleas*, 19 Wend. 73, it was held that such actions alone as survived to executors and administrators were assignable, and that a cause of action by a master for the seduction of his servant was not assignable.

Although this action is based upon the theory of a loss of service by the master, it must inferentially have been determined that it did not affect the property, rights or interests of the master in such manner as to cause the right of action to survive. GROVER, J., in *Haight v. Hayt*, said "that the statute had changed the law so far as property or relative rights are affected by the wrongful act." Judge RAPALLO has said that "the rights and interests for tortious injuries to which this statute preserves the right of action have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests by injuries to which the estate of the deceased is dismissed." *Cregin v. B. C. R. R. Co.*, 75 N. Y. 194; S. C., 31 Am. Rep. 459.

Reference to the law as it stood previous to the revision (and the application of the rule of construction embodied in the maxim of *noscitur a sociis*) would seem to require such an interpretation of the words "property, rights or interests" as shall confine their application to injuries to property rights only and such as had been theretofore enforceable by the deceased. It is stated in 1 Williams Exrs., 677, "that no action is maintainable by the executor or administrator upon an implied express promise to the deceased when the damage consisted entirely in the personal suffering of the deceased without any injury to his personal estate." *Chamberlain v. Williamson*, 2 M. & S. 408, is cited in support of this proposition. In that case Lord ELLENBOROUGH said: "Executors and administrators are the representatives of the personal property—that is the debts and goods of the deceased—but not of their wrongs except when those wrongs operate to the temporal injury of their personal estate." Accordingly it was there held "that an executor or administrator cannot have an action for a breach of promise of marriage to the deceased when no special damage to the personal estate can be stated on the record. So with respect to injuries affecting the life and health of the deceased, all such as arise out of the unskillfulness of medical practitioners, the imprisonment of the party brought on by the negligence of his attorney; such cases being in substance actions for injuries to the person."

This view of the law was approved in a similar case in this court. *Wade v. Kalbfleisch, supra*. It was said in *People v. Tioga Com. Pleas, supra*, by COWEN, J., that "the cases in respect to executors and insolvent assignees, and the like, certainly go very far to direct what we are to consider matter of property or estate so far that it can be touched by a contract and made a subject of transfer between parties in any way at law or in equity." If the right be not so entirely personal that a man cannot by any contract place it beyond his control, it is assignable under the statutes of insolvency or will on his death pass to

his executors. The reason is because it makes a part of his estate; it is matter of property, and as such it is in its nature assignable. On the contrary, if it be strictly personal it is beyond the reach of contract. In the same sense we say of many rights, they are inalienable. No one would pretend that a man's person could be specifically affected by contract, though he should bind himself by indenture, equity could not enforce the agreement. *Mary Clark's Case*, 1 Blackf. 122. "So of a man's absolute personal rights in general, as his claim to safety from violence, and his relative rights as a husband, a father, a master, a trustee, etc." This case was approved in *McKee v. Judd*, 12 N. Y. 622, and it was there said by GROVER, J., that "demands arising from injuries strictly personal, whether arising upon tort or contract, are not assignable, but that all others are." In *Green v. Hudson River R. Co.*, 28 Barb. 9, approved in *Whitford v. Panama R. R.*, *supra*, it was held that the husband at common law could not maintain an action for negligence causing the death of his wife, and that continued to be the law in the State until the act of 1847 was amended by chapter 78 of the Laws of 1870. It was said by Judge DENIO, in *Whitford v. Panama R. R. Co.*, *supra*, "It has never been suggested, so far as I know, that the personal representatives of a deceased person could, at the common law, sustain an action on account of the wrongful act of another which caused the death of the person whose estate they represent." It would seem unnecessary to cite additional authorities to the effect that as the law stood at the adoption of the statute, neither a husband or wife had such an interest in the life and services of their respective consorts as subjected a person through whose negligent act it was taken to the charge of injuring any property rights possessed by either husband or wife.

From the same review it is quite evident that the authors of the statute intended explicitly to provide for the abatement of causes of action for personal injuries accruing to the plaintiff or to his intestate or testator. The assignability and survivability of things in action have frequently been held to be convertible terms and perhaps furnish as clear and intelligible a rule to determine what injuries to property rights or interests are meant by the statute as it is possible to lay down. *People v. Tioga County Com. Pleas*, *supra*; *Zabriskie v. Smith*, *supra*.

The rights of property only which are in their nature assignable and capable of enjoyment by an assignee are those referred to in the statute, such rights as arise out of the domestic relations clearly do not possess the attributes of property, and are not assignable by the possessor. *Id.*

The provisions of the Revised Statutes were, however, modified by chapter 450 of the Laws of 1847, as amended by subsequent statutes giving an action against persons and corporations to the representatives of a deceased person, for the benefit of their husband or widow and next of kin, to recover damages for the pecuniary injuries suffered by them where death was caused by the wrongful act, neglect or default of another, and the act, neglect or default was such as would (if death had not ensued) have entitled the party injured to maintain an action therefor, and in respect thereof against the person who or the corporation which caused the same, although the death was caused under such circumstances as in law amounted to a felony.

We are now to consider the effect which these statutes produced upon the law as it previously existed. The cause of action here provided for has been held not to be a devolution of an existing one, but a new one calling for the application of another rule of damage and distinguished by many other attributes. *Whitford v. Panama R. R. Co.*, *supra*; *Haight v. Hayt*, 19 N. Y. 464; *McDonald v. Mallory*, 77 id. 546; S. C., 33 Am. Rep. 664; *Littlewood v. Mayor, etc.*, 89 N. Y. 24; *Blake v. Midland R. W. Co.*, 18 A. & E. 93; *Leggot v. Gt. N. R. Way Co.*, L. R., 1 Q. B. D. 604; S. C., 17 Eng. Rep. 238; *Russell v. Sunbury*, 37 Ohio St. 372; S. C., 41 Am. Rep. 523; *Yertore v. Wiswall*, 16 How. Pr. 8. That it is founded upon the wrongful act of the party causing the death, and gives a right of action therefor to the representatives of the deceased for the pecuniary consequences suffered by the husband, wife or next of kin, from such wrongful act, is also established by the same authorities.

The cause of action is obviously the wrongful act, and the pecuniary injuries resulting afford simply a rule to determine the measure of damages. However

much the husband, widow or next of kin may suffer pecuniarily by the act causing death, it constitutes no cause of action independent of evidence that it was occasioned by the wrongful or negligent conduct of another. Proof that it occurred in consequence of the contributory negligence of the deceased person, or without the fault of the defendant, furnishes a perfect answer to such an action, and a conclusive reason why the death produced by the wrongful act is the cause of action. The cause of action here provided for does not purport to be in any respect a derivative one, but is an original right conferred by the statute upon representatives for the benefit of beneficiaries, but founded upon a wrong already actionable by existing law in favor of the party injured for his damages. The description of the actionable cause seems to have been inserted merely to characterize the nature of the act, which is intended by the statute to be thereby made actionable, and to define the kind and degree of delinquency with which the defendant must be chargeable in order to subject him to the action." *Whitford v. Panama R. R. Co., supra.*

It will be observed, also, that the statute, although creating a new cause of action, and passed for the express purpose of changing the rule of the common law in respect to the survivability of actions, and conferring a right upon representatives which they did not before possess, does not undertake either expressly or impliedly to impair the equally stringent rule which precluded the maintenance of such actions against the representatives of the offending party.

The plain implication from its language would, therefore, seem to be at war with the idea that the legislature intended to create a cause of action, enforceable against as well as by representatives. The cause of action thereby given is not to the estate of the deceased person, but to his or her representatives as trustees, not for purposes of general administration, but for the exclusive use of specified beneficiaries. *Dickins v. N. Y. Cent. R. R. Co.*, 23 N. Y. 158; *Yertore v. Wüwall*, 16 How. Pr. 8.

The wrong defined indicates no injury to the estate of the person killed, and cannot either logically or legally be said to affect any property rights of such person, unless it can be maintained that a person has a property right in his own existence. The property right, therefore, created by this statute is one existing in favor of the beneficiaries of a recovery only, and depends for its existence upon the death of the party injured. It had no previous life and cannot be said to have been injured by the very act which creates it. Whatever claim a wife or children have at law upon the husband and father for support, perishes with the life of such person, and thereafter their claims upon his estate are governed by statutory rules.

If, therefore, we consider this cause of action as a property right, it is as such a right based upon a tort, and, except as otherwise provided by the statute creating it, must be governed by the existing rules of law applicable to such causes of action. The case of *Littlewood v. Mayor, etc.*, 89 N. Y. 24; S. C., 42 Am. Rep. 271, holding that such causes of action may be settled and discharged by the injured party during his life-time would seem to preclude the idea that the husband and widow and the next of kin had any right of property in the cause of action created by the death of the party injured during his life-time. The question presented by the decision herein was, we think, determined adversely to the plaintiff by the case of *Oregin v. Brooklyn and Crossstown R. R. Co.*, 75 N. Y. 192; S. C., 13 Am. Rep. 459. It was there held when an injury is done to the person of the plaintiff (and necessarily by the terms of the statute to that of his testator or intestate), "that the pecuniary damage sustained thereby cannot be so separated as to constitute an independent cause of action, for the cause of action is single and consists of the injury to the person. The damages are the consequences merely of that injury and when, by the terms of the statute, such a cause of action abates, the character of the damages cannot save it." The conclusions reached in that case tend necessarily to support the doctrine that the causes of action given by the act of 1847, and its amendments, abate by the death of the person injured. It also holds that so far as the personal estate and rights of property of the deceased person are injured by the wrongful act causing death, the cause of action therefor survives to his representatives by force of section 1 of the

Revised Statutes before referred to. Such an action exists independently of the statute of 1847, and has been upheld in favor of representatives to the extent of giving damages for medical attendance, and inability of the injured party to attend to business for the time intermediate his injury and death, when the accident occurred while traveling as a passenger upon the defendant's railroad. The action was there based upon the theory of a breach of contract to carry the passenger safely. *Bradshaw v. Lancashire, etc., Railway Co.*, L. R., 10 C. P. 189; S. C., 11 Eng. Rep. 810.

We have carefully considered the case of *Needham v. Grand Trunk R. Co.*, 38 Vt. 294, but inasmuch as the statutes in that State affecting the question are so different from our own, little analogy exists between the question there presented and the one under consideration. The case of *Yertore v. Wiswald, supra*, is entitled to great respect from the learning and ability of the court by which it was decided. But, although agreeing with some of the propositions entertained by it we are unable to concur in the conclusion reached that the cause of action there considered survived.

The complaint in the present action describes a cause of action arising out of the death alone, and suggests no injury to the estate or property of the deceased. Such a cause of action is abated by the death of the wrong-doer.

The judgment of the general term is therefore reversed, and that of the special term affirmed.

All concur; FINCH, J., in result.

NOTE.—29 Eng. Rep. 386; 33 id. 516; 25 Alb. L. J. 361; *Best v. Vedder*, 58 How. Pr. 187; *Kelsey v. Jewett*, 34 Hun, 11; *Hyde v. Wabash, etc., R. Co.*, 47 Am. Rep. 820; *Roberts v. Lisenbes*, 41 id. 450; *Grubb's Adm'r v. Sutt*, 34 id. 765. As to the effect of plaintiff's death pending an appeal, see *Lewis v. St. Louis, etc., R. Co.*, 21 id. 885.—ED.

MORIARTY v. BARTLETT, Executors, etc.

June 5, 1885.

Leslie W. Russell, for appellants. *William P. Cantwell*, for respondent.

PER CURIAM. It was conceded in the argument of this appeal that the principle determining the survivability of the cause of action was similar to that applicable to a cause of action given to the representatives of a person whose death was occasioned by the negligent or wrongful act of an individual or corporation provided for by section 1902 of the Code of Civil Procedure. We are also of that opinion, and having, in the case of *Hegerich v. Keddle*, decided at this term, held that such a cause of action does not survive, we think this case is controlled by that decision.

The orders of the general and special terms should, therefore, be reversed and the application denied, with costs in both courts.

All concur, FINCH, J., on authority of *Hegerich v. Keddle*, preceding case.

MINGAY v. HOLLY MANUFACTURING Co., Impleaded, etc.

June 9, 1885.

COSTS—EXTRA ALLOWANCE—BASIS OF COMPUTATION—CODE CIV. PRO., § 3258.

Defendant entered into a contract with the water commissioners of Saratoga Springs, and on performance and acceptance thereof by said water commissioners was to receive \$31,000. Plaintiffs brought their action as tax payers, alleging in their complaint that said contract was in violation of the village charter, non-performance, collusion, etc. Judgment was rendered in favor of defendant. The special term granted an extra allowance, the general term reversed the order, holding that the difference between the contract price and the value of the labor, etc., furnished under the contract, was the only basis for an extra allowance, and in the absence of proof on the point no allowance could be made.

Held error; that the right of the defendant to enforce the contract having been established, the subject-matter involved was the contract price, and not the profits on the contract.

Appeal from order of general term reversing an order of special term granting an extra allowance.

Ezek Cowen, for appellant. *Matthew Hale*, for respondent.

ANDREWS, J. The subject-matter involved in the action was the validity of the contract between the water commissioners and the Holly Company. But the sole object of the plaintiffs in impeaching the contract, was to get rid of the obligation imposed thereby upon the water commissioners representing the village of Saratoga Springs to pay the Holly Company the sum of \$31,000 upon performance of the contract on its part, and the acceptance of such performance by the water commissioners. If the contract was valid, this sum, on the completion and acceptance of the work, would constitute a debt against the village of Saratoga Springs.

The plaintiffs brought the action as tax payers, and alleged in their complaint that the contract was made in violation of the village charter; that the company had not performed it in certain respects, and was fraudulently colluding with the water commissioners to have the latter accept the work. The plaintiffs joined the village of Saratoga Springs, and the water commissioners as parties defendant with the Holly Company. The complaint prayed judgment declaring the contract void, and enjoining the water commissioners from taking any further steps to carry it out, and for the repayment to the village of any money paid thereon. The plaintiff failed in the action, and judgment was rendered in favor of the Holly Company, establishing the validity of the contract and adjudging (as is inferred) that the company had performed the contract on its part. The general term reversed the order of the special term granting an extra allowance, on the ground that the value of the contract to the Holly Company, that is to say, the profits the company would have made if the contract had been performed on both sides, or, in other words, the difference between the contract price and the value of the labor and machinery done and furnished by the company under the contract, was the only basis for an extra allowance, and that as no proof was given upon this point no allowance could be made.

We are of opinion that the court erred in this conclusion. The Code (§ 3253) authorizes an extra allowance in certain cases, "not exceeding five per centum upon the sum recovered or claimed, or the value of the subject-matter involved." There was no sum recovered or claimed so as to bring the case within the first clause of the section. But a pecuniary right was directly involved in the action, and the value of that right was, we think, the basis for an allowance under the last clause. It is immaterial that the form of the action and the relief sought would not authorize a money judgment in favor of either party. The plaintiffs sought to avoid a contract providing for the payment to the Holly Company for machinery furnished, etc., and to prevent the water commissioners from accepting performance under the terms of the contract, and thereby imposing upon the village an obligation to pay the contract price. The only interest the plaintiffs had, or which they asserted, was to relieve the village from the obligation of the contract. The village was made a party defendant, so that a judgment setting aside the contract would have been conclusive in favor of the village as to its liability to the Holly Company. On the other hand, the judgment actually rendered was conclusive in favor of the Holly Company as to the validity of the contract and its right to demand and receive the \$31,000 agreed to be paid. If the Holly Company, upon completing its contract, had sued for the consideration, and had recovered, there can be no doubt that an allowance, if granted, would be computed on the whole recovery, and not merely on the profits, or the excess of the contract price over the cost of the work and machinery. It would have been no answer that the company, on non-payment, might have removed the machinery and limited its loss thereon to the difference between its actual and contract value. So if the Holly Company had been defeated in an action on the contract, the whole claim would have been the basis of computation for an allowance to the defendant. The real question litigated was whether the Holly Company was entitled to enforce the contract of payment made by the water commissioners, and its right having been established, the contract price for the purpose of computing the allowance was, we think, the subject-matter involved, and not the mere profits on the contract.

The conclusion is not in conflict with the decided cases. It was held in *Ogdensburgh, etc., R. Co. v. V. & O. R. R. Co.*, 68 N. Y. 176, which was an action by lessor against lessee, to set aside a lease as *ultra vires*, in which judgment was rendered for the defendant, that the value of the lease, and not the value of the leased premises or the amount of rent reserved, was the basis for the allowance. The lessee acquired by the terms of the lease the right to the use of the plaintiff's road for the time specified on payment of an annual rental. The plaintiff sought to deprive the defendant of the benefit of the lease, and if it had succeeded in the action, the defendant's loss would have been the value of the use over and above the stipulated rent. In the present case the contract entitled the Holly Company to a gross sum, of which it would have been deprived if the action had been maintained. It was not merely the profits on the contract, but the right to the whole purchase-price which was involved in the litigation. In *Atlantic Dock Co. v. Libby*, 45 N. Y. 499, the whole value of the premises was clearly not involved in an action to restrain a particular use. In *Conaughty v. Saratoga Co. Bank*, 92 N. Y. 401, it was decided that in an action to forfeit the franchise of a banking corporation, the value of the franchise and not the amount of capital or assets of the bank was the basis for an extra allowance.

We think the order of the general term should be reversed, but the court below having disposed of the case on a question of law, in respect to which we are constrained to differ from its conclusion without passing upon the correctness of the allowance on the merits, the case should be remitted to the general term for further consideration.

All concur.

SUPREME JUDICIAL COURT OF MAINE.

PARKS v. CRESSY.

January 10, 1885.

TAXATION — NOTICE — PERSONAL.

A statute authorized any collector after due notice to sue for a tax.

Held, that a personal demand was contemplated, and a written request by mail was insufficient.

A. L. Simpson, for plaintiff. *Davis & Bailey*, for defendant.

PETERS, C. J. Only the tax of 1875 is now involved in this case. The other taxes sued for are disposed of in another suit. The plaintiff must fail for want of proof of a demand of the tax. The statute (R. S., chap. 6, § 141) authorizes any collector, after due notice, to sue for a tax. We think a special demand was intended by the legislature. The design was to prevent the indulgence of a temptation to make costs. The idea of notice is that, by reason of the demand, the tax payer may know that by a refusal or neglect to pay the taxes he may be sued for them. The collector need not inform him that he will be sued if he does not pay. Still, the demand should be so formal and explicit that he would know that a suit might follow for his omission to comply with the demand. A written request mailed to the person taxed is not sufficient. It should be a personal demand, made by the collector or some authorized agent, unless such a demand be excused by the absence of the debtor from home, or by some other good reason. It is not shown that any such notice was given.

Plaintiff nonsuit.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

SNOW v. PENOBSCOT RIVER ICE COMPANY.

January 15, 1885.

AGENCY — COMMISSIONS — RIGHT TO RECOVER.

An agent was employed to purchase ice for his principal, and authorized to receive from the vendor a certain commission from the purchase-price.

The contract was signed by plaintiff as agent, and no concealment or fraud was practiced on defendant.

Held, that the contract was not void as against public policy, and plaintiff was entitled to recover.*

Assumpsit to recover commissions for the sale of defendant's ice.

Charles P. Stetson, for plaintiff. *Barker, Vose & Barker*, for defendant.

HASKELL, J. The plaintiff was employed to purchase, and was authorized to receive from the vendor, a commission of five per cent on the purchase-money; equipped with this authority, he purchased for his principal 10,000 tons of ice from the defendant, who agreed to pay the plaintiff a commission of five per cent, for the recovery of which this action is brought.

At the trial, the presiding justice was requested by defendant to charge the jury "that if the plaintiff as agent had discretionary powers to deal with these parties, or with any other ice dealers as he saw fit, and to fix the price at which the ice should be purchased, and that the commissions are claimed, as a consideration for awarding or giving this contract to the defendant in preference to other competitors, the contract is void as against public policy." The request was denied; and exceptions present the question whether the denial was error. A requested instruction must be wholly correct. *Grand Trunk Railway Co. v. Latham*, 63 Me. 177. The evidence must warrant the jury in finding such facts as to make the requested instruction applicable to the case. *Penobscot Railroad Co. v. White*, 41 Me. 512; *Lord v. Inhabitants of Kennebunkport*, 61 id. 462. The instruction was properly withheld, for the evidence does not prove that the commissions are claimed as a consideration for awarding the contract to the defendant in preference to other competitors; on the contrary, it appears that the commissions had nothing to do with so awarding the contract. The plaintiff was authorized to purchase ice for his principal, and to receive from the vendor a stated commission of five per cent; that is, the vendor was required to pay a commission of five per cent from the purchase-money. The plaintiff would receive the same advantage from whomsoever the purchase might be made. The commissions were no uncertain factor to induce the plaintiff to award his principal's contracts where the plaintiff would receive the greatest benefit to himself. It was substantially the same as if the plaintiff had received the compensation directly from his principal, for, in that event, the purchase-money could have been correspondingly reduced, and the vendors would have received the same price for their merchandise; so that, whether the requested instruction is correct as an abstract rule of law becomes wholly immaterial, and its discussion would be fruitless.

The defendant asks that the verdict be set aside as against both law and evidence.

The contract to pay commissions is not denied; but it is claimed to be invalid as against public policy. The numerous cases cited by the counselors for the defendant, in their elaborate brief, clearly establish the rule that the strictest fidelity is required from those persons acting in a fiduciary capacity, and that an agent clothed with discretionary powers shall not receive from those benefited by the exercise of that discretion any value or thing. The agent's duty is to faithfully perform that service with which he is charged, and, for his reward, the principal alone is responsible. The plaintiff's claim does no violence to these rules of law. It is not grounded upon such facts as bring it within their scope. Here the principal says purchase for me at a stipulated compensation, but for convenience you may receive directly from the vendor the amount agreed to

* See 10 Eng. Rep. 576; 42 Am. Rep. 337; *Duryee v. Lester*, 75 N. Y. 442; *Barry v. Schmidt*, 46 Am. Rep. 85, 87, *note*; *Robbins v. Sears*, 23 Fed. Rep., 874, 875, *note*.

between us, which he may add to his purchase-money that I am to pay. The very nature of the transaction required the plaintiff to disclose his agency to the defendant. Indeed, the contract for the sale of the ice was signed by the plaintiff as agent for his principal, and no concealment or fraud was practiced upon the defendant. He acted with a full knowledge of the plaintiff's agency, and the contract to pay commissions was made between the parties with a full understanding of the relations of each other to the subject-matter of it.

True, the interests of buyer and seller are adverse (*Parebrother v. Simmons*, 5 Barn. & Ald. 333), and it would be a fraud for one person to secretly act as the agent of both. So a broker, effecting the exchange of stocks for real estate, who has concealed his employment by one party from the other cannot recover his promised commissions from the party who had full knowledge of the broker's employment, because the agreement tempted the broker to deal unjustly, and was against public policy, *Rice v. Wood*, 113 Mass. 133; S. C., 18 Am. Rep. 459; *a fortiori*, he cannot recover the same of the party from whom the employment was concealed. *Walker v. Osgood*, 98 Mass. 348; *Farnsworth v. Hemmor*, 1 Allen, 494. The facts of this case do not come within the rules of law adjudged by these authorities, for there was no concealment of the employment, no fraud, no unfair dealing, no temptation for the agent to deal unjustly with his principal, by awarding the contracts to whomsoever would pay the highest commissions. Every thing was honest, straightforward and above board, and the contract for commissions is in no way subversive of public interest. In *Bunker v. Miles*, 30 Me. 431, an agent was provided with \$80 with which to purchase a horse upon the best terms he could at a fixed compensation of \$1. The horse was purchased for \$72.50, and the court held the agent liable to account to his principal for what remained of the \$80, above the price actually paid for the horse and the agent's agreed compensation. Would it have been fraud for the agent to have paid \$73.50 for the horse, and to have taken the vendor's note to himself for \$1? and in that case would the note have been void between the parties to it?

It is claimed, that the contract for the sale of the ice was obtained by the false and fraudulent representations of the plaintiff, as to his principal's financial ability, but after plenary instructions from the court, the jury found otherwise, and it is not perceived that the verdict is so manifestly against the weight of evidence as to require the court to interpose.

It is claimed, that the plaintiff's demand had been settled before action brought, but in this behalf, the jury under instructions to which no exception is taken, found otherwise, and it is by no means clear that their finding was erroneous.

So, too, the defendant claims an estoppel upon the plaintiff from insisting upon his commissions, but the evidence fails in this particular also.

Let the defendant abide its contract, knowingly made without concealment, or fraud, or other illegal taint.

Motion and exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

CRANE v. INHABITANTS OF LINNEAS.

January 17, 1885.

PENSION MONEY — ATTACHMENT — WHEN CANNOT BE RECOVERED BACK.

The defendant town furnished plaintiff with support, and also advanced him money to assist in obtaining his pension, plaintiff promising to repay, when the pension was obtained, and after receiving it, refused. The town brought its action and attached the money.

Held, that the town was entitled to receive it, and plaintiff could not recover it back.

W. M. & F. A. Robinson, for plaintiff. Madigan & Dunworth, for defendant.

EMERY, J. In *Smart v. White*, 73 Me. 332; S. C., Am. Rep. 356, cited by plaintiff, the defendant, an overseer of the town, assisted her (the plaintiff) to obtain her pension; under a verbal agreement with her, he said, "that whatever back pay might be received should be applied toward her indebtedness to the town for her support." The verdict found the fact, that the defendant got the back pay from her under and

by force of the contract. The defendant was to assist her in getting the pension, and she was to make compensation for such assistance by turning the back pay over to the town for which the defendant was acting. It was held that the contract itself, and the reception of the money under it, were forbidden by section 5485, U. S. R. S., and that the money could be recovered back.

In the case now at bar, neither the town nor its officers undertook to assist in obtaining the plaintiff's pension. There was no agreement to assist, and no agreement for compensation for assistance. The money was not paid under any such agreement. It was paid after an attachment by suit, and to settle the suit. The case, therefore, does not fall within the principle of *Smart v. White*, and the payment by the plaintiff of his debt to the town was not forbidden by section 5485.

The plaintiff, however, invokes section 4745, U. S. R. S., which forbids "any pledge, mortgage, assignment, transfer or sale" of the pension claim. The case, however, does not show any such. The town furnished the plaintiff with pauper supplies, as it was by law obliged to. It also advanced him money to procure evidence to obtain his pension. The plaintiff promised to repay the town when he obtained his pension. The question of the town's authority to advance the money is immaterial, as plaintiff cannot recover back on that ground. There was nothing in this transaction, that tends to secure to the town any special privilege in the pension claim, or any control over it. Such a promise was no pledge nor mortgage. The town was only a creditor of the plaintiff. Without regarding the statute, it had no more legal interest in the pension claim, and no more control over it than his other creditors. It did not receive the money under any alleged pledge. It brought its action as a general creditor and attached the plaintiff's property. Thereupon the plaintiff paid his admitted debt. Such payment was not forbidden by section 4745.

The plaintiff also invokes section 4747, U. S. R. S., which declares that no sum of money due, or to become due, to any pensioner shall be liable to attachment. This money was not due him as a pensioner, it had been collected and had come into his possession and had been intrusted by him to the trustee. The reasons and authorities for holding money, the proceeds of a pension check, in this situation, are clearly stated in *Friend, in equity, v. Garcelon*, ante 57. The principle there enunciated, governs this case on this point. There was no duress. The defendants desired to collect an admitted debt. They used the common methods of attachment. The plaintiff thereupon paid his debt and no more, as the costs were forgiven him. It was his duty to pay it, and it was the town's right to receive it.

Judgment for defendants.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

CHASE v. MAINE CENTRAL RAILROAD CO.

January 19, 1885.

NEGLIGENCE — RAILROAD CROSSING — EVIDENCE — CHARACTER FOR CAREFULNESS — CONTRIBUTORY NEGLIGENCE — CHARGE OF COURT.

Plaintiff's intestate was killed at a railroad crossing, his sleigh colliding with a train; there was no evidence as to how the accident occurred, no one being with him nor having seen him when the collision took place. In an action to recover damages,

Held, that the opinions of witnesses as to his general character for carefulness were inadmissible as evidence that he was not guilty of contributory negligence.*

The court charged the jury to take into consideration, upon the question of the intestate's care upon the occasion of the injury, the knowledge of the jury "of the habits of thought and mind, and the natural instincts of men" to preserve themselves from injury.

Held error; that being a mere presumption, it could not take the place of proof, and in the absence of any proof of the surrounding circumstances, was insufficient to send the case to the jury.†

* 18 Eng. Rep. 231; 23 id. 816; 30 id. 817-8; 18 Am. Rep. 455; 42 id. 227.

† Moak's Underhill on Torts, 312.

J. W. Spaulding & F. J. Buker, for plaintiff. *Drummond & Drummond*, for defendant.

PETERS, C. J. The intestate's sleigh collided with a train at a railroad crossing. He thereby received an injury, and very soon afterward died. He never was conscious enough after the injury to tell how the accident happened. No one was with him at the time. No one saw him at the moment of the collision. As evidence that he could not have been guilty of any negligence which contributed to the accident, witnesses who had been his neighbors for some time were permitted to testify to their opinion of his general character for carefulness. We think this was overstepping the limit allowed to collateral evidence in this State. We dare not abide by it. Our belief is that such a rule would be fraught with much more evil than good.

It was said, in *Eaton v. Telegraph Co.*, 68 Me. 63, 67, that "the best authorities clearly sustain the doctrine that the fact of a person having once or many times in his life done a particular act in a particular way, does not prove that he has done the same thing in the same way upon another and different occasion." See cases there cited. If in civil cases a person's character proves carefulness in one instance, why not in all instances? Where and how can a true line of distinction be drawn? If by such proof, a plaintiff can be shown to have been careful in one case, why not by the same mode of proof show that a person acted carefully or carelessly in any case, in all cases? In many litigations, under such a test, there would arise a wager of character which would as unfairly settle the dispute, as did formerly the wager of battle. If the intestate's general character for care be in issue, why not that of the engineer and of every man concerned in the management of the train? If a man who is customarily careful were always so, there would be reason for admitting the evidence. But the issue is whether the intestate was careful in this particular instance — a fact to be either directly or circumstantially, affirmatively proved. The objection to such a method of proof, is augmented by the fact that the testimony consisted of merely the opinions of neighbors — one generality proving another. But upon what tests or what definition of care are their opinions grounded? The question was not whether the intestate managed his farm or his shop, or his horses carefully, but whether he used due care in attempting to cross a railroad track at the very moment when a regular train was due at the crossing. The law imperatively demands that a traveler look and listen before crossing, if there is any opportunity to do so. What did these farmer witnesses know about the intestate's habitual care in that respect? It is not a ground for the admission of this evidence that the plaintiff can produce no other. It is neither of primary nor secondary importance; it is not evidence at all. 1 Greenl. Ev., § 84.

The question is not a new one in this court. The sole question considered in the case of *Scott v. Hale*, 16 Me. 326, was whether similar evidence was admissible. The defendant there, was sued for damages for the loss of a building by fire, the allegation being that the fire was occasioned by the negligence of the defendant. In that case the same arguments were presented as here. The evidence received in that case, came nearer the point at issue than the evidence here. At the trial, the court permitted witnesses to testify that the defendant was very careful with fire, and that they never discovered any carelessness in him about taking care of his fires during the time they were at his house just before the event complained of. It was held that the evidence was inadmissible, and the verdict was set aside. The same rule has been maintained in subsequent cases. *Lawrence v. Mt. Vernon*, 85 Me. 100; *Dunham v. Rackliff*, 71 id. 345. The case of *Morris v. East Haven*, 41 Conn. 252, cited by the defendants, is an especially pertinent and sustaining decision. See *Baldwin v. Railroad*, 4 Gray, 333. Exception is taken to the judge charging the jury to take into consideration, upon the question of the intestate's care upon the occasion of the injury, the knowledge of the jury "of the habits of thought and mind, and the natural instincts of men" to preserve themselves from injury. Following, as no doubt it did, an impressive argument of counsel that a man would not be so unwise as to rush into danger when it was avoidable — we are inclined to think the idea intended was presented to the jury too prominently.

Such a consideration is by no means evidence, for if it were so, a jury might accept it as conclusive evidence. It is no more than an accompaniment or an appurtenance of evidence. It may have some influence upon the interpretation of facts affirmatively presented. It pertains, as said by defendant's counsel, to those natural laws in connection with which all evidence may be weighed. It belongs to the class of slight presumptions, described by Mr. Best, which, "taken singly, do not either constitute proof or shift the burden of proof." 1 Best's Ev., § 319.

It may give character or force to facts already proved, but it does not of itself add or create proof. It is rather an argument or mode of reasoning upon evidence. Practically speaking, it is no more than that a person's motive may be taken into consideration in relation to any act done by such person. It would be reasonable to say, that a man would be naturally stimulated to avoid, rather than rush into dangerous situations. He would be impelled by strong motives to do so. But this would apply to the engineer, or fireman, or brakeman on a train as well as to the traveler, although not generally in the same degree.

But the weakness of the plaintiff's position lies in the fact that this motive for personal safety does not operate upon the minds of men until they can clearly see that they are endangered by their carelessness. It does not keep them from careless acts. The danger is often not seen until too late to be extricated from it. The careless act usually precedes the moment when the natural instincts for self-preservation are aroused. And a man is quite prone to take risks. A man is careless to take a risk in crossing a railroad in advance of a coming train. We all know that he often does it. There is no doubt that the intestate was impelled by all his instincts and love of life to save himself when he saw that the horrible danger was upon him. But how the unfortunate man got into the awful situation no one seems to know, and no evidence explains to us. It seems to be an unexplained catastrophe.

Other questions are discussed which may be properly passed. A good deal of discussion is elicited by the ruling that the plaintiff's intestate had a right of passage across the railroad. Perhaps the point may be avoided upon the ground of a license or permission from the defendant company to the public, as was the case in *Barry v. Railroad*, 92 N. Y. 286; S. C., 44 Am. Rep. 377.

Exceptions sustained.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

DOUGLASS v. SNOW.

January 26, 1885.

SPECIFIC PERFORMANCE — STATUTE OF FRAUDS — PART PERFORMANCE.

A court of equity has power to decree specific performance of contracts for the conveyance of lands, notwithstanding the statute of frauds is pleaded as a defense.

Part payment of the purchase-price is not such part performance as will take the case out of the statute, but where the contract is admitted and no benefit of the statute claimed, the court will decree performance if the evidence clearly shows who is the real vendee.*

H. A. Tripp, for plaintiff. *A. P. Wiswell*, for defendant.

VIRGIN, J. The plaintiff seeks the specific performance of an alleged "verbal contract," whereby she avers the defendant Snow agreed with her son, an alleged agent, to convey to her, by a good and sufficient deed, certain land known as the "red store" on payment of \$425, and makes the defendant Chase a party to whom Snow subsequently conveyed the property.

The only partial performance which is alleged in the bill is the payment of \$350 of the purchase-money. Such payment, as held by the more modern authorities, is not sufficient of itself as part performance to take the case out of the statute of frauds, for the money may be recovered at law. 4 Kent, 451; *Kidder v. Barr*, 85 N. H. 235; *Glass v. Hulbert*, 102 Mass. 28; S. C., 3 Am. Rep. 418; *Purcell v. Minor*, 4 Wall. 513; Wat. Sp. Per., § 268, and cases in note 4.

* 31 Eng. Rep. 714; 37 Am. Rep. 849; 31 Alb. L. J. 392.

But the defendants have admitted the contract so far as its terms are concerned, and have not raised the question of the statute of frauds by demurrer, plea or answer; and not having claimed the benefit of it, they cannot now set it up. *Newton v. Swazey*, 8 N. H. 13; *Ridgway v. Wharton*, 3 De G., M. & G. (Am. ed.) 677, and cases in note 2; 1 Dan. Chan. (5th ed.) 656-7; Story's Eq. Pl. (8th ed.) 763. For having admitted an agreement valid at common law, and thereby avoided the mischief against which the statute was directed, no evidence of its terms is necessary *Coxine v. Graham*, 2 Paige's Ch. 181; *Newton v. Swazey*, *supra*, and the court might decree performance, so far as Snow at least is concerned, provided the evidence reasonably satisfies us that the plaintiff was the real vendee.

It is objected that the plaintiff is not a competent witness. She is unless she comes within some of the exceptions to the provisions of R. S., chap. 82, § 93. It is claimed that Chase is administrator of the estate of the plaintiff's son, who, it is claimed, is the equitable vendee of the premises. But the mere fact that he is such administrator is not sufficient. He must be a party in his official character and appear as such. He is not sued as such. He is joined in the bill simply as an individual to whom the premises were conveyed by the plaintiff's alleged equitable vendor. Neither by his answer does he appear in that capacity. His signature intimates no official character. If his allegations in the answer are true he holds the land in his individual and not his representative character. At most, he is the trustee of the plaintiff's son so far as this case is concerned, holding the property by a resulting trust. Our opinion, therefore, is that she is a competent witness.

Her testimony is positive and direct, that she authorized her son to make the purchase for her and furnished the money for the two payments; that she furnished the money for the policy and subsequently assigned it; that on the death of her son in October following, she appointed Limeburner as agent, to pay the balance and take the deed. These facts are not disputed except by Snow's answer, but they are corroborated by the testimony of several witnesses, some of which squarely contradicts the allegations in the answer and tends to establish the fact that Snow understood her son to be the plaintiff's agent in making the uncontradicted agreement.

1. The policy of insurance on the store was issued to her, as is expressly testified to by the insurance agent, and was transferred by her to Snow, within a few days thereafter. Unless she was understood by Snow to be the real purchaser, he was accepting the transfer of a policy issued to one known to have no insurable interest. If she was the real party to the agreement, she became the vendee immediately on its completion, for, "equity looking upon that as done which ought to be done" (Pom. Eq. Jur., §§ 363-4), the equitable title passed, and she then might insure, as well as convey it (§ 368). He does not deny these facts, but does not produce the policy or account for it (although shown to be in him), except by saying it is not in his possession and does not know where it is.

Limeburner, who succeeded her son as agent, is also dead. But Stover, a disinterested witness, so far as this case discloses, testifies that he heard Snow say that the son had paid \$350 for the plaintiff and that she was to have a deed when the balance was paid; that Snow directed Limeburner to go to Tripp's office and he, Snow, would go and get the mortgage discharged and "go in then and fix it up." Although afterward in explaining why he did not come back, said he "did not know the plaintiff in the trade," which is inconsistent with the proved facts.

Snow does not absolutely deny these admissions either in his answer or testimony, only testifying that "he thinks he told Stover of the payments, but not that they were paid for the plaintiff." But he admits that Limeburner several times asked him for a deed, and he then, in addition to the balance of purchase-money, demanded \$65 for goods alleged to have been sold to the son, but made no such claim to Chase, so far as the testimony shows.

2. The testimony of Tripp is also unqualified and directly in point. That Limeburner and Snow came together to his office in December, and said that the plaintiff was to pay the \$75; that Snow claimed interest for delay, which Tripp computed, and produced his figures at the hearing; that Snow was to accept the balance and interest, \$79.37, give the plaintiff a deed, and authorized Tripp to

make it, handing to him another, containing a correct description of the premises; that Snow remained until the deed was completed, and then went out with the avowed purpose of obtaining a discharge of the mortgage, and then to return to execute the deed; but did not return. These facts are not denied in his testimony, though some of them are, in his answer. So he denied any personal knowledge that the policy was issued to the plaintiff, although it was transferred by her to him, and he does not show it out of his possession to our satisfaction.

Our opinion, therefore, is that the plaintiff's case is satisfactorily proved. *Neale v. Neales*, 9 Wall. 1, 12. We are satisfied that the son acted in behalf of his mother, and that Snow so understood it. Notice to Chase was not necessary. From his own standpoint he claims to hold all, except the amount he advanced from his individual funds, in trust for the son's estate, and shall turn it over to that estate when he sells the property and deducts the amount which he advanced.

The defendant's counsel challenge the power of the court to decree specific performance of agreements for the conveyance of land. But this cannot be seriously questioned, even if he had regularly insisted upon the benefit of the statute of frauds. Stat. 1874, chap. 175; R. S., chap. 77, § 8, cl. 11; *Wilton v. Horwood*, 23 Me. 131; *Ash v. Hare*, 73 id. 401; *Pulsifer v. Waterman*, id. 244-5. The incidental remark found in the opinion in *Jellison v. Jordan*, 68 id. 373 (which was an action at law), could not have been intended to apply to equity.

Let a decree be drawn directing the defendant Chase to convey the premises to the plaintiff on payment of the balance of the purchase-money (\$75) with interest thereon until payment, and payment to be made within thirty days after the announcement of this opinion on the county docket.

Bill sustained, but with costs against Snow only.

PETERS, C. J., DANFORTH, FOSTER and HASKELL, JJ., concurred; EMERY, J., did not sit.

LEASAN v. MAINE CENTRAL RAILROAD CO.

January 26, 1885.

NEGLECTANCE — RAILROAD CROSSING — PRESUMPTION — BURDEN OF PROOF — ABSENCE OF FLAGMAN.

The general rule is that where the injured party remains passive, the happening of an accident affords *prima facie* evidence of negligence.*

But in an action to recover for injuries received by a traveler at a railroad crossing, the traveler himself plays an active part and the burden of proof is on him to show that he was not guilty of contributory negligence.†

It is negligence *per se* to attempt to cross a railroad track without first looking and listening for a coming train if there is a chance for doing so.

As between a railroad and a traveler, the railroad has the right of way.

Where not required by law, the failure to station a flagman at a crossing is not negligence *per se*, but is a question for the jury.

Thompson & Dunton, for plaintiff. *Drummond & Drummond*, for defendant.

PETERS, C. J. To entitle the plaintiff to recover, he must show, first, that the defendants were guilty of negligence; the injury itself does not import negligence.

Secondly, he must show that their negligence caused the accident. There must be a visible connection of cause and effect. It is not enough to show that the defendants' negligence was adequate and sufficient to cause it — that it might have caused it — he must show that it did cause it; that it was the predominating efficient cause of the accident and injury.

If the accident was caused partly by the plaintiff's own negligence, then it was not, in a legal sense, caused by the negligence of the defendants. In such case, it was caused by both parties. If the result was produced by a commingling of the negligence of the two parties, the plaintiff cannot recover.

Therefore, thirdly, the plaintiff must produce affirmative proof, directly or indirectly, that he was not himself guilty of any negligence which helped cause the accident. Sometimes this is impliedly shown by the proof of the manner of the

* Moak's Underhill on Torts, 814-5; 47 Amer. Rep. 75.

† 28 Am. Rep. 563.

injury. This is by proving the defendants' negligence, the same proof may exculpate the plaintiff from any charge of negligence. It may be inferred that the plaintiff was, at the time of the accident, using due care, from the absence of all appearance of fault upon his part in the circumstances under which the accident happened. To state the requirements more precisely, the plaintiff must show affirmatively, or it must affirmatively appear, that he was himself in the use of due care. If so appears from a full account of the circumstances attending the occurrence, whether the evidence be put in for one purpose or another, then he does affirmatively sustain the burden obligatory upon him.

To illustrate the idea: By the negligence of a railroad company a train of cars runs off the track, whereby passengers are injured. In such a case the passenger, ordinarily situated in the car, who sues for damages for his injury, would not be required to show any fact further than the occurrence itself. Proof of the accident tells all that can be told — is *prima facie* at least the whole story. *Res ipsa loquitur*. *Stevens v. Railroad*, 66 Me. 74.

The injured party is passive in such a case. In the case, however, of a collision between a railroad train and the wagon of a traveler, the traveler plays usually an active part, disconnected with, or independent of the acts of others, and the acts of the two parties conjunctively produce a collision. In such case not much can be based upon inference and presumption. The prosecuting party must make it distinctly appear that his own remissions did not contribute in causing the injury.

The present case is of the latter description. With the burden of proof on the plaintiff, we think the verdict in his favor should not stand. His conduct seems to have been in no view defensible. He knew the situation of the crossing; was aware that an engine was likely at any time to be upon the track; could have both seen and heard the movement of the engine seasonably to enable him to save himself from injury, and testifies that he does not know whether he did either or not; was driving rapidly upon a descending grade to the crossing, passing another team on the way; and when it was too late for either party to avoid the predicament, met with the accident. It was the repetition of an experiment too often made of taking narrow chances in passing in front of an advancing train.

Our very strong belief is, that the absence of whistling or bell-ringing or of signaling of any kind, played no material part in causing the accident. When the agents of the company saw that a collision was impending, they were helpless to prevent it.

The rule is now firmly established in this State, as well as by courts generally, that it is negligence *per se* for a person to cross a railroad track without first looking and listening for a coming train, if there is a chance for doing so. *State v. Maine Central*, 76 Me. 357. "No neglect of duty on the part of a railroad company will excuse any one approaching such a crossing from using the senses of sight and hearing, where these may be available." 1 Thomp. Neg. 426, and cases in notes. Experience has taught men that there are, and can be no safeguards against injuries at railroad crossings nearly as efficacious as to look and listen for an approaching train.

The counsel for the plaintiff, in an able argument upon the facts of the case, places too much reliance upon his view of the relative rights of the parties in the use of the highway at its crossing with the railroad. At the place of intersection there are no doubt concurrent rights. Neither has an exclusive right of passage. They have equal rights. But the manner of exercising those rights is quite another thing. A railroad company would not have the right to occupy the way in a manner or to an extent that would unreasonably delay the public travel or render it dangerous; nor to start a train at an instant when it would be likely to produce collision. But when a train is under way it has the first right of the road. Its right may then be first exercised. It cannot be required to stop except in cases of apparent danger not otherwise avoidable. The traveler must stop for the train. For that purpose are the requirements of signals and gates and the like, to warn the traveler to keep out of the way. There must be a uniform and certain rule to regulate the matter, or dire confusion would ensue. The persons manning a train have the right of relying upon the supposition that a traveler

intends to wait for the passing of the train, unless it appears that he has not a chance to do so.

In *Continental Improvement Co. v. Stead*, 95 U. S. 161, the law of the road is expressed as follows: "Of course, these mutual rights (of railroad and traveler) have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and the right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way."

In *Pierce on Railroads*, 842, it is said: "The obligations of the company and of the traveler are mutual and reciprocal, and the same degree of care to avoid a collision is incumbent on each. It is the duty to give the warnings required by the statute, or in the exercise of ordinary care, and it is his duty to have his attention alive to them, and to heed them. The company, having a fixed place of movement and a peculiar momentum, has the right of precedence in crossing highways; and he must wait till the train, the coming of which he knows, or ought to know, has passed."

In *Whitney v. Railroad*, 69 Me. 208, VIRGIN, J., says: "On account of the motive power used by railroads, and the difficulties attending its management, and the noises incident thereto, the statute has prescribed means particularly adapted to give notice of the approach of a train, the object being to warn all persons of such approach in season to enable them to stop at a safe distance, and thus avoid the risk not only of collision, but also of alarm to horses."

For the defense, it is contended that the plaintiff could not give in evidence the fact of a failure to station a flagman at the crossing, because no such ground of recovery is alleged in the writ. It need not be alleged. Neither the statute nor any municipal proceedings imposed such a requirement at the place in question. Therefore a failure in that regard would not constitute negligence *per se* negligence in law. If the jury found that such a caution was indispensable, its omission would be at most only evidence of negligence, one circumstance to be taken in connection with all other circumstances upon the main or central question whether the defendants at the particular time and place prudently managed their road. 1 Thom. Neg. 419, and cases; *McGrath v. Railroad*, 63 N. Y. 528; *Com. v. Railroad*, 101 Mass. 201; *Houghkirk v. Del. & Hud. Canal Co.*, 92 N. Y. 219; S. C., 44 Am. Rep. 370.

It was contended by the defense, that it is a question of law and not of fact, whether the exigencies in any given case require the presence of a flagman at a railroad crossing. Of course, there may be extreme cases where a judge would be justified in giving an absolute direction upon the question. But generally it must be an issue for the jury. It is said, the jury are not a very competent tribunal for the settlement of such a dispute. The court should inform and aid the jury. It is also said, that when the facts respecting the situation are undisputed, the conclusion must be one of law. But undisputed facts may weigh against one another. One person may give the dominant weight to one fact and another person to another. Usually such questions present an exigency to be judged of. Even though the facts are undisputed, if they are of such a nature or pertain to such a matter, that different intelligent and honest minds might exercise different judgments upon them, the question to be decided belongs to the jury. It is plainly observable that the tendency is to multiply the instances in which the court will take negligence cases from the jury and decide them as matters of law, but the advancement of the law in such respects has not extended to the limit assigned for it in the argument for the defendants. See *Cumberland Valley R. R. v. Mangans*, 48 Am. Rep. 88; 23 Am. Law Reg. N. S. 518, and note.

Motion sustained.

DANFORTH, VIRGIN, FOSTER, EMERY and HASKELL, JJ., concurred.

WOODBURY v. GARDINER.

January 26, 1885.

SPECIFIC PERFORMANCE—ORAL AGREEMENT TO CONVEY LAND—SUBSTANTIAL IMPROVEMENTS.

When a party to an agreement fair and just in its terms, understandingly entered into and concluded, is injured, without default on his own part, by its non-fulfillment of the other party, the most direct and satisfactory remedy which he instinctively seeks is specific performance.

The ground of the remedy is an equitable estoppel based on an equitable fraud.

A father-in-law made an oral agreement with his son-in-law that if he would sell his farm and come and live with him on the homestead, carry on the farm and maintain him and his wife while they lived and furnish them with a horse and carriage for their own convenience, he would convey the farm to plaintiff.

The plaintiff entered into possession upon faith of the agreement, made improvements, paid taxes, etc., thereby enhancing the value of the land. Subsequently some unpleasantness arose between the parties and the father-in-law refused to convey, although he continued to reside with, and be supported by the plaintiff until his death.

Held, that plaintiff was entitled to a specific performance of the agreement by the sole devisees of the vendor.*

D. D. Stewart, for plaintiff. *James Wright*, for defendant.

VIRGIN, J. Bill in equity to enforce specific performance of an alleged oral agreement for the conveyance of a farm, brought against the sole devisees of the vendor, and also against one claiming as assignee of a mortgage thereon. Among other defenses the statute of frauds is interposed.

When a party to an agreement fair and just in its terms, understandingly entered into and concluded, is injured, without default on his own part, by its non-fulfillment of the other party, the most direct and satisfactory remedy which he instinctively seeks is specific performance. This practical result he cannot obtain by the common law, for that measures all losses by money; but equity comes in to supply this more complete justice, and has laid down certain rules of relief by which, when its circumstances bring it within them, every contract susceptible of substantial enjoyment may be enforced.

In this State, the early equity jurisdiction of the court was limited to a very few subjects. It was gradually from time to time extended to others, until 1874, when the legislature conferred "full equity jurisdiction according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate and complete remedy at law." Stat. 1874, chap. 175. And notwithstanding the clause "in all other cases," the re-enactment of this statute in R. S. (1883), chap. 77, § 6, was not intended to be limited in effect by reason of its being accompanied by a re-enactment of the various restricted provisions of the former statutes. *Glass v. Hulbert*, 102 Mass. 38; *Somerby v. Buntin*, 118 id. 287.

Until the Stat. 1874, chap. 175 took effect, this court, on account of limited equity jurisdiction, could not decree specific performance of unwritten agreements for the conveyance of land, under any circumstances. *Stearns v. Hubbard*, 8 Me. 320; *Wilton v. Harwood*, 23 id. 131; *Bubier v. Bubier*, 24 id. 42; *Farnham v. Clements*, 51 id. 426. But now that the broad general power is conferred, jurisdiction extends to the enforcement of all oral agreements when the parties have not a "plain, adequate and complete remedy at law," and the circumstances are such as to bring them within the established rules of equity governing such matters.

As this is the first case of the kind which has come before this court since the enactment of the above statute, it may be excusable to remark that it has long been held in England that part performance of an unwritten contract to convey land may authorize a court of equity to compel specific performance by the other party in contradiction to the positive terms of the statute of frauds. *Lester v. Foxcroft*, Colles P. C. 108; S. C., 11 Eng. Rep. 768; *Bond v. Hopkins*, 1 Sch. & Lef. 433; *Coles v. Pilkington*, L. R., 19 Eq. 174. And the same doctrine has been adopted by all (save three or four) of the States of the Union. Pom. Eq. Jur., § 1409, some of them making it an express exception to the statute of frauds. Wat. Sp. Per., § 257.

* 19 Eng. Rep. 539, 764; 37 Am. Rep. 849; 32 id. 668; 25 id. 466; 21 Week. Dig. 116.—Ed.

The ground of the remedy is an equitable estoppel based on an equitable fraud. After having induced or knowingly permitted another to perform in part an agreement on the faith of its full performance by both parties, and for which he could not well be compensated except by specific performance, the other shall not insist that the agreement is void. *Morphett v. Jones*, 1 Swanst. 181; *Buckmaster v. Harrop*, 7 Ves. 346; *Potter v. Jacobs*, 111 Mass. 32, 37. In other words, the statute of frauds having been enacted for the purpose of preventing frauds should not be used fraudulently. *Mestaer v. Gillespie*, 11 Ves. 621, 627; *Whitbread v. Brocherst*, 1 Bro. C. C. 404; *Ash v. Hare*, 73 Me. 403; Pom. Eq. Jur., § 921.

Compensation in damages for the breach of an agreement to convey land is not regarded as adequate relief. *Jones v. Robbins*, 29 Me. 351; *Foss v. Haynes*, 31 id. 81; *Snowman v. Harford*, 55 id. 199. Hence parties thereto may resort to equity.

To be enforceable, the agreement must be concluded, unambiguous, founded on a valuable consideration, fair and just in all its parts, and such that its specific performance will not be harsh or oppressive upon the party against whom it is sought (Pom. Eq. Jur., § 1405 and cases in notes), and proved to the satisfaction of the court. *Parkhurst v. Van Cortland*, 1 Johns. Ch. 273; *Neale v. Neales*, 9 Wall. 1, 12.

To exclude the operation of the statute of frauds, the acts of performance must be such as have unequivocal reference to the agreement sought to be enforced, show that they were done in pursuance and execution of it, that damages recoverable in law would not adequately compensate the plaintiff, and that fraud and injustice would result to him if the agreement be held inoperative. Wat. Sp. Per., § 261, and cases in note; 8 White & T. L. Cas. 516; *Williams v. Morris*, 95 U. S. 457. In other words, partial performance is such a carrying out of the agreement by one party thereto, that fraud would result to him, unless the other party be compelled to perform his part of it. *Tilton v. Tilton*, 9 N. H. 390; *Ash v. Hare*, 73 Me. 403. The taking of open, actual possession of the premises by the vendee, with the assent of the vendor, pursuant to, and in execution of an agreement for their sale, has always been considered an act of performance (*Morphett v. Jones*, *supra*; *Knickerbocker v. Harria*, 1 Paige's Ch. 209; *Potter v. Jacob*, 111 Mass. 32; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; Wat. Sp. Per., §§ 272-277); and when combined with the making of valuable improvements by way of permanent erections thereon, or by skill and labor bestowed by cultivation, whereby the land was greatly enhanced in value, they all become important and pregnant acts which can be reasonably referred only to an agreement for a substantial interest in the property. *Lester v. Foxcroft*, *supra*; *Surcome v. Penningor*, 3 DeG., M. & G. 571; *Parkhurst v. Van Cortland*, 14 Johns. 15; *Freeman v. Freeman*, 43 N. Y. 34; S. C., 3 Am. Rep. 657; *King's Heirs v. Thompson*, 9 Pet. 204; *Neale v. Neales*, *supra*. And the case is peculiarly strengthened when it also appears that the land has been, by direction of the vendor, assessed to the vendee, ever since possession taken, and that he has promptly paid the taxes. Wat. Sp. Per. citing *Miranoille v. Silverthorn*, 1 Gr. (Pa.) 410.

This doctrine applies to gifts from parent to children. *Loddell v. Loddell*, 36 N. Y. 327. Accordingly, where a step-father agreed with his step-son, just of age and about to leave home, that if he would work the farm and take care of the family, he should have a deed of one-half of the farm, on substantial performance by the son, the court decreed specific performance. *Twiss v. George*, 33 Mich. 238. So, in the absence of such relationship, where a husband and wife accepted the offer of an aged person in poor health, that if they would give himself a nurse, lodging and board in a certain house, and take care of him until his death, he would convey the house to his wife; and they fulfilled their agreement and expended \$200 in repairs, specific performance was decreed against his heirs. *Watson v. Mahan*, 20 Ind. 223. See, also, *Hiatt v. Williams*, 72 Mo. 214; S. C., 37 Am. Rep. 438; *Bohanan v. Bohanan*, 96 Ill. 591; *Littlefield v. Littlefield*, 51 Wis. 23.

The following facts are fully substantiated by the proofs and make out a strong case within the rules above mentioned:

J. O. Gardiner, some seventy years of age, together with his wife, a few years his junior, resided on their home farm in Canaan. The plaintiff, rising fifty years

of age, together with his wife (daughter of the Gardiners) resided on his farm, in Pittsfield. During the summer of 1877, Gardiner frequently importuned the plaintiff to sell his property in Pittsfield, move on to his homestead in Canaan, support him and his wife during their respective lives, and have the homestead. Finally, in September following, Gardiner and the plaintiff made an oral agreement that plaintiff should sell his farm, farming tools, etc., in Pittsfield, remove with his wife and family on to the homestead, carry on the farm, maintain Gardiner and his wife during life by furnishing them such support as they might need, keep Gardiner's horse and carriage for their convenience, but the plaintiff to have the use of it on the farm, Gardiner and wife to pay their own doctor's bills, furnish their own clothing, and from choice to do their own house-work so long as they were able, and Gardiner to work only when he pleased. That Gardiner should convey the farm to the plaintiff, taking back a mortgage thereof conditioned for the support of himself and wife as above stipulated.

Thereupon the plaintiff, assisted by Gardiner, sold and conveyed his farm and some personal property in Pittsfield for \$2,600, with which he paid outstanding debts amounting to some \$1,800 or \$1,900, and on October 4, 1877, removed with his family to Canaan, when, on delivery thereof by Gardiner, he entered into full possession of the homestead in strict pursuance and execution of the agreement, and for no other purpose, occupying the whole premises except two or three rooms which Gardiner and his wife occupied.

The plaintiff took with him to the homestead rising \$1,000 worth of personal property, comprising neat stock, horse, farming tools, wagons, grain, etc. Finding the farm, as previously informed by Gardiner, somewhat run down, the plaintiff purchased and expended on it, during the first two years, forty tons of hay, \$15 worth of yard manure, thirteen hundred pounds of phosphates and five hundred pounds of plaster, cleared the bushes from the pasture, re-set more than one hundred rods of fence, cultivated new land, and with other lumber and timber, added to some already there — one-half of which he purchased of a former tenant — erected a new stable at an expense of \$250, and caused all of the buildings to be insured — all, with the full knowledge and consent of Gardiner. He also paid the taxes upon the homestead and personal property for the next and every succeeding year, since, the same having, by direction of Gardiner, been assessed to him.

Soon afterward the plaintiff and Gardiner went to an attorney at law to execute the deed and mortgage. The attorney advised them, and they consented to postpone their execution until after the trial of a pending action against the plaintiff by the holder on a note of \$1,000 or \$1,100, given for a patent right, as it might involve the homestead.

Subsequently some unpleasantness arose between the parties, and although Gardiner and his wife continued to reside and be supported by the plaintiff on the homestead until Gardiner's decease in April, 1882, he frequently refused to convey according to his agreement. Immediately after the burial of Gardiner, his widow (one of the defendants) left, and has since resided with the other daughter (the other defendant), and has constantly refused to be supported by the plaintiff and to give a deed and take a mortgage for her support, as her husband, with full knowledge on her part, had agreed, although the legal title to the premises is in her as sole devisee of her husband.

We have said that the facts are fully substantiated, which is emphatically true upon the direct testimony and admission of both parties; and on no other theory than that established by the direct testimony, are the undisputed acts and conduct of the parties to the agreement reconcilable. *Neale v. Neales*, 9 Wall. 1, 10. But we do not mean to intimate that there is not some conflicting testimony relating to minor matters, yet the main facts stand uncontradicted. Nor is there any doubt that considerable bad blood was manifested by the exchange of cross words and abusive epithets between the parties some time before the decease of Mr. Gardiner; and had this been all on one side we should long hesitate before sustaining the bill. But in this respect, this case is like many others of like nature. In the language of Mr. Justice DAVIS, in *Neale v. Neales*, last cited, "it is to be regretted that the contest over this property, like all contests between near relations, has

elements of bitterness in it." But they did not grow out of any alleged non-fulfilment of the agreement on the part of the plaintiff, for the declarations of Mr. Gardiner, testified to by several distinct witnesses, all admit that he never called upon the plaintiff in vain for support. Nor is there wanting evidence from the same reliable sources showing that it was far from an easy matter to "get along pleasantly" with the older parties. Moreover, the testimony contains more than a mere suggestion that they were exposed to bad influences, ill-conceived advice. It is utterly incredible that Mr. Gardiner would have voluntarily resorted to the gross fraud of attempting to put the mortgage set up by one of the defendants upon the homestead. Neither can we believe that this defendant understood the allegations in her answer relating thereto when she made oath to them, they are so inconsistent with the facts fully proved as also by her own deposition.

The mortgage cannot be upheld. Its fraudulent character is fully exposed. It was instigated as a fraud upon this plaintiff, and it limped with fraud every step it took, the defendant assignee being fully cognizant of it. *Lewis v. Small*, 71 Me. 552; *Ash v. Hare*, 73 id. 401.

There was no waiver. The parties undertook to settle their troubles by reference, which proved abortive. The plaintiff has continued in full possession, and has surrendered no claim which he seeks to enforce. The nonsuit of his action was no bar to this suit. Neither is there any legal objection to the competency of the plaintiff as a witness, he is not coming within any exception to R. S., chap. 82, § 93, enumerated in § 98.

Mrs. Gardiner being sole devisee of the homestead is the proper party. It is a fundamental maxim "that equity looks upon things which ought to be done, as actually performed;" consequently, when a contract is made for the sale of an estate, equity considers the vendor as the trustee of the vendee, holding the vendee's legal estate on a naked trust. *Linscott v. Buck*, 33 Me. 530; *Sug. Vend.* (Perkins' ed.), chap. 5, § 1; *Pom. Eq. Jur.*, 364 *et seq.* The equitable title changes when the contract is completed. The consequences of this doctrine follow. As the vendee's legal estate is held on a naked trust by the vendor, this trust, impressed upon the land, follows it in the hands of his heirs and devisees, and his grantees with notice. *Cotter v. Loyer*, 2 P. Wms. 623; *Vawcen v. Jeffrey*, 16 Ves. 519; *Pom. Eq. Jur.*, § 368, and notes.

There is no intimation in the case that any debts exist against the estate. *Hayes v. Cemetery*, 108 Mass. 400, 403.

Unless the agreement be performed, this plaintiff will be greatly damnified, and we have no hesitation in decreeing its specific performance.

Decree accordingly. Bill sustained, with costs.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

FESSENDEN v. Judge of Probate.

January 28, 1885.

EXECUTOR AND ADMINISTRATOR — ACCOUNTS — TAXES — WHO SHOULD PAY.

An executor cannot be allowed in his account the amount of taxes paid by him prior to a sale of the land for payment of debts. The heirs and devisees, being entitled to the rents until sold, should pay the taxes.

Woodman & Thompson, for plaintiff. *P. J. Larabee*, for defendant.

PETERS, C. J. The appellant was devisee in trust, and executor under Daniel Brown's will. The estate proving insolvent, certain real estate of the testator was sold for the production of assets to be applied to the payment of debts. The appellant presents for allowance in his accounts as executor, the amount of taxes assessed upon such real estate prior to its sale. The claim was properly disallowed.

Heirs and devisees have the rents of real estate until it is sold by an administrator or executor for the payment of debts, and for that reason they should pay the taxes. The taxes are a charge upon the rents. The technicality which gives to heirs and devisees the rents of an insolvent estate is an extreme doctrine against

creditors, and the severity of requiring creditors to pay the taxes while others reap the rents should not be superadded. *Kimball v. Sumner*, 62 Me. 305; *Lucy v. Lucy*, 55 N. H. 9; *Palmer v. Palmer*, 13 Gray, 328; Schoul. Ex., § 510, note.

There may be exceptions to the rule. There may be occasions when it would be reasonable and right for such a charge to appear in an administration account. But the appellant does not show the necessity for the charge; the burden is upon him to do so. The indications are the other way. The estates sold were rentable properties. The rents accruing after the testator's death and before the sale must have greatly exceeded the taxes. It looks as if the taxes were paid by the right person out of a wrong pocket.

Complaint is made that the court of probate unreasonably reduced the appellant's bill for fees, and cut down an account paid by him for the services of an attendant during the last sickness of the testator. Those are questionable, either of fact or of discretion, that should be finally settled by a single judge, unless he sees fit to report them to the full court for its decision. In only an extreme case, but not under any ordinary circumstances, would the law court interfere with a decision of such questions, made by a judge at *nisi prius*. *Crocker v. Crocker*, 43 Me. 561.

Exceptions overruled.

WALTON, VIRGIN, LIBBEY and EMERY, JJ., concurred; HASKELL, J., did not sit.

BRASTOW v. ROCKPORT ICE CO.

January 28, 1885.

ICE — RIGHT TO TAKE FREE TO ALL

Lily pond, containing more than ten acres, is a "great pond" within the meaning of the ordinance of 1641-7, and is a public pond, and the right to take ice therefrom is free to all, which right must be exercised in a reasonable manner and with a due regard for the rights of others.*

Baker, Baker & Cornish, for plaintiff. *A. P. Gould*, for defendant.

WALTON, J. In this State, ponds containing more than ten acres are public, and the right to cut ice upon them is a public right, free to all. In this particular, the right of a riparian owner is no greater than that of every other citizen. And the exercise of the right by a riparian proprietor, although continued for more than twenty years, will not enlarge his right. It will still be no more than a right in common. It will not thereby be changed from a common to an exclusive right. The exercise of such a right is in no respect adverse or aggressive, and presumption cannot be predicated upon its exercise, however long continued. The right to take ice from a public pond, like all public rights, must be exercised in a reasonable manner, and with a due regard to the equal rights of others, as the right to boat, to fish, to dig clams and oysters, must be exercised in our bays and harbors and on the sea itself. And it is the opinion of the court that the right of the parties to this litigation to cut ice on Lily pond is equal; that neither has a right superior to, or to the exclusion of, the other. True, the defendants are a corporation and their charter authorizes them to cut ice on Lily pond. But there is nothing in the charter to indicate that the right was intended to be exclusive. And it is the opinion of the court that it is not exclusive; that both parties must exercise the right in a reasonable manner, and with a due regard to the rights of each other, and of all others who may wish to take ice from the pond. The claim of the plaintiffs to an exclusive right to cut ice on Lily pond, opposite to so much of the shore as they own or have leases of, cannot be sustained. Lily pond, it is admitted, contains more than ten acres. It is, therefore, a "great pond" within the meaning of the ordinance of 1641-7, and by the principles of that ordinance (which have been too many times recognized, sanctioned, and declared to be a part of the common law of this State to be now disregarded)

* Moak's Underhill on Torts, 351; 55 How. Pr. 376; 5 Abb. N. C. 172; 26 Hun, 246; 38 Am. Rep. 246; 5 id. 224; 46 id. 580; 24 Alb. L. J. 516; 25 id. 106.—Ed.

it is a public pond, and the use of it free to all who can reach it without trespassing upon the lands of others. *Barrows v. McDermott*, 73 Me. 441; *West Roxbury v. Stoddard*, 7 Allen, 158; *Hittinger v. Eames*, 121 Mass. 589.

Such being the law, of course the plaintiff's bill, in which they ask that the defendants may be enjoined from cutting ice "between the shores under their (the plaintiffs') ownership or control and the center of the pond in front of the same," cannot be sustained. But, as the principal question is a new one in this State, and there is evidence that the defendants as well as the plaintiffs have claimed greater rights than they are entitled to, and it was equally important to both parties to have their rights judicially determined, we think the bill should be dismissed, without costs.

Bill dismissed, no costs.

PETERS, C. J., VIRGIN, LIBBEY, EMBRY and HASKELL, JJ., concurred.

CASWELL v. FULLER.

January 31, 1885.

FALSE REPRESENTATIONS—INDUCING LOAN—BANKRUPT—ESTOPPEL.

Plaintiff induced a loan from defendant upon the false representation that he had already been adjudged a bankrupt, and needed funds to carry him through the bankruptcy proceedings. Not paying the loan defendant made oath required by statute and plaintiff was arrested upon a writ wherein the loan was sued for. In an action to recover damages on the ground that the arrest was illegal,—

Held, that plaintiff was estopped from showing the falsity of the oath as to the amount due, and that his discharge in bankruptcy did not discharge the loan.

Jos. Williamson, for plaintiff. *Wm. H. Fogler*, for defendant.

HASKELL, J. The plaintiff sues for damages suffered from an alleged illegal arrest, grounded upon the false oath of the defendant, that at least \$10 were due upon the debt sued, and were unpaid, when in fact it had been discharged in bankruptcy.

The defense is, that the plaintiff, by his own statement when he contracted the debt, led the defendant to believe that he, the plaintiff, had already been adjudged a bankrupt, and wanted to borrow the money to help himself through bankruptcy; that, relying upon the truth of his statement, the defendant loaned the money, and, after it became due and payable, made the oath, believing that it was true.

The presiding justice ruled that this defense, if proved, would in law bar the plaintiff's action. To this ruling the plaintiff alleged exceptions, the verdict being for the defendant.

Estoppels in pais have long been regarded by courts as wise and salutary. That a man should be allowed by his own speech and conduct to lead another astray, and thereby take substantial benefit from the error of which he was the cause, is subversive of natural justice.

The plaintiff induced a loan from the defendant upon the false representation that he had already been adjudged a bankrupt, and needed funds to carry him through the bankruptcy proceedings. The defendant, failing to receive payment of the loan when due, made the oath required by statute as a prerequisite to arrest on mesne process on contract, and caused the plaintiff's arrest upon a writ, wherein the loan was sued for. It is not pretended that any part of the oath was false, beside that stating the debt sued, or at least \$10 of it, to be due and payable. To show the oath false in this particular, the plaintiff relies upon his discharge in bankruptcy, which would not have discharged the defendant's loan had the plaintiff's representations when he procured it, relative to his bankrupt proceedings, been true. Having availed himself of false representations to procure the loan, the plaintiff cannot deny their truth for the purpose of charging the defendant with a false oath, made upon the belief that the false statements of the plaintiff were true.

By reason of the false representations of the plaintiff, the defendant parted with his money, and equitable estoppel precludes the plaintiff from gaining advantage

from his own falsehood. *Stanwood v. McLellan*, 48 Me. 275; *Piper v. Gilmour*, 49 id. 149; *Wood v. Pennell*, 51 id. 52.

This defense is fatal to the plaintiff's case, and the other exceptions become immaterial.

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

KING v. JEFFREY.

February 2, 1885.

PLEADING — ACTION TO ANNUL JUDGMENT — DECLARATION.

In an action to vacate a judgment and to annul an execution issued thereon, the declaration is fatally defective that does not show but that the defendant in the original action was arrested upon a valid precept, properly issued upon a valid judgment, rendered, upon legal process duly served, by a court having complete jurisdiction of the parties and of the subject-matter of the suit.

Frank W. Dana & W. F. Estey, for plaintiff. *N. & J. A. Morrill*, for defendant.

HASKELL, J. *Audita querela*, seeking to vacate a judgment of this court and to annul an execution issued upon it, whereon the plaintiff has been imprisoned, and to recover damages suffered thereby.

This writ alleges, the plaintiff and defendant, both to be of Lewiston, in the county of Androscoggin. The declaration states, that the officer's return on the original writ shows, that it was served by attachment of real estate and summons seasonably left "at the last and usual place of abode of the said King," this plaintiff, "in said county," meaning the county of Androscoggin, and that, at the time of suing out the same and of the service thereof, this plaintiff, the defendant in that action, was an inhabitant of the State. It does not aver that he was not an inhabitant of the county of Androscoggin, or that he did not live there. His counsel does not suggest that the summons was not seasonably left at his domicile in that county. It follows, therefore, that the declaration fails to show, but that the original judgment, sought to be vacated, was rendered upon actual notice to the defendant in the original action, that is, legal service, seasonably made as required by statute. *Sanborn v. Stickney*, 69 Me. 348. The temporary absence of the defendant in the original action from the State did not require a stay of execution, or that a bond should have been filed before the same issued. *Jackson v. Gould*, 73 Me. 341.

The declaration, therefore, is fatally defective in substance, in that it does not show but that the defendant in the original action was arrested upon a valid precept, properly issued upon a valid judgment, rendered, upon legal process duly served, by a court having complete jurisdiction of the parties and of the subject-matter of the suit. The plaintiff fails to show but that he has been imprisoned by due process of law, for the non-payment of a debt, to which he does not pretend to have any defense, legal or equitable.

Exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and EMERY, JJ., concurred.

LEAVITT v. EASTMAN.

February 14, 1885.

EMERENT DOMAIN — STATUTORY COMPLIANCE — SCHOOL DISTRICT — INVALID NOTICE.

Where private property is sought to be taken against the will of the owner, under statute authority, all the statute requirements must be fully and strictly complied with. In the procedure, no step, however unimportant seemingly, must be omitted, nor will the substitution of other steps in the place of those named in the statute be sufficient.

Defendants as a committee of a school district entered upon the land of plaintiff, who was a mortgagee in possession, partly removed a fence and built on the lot a school-house. In an action of trespass *quare claustrum*, defendants justified under the statute proceedings in pursuance of which they gave notice as follows: "To the inhabitants of school district No. 19, in the town of Harpswell: Application in writing having been made to the

undersigned, as selectmen of the town of Harpswell, by . . . committee of said district, for the location and erection of a school-house, to call a meeting of the qualified voters thereof for the purpose hereinafter named. You are hereby notified and warned to meet at the Union House, within said district, on the fifth day of June next, at two o'clock in the afternoon, for the purpose of hearing the inhabitants of said district on the subject of their disagreement respecting a suitable place to be selected for the erection of a school-house in said district, and of deciding where such school-house shall be located and lay out the same. Given, etc."

Held, that the notice was insufficient to conclude the owner as to the extent of the lot or the amount of damages, and consequently the proceedings were invalid.

John J. Perry & D. H. Meaher, for plaintiff. *P. J. Larrabee and Strout & Holmes*, for defendant.

EMERY, J. At the time of the alleged trespass, the plaintiff was mortgagee of the *locus*, with at least the right of possession. The defendants entered, removed a part of the fence inclosing the lot, and built on the lot a school-house. This was an injury to the realty for which, if a trespass, the mortgagee, under our law, can maintain the action of trespass *quare clausum*, the legal title being in him. *Smith v. Goodwin*, 2 Me. 173; *Stowell v. Pike*, id. 387; *Frothingham v. McKusick*, 24 id. 403; *Cole v. Stewart*, 11 Cush. 181. Had it been an injury to the possession merely, not affecting the mortgagee's security, this action might not have been maintainable (*Hewes v. Bickford*, 49 Me. 71), but we think the removal of the fence and the disturbance of the surface and soil, bring this case within the principle of the cases before cited.

The defendants justify as the committee of the school district which had essayed to take this land for a school house lot under statute proceedings. The validity of these proceedings for taking the lot is the only remaining issue. The district at one of the meetings, by a two-thirds vote, had voted to locate its school-house lot on land of which the *locus* was a part, alleging the owner's refusal to sell. Application was made to the municipal officers to lay out a lot thereon, and appraise the damages to the owner. There are two contingencies in which application can be made by a district to the municipal officers for action in relation to school-house lots. One is where the district cannot agree by a two-thirds vote upon a location. Then the municipal officers are, in effect, to call a district meeting, hear the contending parties, "decide where the school-house shall be placed." R. S., chap. 11, § 56. The other contingency is when the location has been made, and no agreement can be made with the owner. Then the municipal officers are to determine, not the location, but the size and shape of the lot to be taken, and the damage caused by such taking. "They may lay out a school-house lot, not exceeding one hundred square rods, and appraise the damage." They are to proceed "as is provided for laying out town ways and appraising damages therefor." R. S., chap. 11, § 57. Both these statute provisions were substantially in force at the date of these proceedings.

This application in this case was clearly and admittedly of the latter kind. Under it the municipal officers were not to locate a lot, but were to stake out a lot in a location already made. This last, they actually did, and appraised the damages. The notice they gave, however, was as follows: "To the inhabitants of school district No. 19, in the town of Harpswell: Application in writing having been made to the undersigned, as selectmen of the town of Harpswell, by . . . committee of said district, for the location and erection of a school-house, to call a meeting of the qualified voters thereof for the purpose hereinafter named. You are hereby notified, and warned to meet at the Union House, within said district, on the fifth day of June next, at two o'clock in the afternoon, for the purpose of hearing the inhabitants of said district on the subject of their disagreement respecting a suitable place to be selected for the erection of a school-house in said district, and of deciding where such school-house shall be located and lay out the same. Given, etc." This notice was evidently applicable to a case within the former contingency. Was it sufficient notice of the application actually made, and of the proceedings that actually followed?

It is common learning that where private property is sought to be taken against the will of the owner, under statute authority, all the statute requirements must be fully and strictly complied with. In the procedure, no step, however unim-

portant seemingly, must be omitted, nor will the substitution of other steps in the place of those named in the statute be sufficient. To deprive the citizen of his property requires the whole statute, and nothing in the place of the statute. If there be any degree in the importance of the requirements, that of notice of the intended proceedings would be the chief. The right of being seasonably informed of just what is intended in such cases, has always been regarded as indefeasible, even where the statute makes no provision. *Harlow v. Pike*, 3 Me. 438. The notice should clearly indicate to all parties interested what the application is and what proceedings are intended. If the application is authorized, and the proceedings indicated are such as the statute provides to follow such an application, the land-owner may choose to appear and contest. If either the application or the indicated proceedings are unauthorized, or if the proposed proceedings are inapplicable, the land-owner may disregard them and the notice of them. He cannot be bound by the notice unless it notify him of an authorized application to be followed by appropriate proceedings provided by statute for such a case.

The notice in this case informed the public of an application in a case of a disagreement about a location, and of the intention of the municipal officers at a named time and place to hear the inhabitants of the district on the subject of their disagreement, and to decide where the school-house should be located. In this question, the land-owner may have felt no interest. He may have been willing for the location to be made on his land, and only desired to be heard on the extent of the lot or the damages. He could assume that a new application must be made for these purposes in case of disagreement as to price, and so disregard the proceedings in which he did not care to be heard. We do not think the notice was sufficient to conclude the owner as to the extent of the lot or the amount of damages, and consequently the proceedings were invalid. *Harris v. Marblehead*, 10 Gray, 40; *Fitchburg R. R. Co. v. Fitchburg*, 121 Mass. 182.

The defendant's counsel calls our attention to the words "lay out the same," at the end of the notice, and contends that these words gave the owner sufficient notice. We think the notice as a whole is unmistakably of an intention to decide a question of disagreement about a location, and not of an intention to lay out a lot, and appraise damages therefor. Under such an application as the notice stated, there was no authority to lay out a lot, and the owner might properly disregard the words "to lay out the same."

The defendants also contend that the return of the municipal officers, reciting that a proper notice was given, is conclusive. No authority is cited for the proposition. In *Harlow v. Pike*, 3 Me. 438, such return was not regarded even as evidence of a notice. In *Cool v. Crommett*, 13 id. 250, and in the *Limerick Case*, 18 id. 183, it is spoken of only as *prima facie* evidence. In this case the notice actually given, is in evidence before us, and we cannot disregard it, in passing upon the plaintiff's rights.

It is also urged that the plaintiff must have known of various proceedings of the school district, and so have known what the application really was and that the notice did not in fact mislead him. However that may be, the legal transfer of the land requires the full observance of all the statute formalities. The rule is general, and the land-owner may rest upon it securely. There is in this case no sufficient evidence of waiver of any formality.

There is no need to consider any other objections to the proceedings. The justification fails for want of sufficient notice of the intention to take the land.

Judgment for plaintiff for \$1 damages.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

HALL v. OTIS.

February 16, 1885.

EVIDENCE — DRAFT — PRESUMPTION — ADMINISTRATOR — ADVERSE PARTY AS WITNESS.

Where one makes a draft from a fund composed partly of his own money and partly of the money of another, the presumption is, that it was drawn from his own funds, but may be rebutted by evidence.

Where an administrator testifies to facts happening before the death of his testator, the testimony of adverse party must be confined to the specific facts testified to by the representative party.

The complainant, the administrator upon the estate of Daniel E. Hall, testified before the master as to some facts happening before the death of Hall. The respondents offered the testimony (in a deposition) of M., one of the respondents, as to *other facts* happening before the death of Hall. The evidence of the *other facts* was excluded.

Held no error.

Bolster & Watson, for plaintiff. *N. & J. A. Morrill*, for defendant.

EMERY, J. This case has once been before the court, and an opinion given construing the will in 71 Me. 326. The case was then sent to a master, to whose report, exceptions are taken, and the case is again reported to the law court to dispose of the exceptions, and make some further orders in the case.

I. Annie E. Hall, legatee under the will of Daniel E. Hall (see former report of the case), had a right to consume the estate of Daniel E. Hall, but what she did not consume, was to go over. She, after the death of Daniel E. Hall, made deposits of money, from time to time, in an Auburn bank.

The master's report finds that the earlier deposits were from funds of the estate of Daniel E. Hall, but that the later deposits were not. Subsequently she drew out a portion of the total deposit, leaving a portion still in the bank, where it remained at the time of her death. If what she drew out, were funds of the estate of Daniel E. Hall, they were consumed by her, and the funds of that estate were reduced that much. If what she drew out, were her own funds, then the funds of the estate of Daniel E. Hall, remaining unconsumed, were so much more.

There was no evidence as to which fund was drawn against, and the master fell back upon the presumption, and ruled that the amount so drawn out was to be considered as drawn from her own funds, and not from funds of the estate of Daniel. The respondents excepted to this ruling. Their position is that the bank became indebted to Mrs. Hall for each deposit as soon as it was made, and that it made a payment on account each time it paid her check. The respondents claim that the payment made by the bank was to be considered a payment on the older item of indebtedness, or the older deposit. If this were a case between the bank and Mrs. Hall, such might be the applicable rule; but the bank is not a party here. This is not a case of payment between debtor and creditor, as Daniel E. Hall was not a creditor of Mrs. Hall, and the presumptions as to such payments do not apply here. The question here is, what is the presumption when one makes a draft from a fund composed partly of his own money and partly of money of another? We think the presumption is the draft was intended to be made, and was made from the drawer's own fund. Of course the presumption can be overturned by evidence, but where there is no evidence we think such is the presumption.

The master does not expressly find that the deposits, not of funds of the estate of Daniel E. Hall, were of the funds of Mrs. Hall, but she deposited them in her own name, and nothing else appearing, they are to be presumed to be her own funds. We may regard them as such in passing upon this question. The master acted upon a correct presumption, and his report so far is not objectionable.

II. The complainant, the administrator upon the estate of Daniel E. Hall, testified before the master as to some facts happening before the death of Hall. The respondents offered the testimony (in a deposition) of Martha J. Clark, one of the respondents, as to other facts happening before the death of Hall. Such facts of her deposition as related solely to other facts happening before the death but not testified about by the administrator, were excluded, and were not excluded by the master. This exclusion is another objection made to the report by the respondent.

At common law, Martha J. Clark, being a party and interested, could not have testified at all. The first act admitting parties to testify, still wholly excluded a party from testifying, where the adverse party was the representative of a deceased party. That act, therefore, did not admit any part of Mrs. Clark's testimony. The next statute upon the subject, that of 1862, chapter 109, only applied to matters after the death of the decedent.

The excluded testimony must be admitted, if at all, under the statute of 1866, chapter 9, now Revised Statutes, chapter 82, section 98, part 11. This statute provided that the representative party may offer himself as a witness, and testify to any facts legally admissible upon the general rules of evidence, happening before the death of the decedent, and that when he does so, the adverse party shall neither be excluded nor excused from testifying in reference to such facts. There is some difference in the wording of the two statutes which may be noticed. The former, after permitting the representative party to "testify to any fact" happening after the death of the decedent, declares that, "in reference to such matters" the adverse party may testify. In the latter statute the opposite party is only permitted to testify "in reference to such facts." In the former statute, the representative may testify to any "facts" happening after the death. The adverse party may testify to "matters." In the latter statute, the adverse party is confined to certain facts, "such facts." What facts? We think the legislature meant to confine the adverse party to such facts as the representative party had testified to. We do not think it was intended to permit the adverse party to go over all matters in his testimony, giving his own version without fear of contradiction, upon all the issues of the case, when the representative party has perhaps only testified to a conversation with such adverse party.

The representative party, under the general rules of evidence, could not give statements of his decedent, could not give the deceased party's version of the case upon any issue. That version is silenced by death. The version of the adverse party is silenced by law, that death may give him no advantage, and present no temptation. There may be one or more facts happening before the death of which the representative has personal knowledge. He is allowed to testify as to those. It becomes fair then, that the adverse party should be permitted to testify as to those facts. It becomes fair, that the case should have even his unwilling testimony upon these facts. The statute so provides. Fairness requires no more. The statute is not clearly worded, but in view of that difference of the phraseology already noticed, and of the undue advantage which the opposite interpretation might give an adverse party, and the temptation it might subject him to, we think the correct interpretation of the latter statute is, that the adverse party is confined to the specific facts testified to by the representative party.

III. Some portions of the deposition of Mrs. Clark, in reference to some matters happening after the death of Hall, it is claimed were excluded by the master, and that the exclusion is made another ground of objection to the report. We have carefully studied the deposition and the case, and we cannot see how the testimony of Mrs. Clark as to such matters could affect the result. They did not have sufficient bearing on any issue to be of any value. The respondents were not injured by the exclusion, and therefore there is no occasion to determine its correctness.

This disposes of the objections to the report, which we think should be accepted.

The respondent, Otis, as administrator of Annie E. Hall, claims an allowance out of the property in his hands belonging to the estate of Daniel E. Hall (represented by the complainant), for disbursements, services, etc., incurred by reason of the bringing of this bill. The bill was brought not only to obtain a construction of the will, but to obtain property alleged to belong to the estate of Daniel E. Hall. The process is adversary in its nature.

In the former decree (71 Me. 826), it was ordered that no costs should be taxed for, nor against, the respondents. The proceedings since that decree have been hostile.

The complainant has been pursuing his remedy to recovery property, and the respondent has been resisting, and resisting strenuously.

We think the estate he represents should pay the expenses of that resistance, and that the estate represented by the complainant should not be charged with the expense of the efforts made to diminish it. If the respondent estate is not required to pay costs, that is the utmost its representative could expect, after the contest he has made. We think the claim should not be allowed.

The master's report is to be accepted, and final decree made at *nisi prius*, in accordance with the report, and this opinion.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

INHABITANTS OF BROOKLINE v. SHERMAN.

June 18, 1885.

REPLEVIN — TITLE TO FURNITURE IN PUBLIC BUILDING.

A town owned an engine-house and a fire engine kept therein. Engine men composing the company were appointed from time to time and paid by the town. The furniture in the house was purchased by the company with money, part of which was paid by the town, part raised by subscription by citizens for the purpose of fitting up the house, and part was paid by the company from prize moneys received by it.

Upon a claim of ownership to the furniture being made by members of the company, — *Held*, that the title to the furniture was in the town.

Action of replevin to recover certain furniture in an engine-house at Brookline. It appeared that the plaintiff town organized a fire department in 1871, and in the same year erected an engine-house. In 1871, fire engineers were appointed by the selectmen of the town and have thus been annually appointed since, and these fire engineers have duly appointed, from time to time, engine men, composing the company, of which, on April 21, 1882, the defendant was a member. These enginemen have always been paid by the town. In 1881 the engineers of the town duly appointed the defendant and others, who acted with him, enginemen for the year beginning May 1, 1881. From 1871, onward, the term during which enginemen were appointed to serve, began on May 1, in each year. Ever since 1871, the town has owned and kept in its engine-house a fire engine. In this building there was a room provided by the town for the enginemen which they called the parlor. The articles replevied constituted the furniture of this room. The defendant became a member of the company in July, 1872. On April 21, 1882, at a special meeting of the company it was voted "to remove the company's furniture from the 'parlor' to-night and that it be divided." In pursuance of this vote the property replevied was removed from the engine-house to the house of defendant. At a meeting of the company, held April 25, 1882, it was voted to disband, to take effect April 30, 1882. No other meeting of the company was held until May 1, 1882, when the new enginemen, appointed to succeed the old company, met and organized. The furniture replevied was purchased in the spring of 1872, by a committee of the enginemen, who then constituted the company, from a fund made up as follows: \$125 paid by the town February 5, 1872, on recommendation of the engineers toward furnishing the house; \$700 raised by subscription by citizens of the town for the purpose of assisting the engine company in fitting up the house, and \$100 furnished by the then existing engine company, being prize money received by the company. The furniture had been used by each succeeding engine company since it was first bought.

At the trial in the superior court the defendant claimed, upon the evidence, that the company was a voluntary association, and that the property replevied belonged to himself and the others who constituted the company on April 21, 1882, and that they had a right, having voted to disband, to remove the property and divide it among themselves, and asked a ruling to that effect. The court declined so to rule and the defendant alleged exceptions.

M. & C. A. Williams, for plaintiffs. *A. O. Brewster*, for defendant.

C. ALLEN, J. The defendant has no valid ground of exception to any of the rulings made at the trial. The enginemen were a fluctuating and temporary body and did not constitute a corporation, and were not endowed with legal succession. They did not own the property, provided for the use of the engine company. They could not sell it for the purpose of dividing the proceeds among themselves, nor could they distribute the property itself among themselves. The town provided the engine and engine-house, and paid the enginemen. The property in question was for the use of such persons as should be members of the engine company for the time being. It could not have been contemplated that

each member, upon withdrawing from time to time, from the company, should be entitled to assert a private ownership to a share of the furniture. This would defeat the very object for which it was provided. Whoever gave money for this purpose, whether members of the company or citizens-at-large, must have given it with the understanding that the furniture should remain in the room and that it should be appropriated for the use and benefit of the company, as it might be constituted from time to time. The purpose was to aid and improve the efficiency of the organization by furnishing a convenient and attractive room for its use as a body, and not by making a gift of property to the individuals who composed the company at that or any other particular time, which they might distribute among themselves or sell for their individual emolument.

It is more reasonable to consider that the title to the furniture was vested in the town, which owned the building and the engine, and which paid the engine-men, and the general expenses of maintaining the fire department. Whatever was given, was given in law to the town, for the purposes named. It is unnecessary here to consider whether the town took it on a trust which could be enforced; whether it did or not, it would be equally entitled to recover. But the legal title must be somewhere. It is not in the individuals who compose the company. The company has no corporate existence. And on the facts stated, we are satisfied that the legal title is in the town.

In *Perry v. Stowe*, 111 Mass. 60, no support is found for the support of the defendant.

Exceptions overruled.

BISBEE v. FADDEN.

June 18, 1885.

REPLEVIN — DEMAND.

No demand is necessary before commencing an action of replevin if the defendant comes tortiously into the possession of the property and tortiously detains it from the party entitled thereto.

Action of replevin to recover certain articles of furniture, a trumpet and officer's badges, used by a fire engine company, known as the Washington Engine Company, of Holbrook. At the trial in the superior court, the plaintiffs offered evidence tending to show that the town of Holbrook at the April town meeting, 1879, voted to accept the statute law in relation to the fire department. Pub. Stat., chap. 35, §§ 28-39. The statute provides for the creation of a fire department, by appointment, in April of each year, of engineers, to hold office from May first following, to May first of the next year, and the enginemen, constituting the fire department, are appointed by the engineers. After the year 1879, engineers were appointed in the town of Holbrook pursuant to the vote, who yearly approbated enginemen to constitute the Washington Engine Company. The plaintiffs were the members of said company, approbated for the year beginning with May, 1882. The defendants were members of the same company for the previous year, beginning May 1, 1881, and with another member were appointed, by a vote of the company, passed April 29, 1882, a committee to take charge of the property for the old company for safe-keeping. T. L. White was appointed by the town of Holbrook as an engineer in May, 1882, and this writ was brought by his direction. The new company for 1882, after being approbated, met and organized May 15, 1882. No demand or request for the return of the property was made of the defendants after the new company was approbated. The defendants made a large number of requests to the court for instructions to the jury. The first six of these requests were to the effect that the action could not be maintained because no demand was made by the defendants. The seventh and eighth requests were as follows:

7. The fact that the plaintiffs were approbated as members of the Washington Engine Company, if they ever were, confers upon them no title or right of possession of the property replevied.

8. If the jury find on the whole evidence, that the action was commenced by

T. P. White without the direction or assent of the plaintiffs, and that they have not affirmed his action in the matter by any action taken by the plaintiffs as a body, their action cannot be maintained, and the verdict must be for the defendants.

The court declined to give the instructions asked for. The jury found for the plaintiffs and the defendants alleged exceptions.

G. F. Williams, for plaintiffs. *E. Avery*, for defendants.

C. ALLEN, J. It is plain that the defendants had no title to the property, and the principal question was whether they had possession of it under such circumstances that they were liable to an action of replevin by the plaintiffs. The evidence was quite sufficient to warrant a verdict for the plaintiffs. The defendants themselves testified that they took the property for safe-keeping for the old company, which had no title to it, or right of possession after the new company should be formed, that they anticipated no danger to the property where it was before they took it, and that they did not take it with the purpose of handing it over to the new company.

This taking, was by virtue of a vote passed by a portion of the old company appointing a committee to take charge of the company's property after May 1st. The whole property appears to have been taken under this vote. This property included the trumpet and officers' badges, as well as the furniture. The jury might well find that the taking was tortious, and the detention tortious, so that no demand was necessary. It was clearly to be inferred that the defendants took their action for the very purpose of keeping the property away from the new company, which would have the right to its possession and use. *Perry v. Stowe*, 111 Mass. 60; *Brookline v. Sherman*, ante, 114.

The fact that, at the time of the original taking, the plaintiffs had not been appointed as enginemen, would not, under these circumstances, render a demand necessary after their appointment. The defendants' act was a wrongful one at the time it was committed, and their detention of the property continued to be wrongful, and the plaintiffs, as soon as they became entitled to the possession, might assert it by an action. The first six requests by the defendants for instructions all rested on the theory that a demand was necessary. The general effect of the instructions which were given, was that the defendants had no right to keep the property for themselves or for the previous company, and if they intended to keep it from the new company, or for any other company, then, upon this issue, the plaintiffs were entitled to a verdict; while, if the taking of the property was for the purpose of safe-keeping, then the plaintiffs must make a demand, or they could not maintain replevin. These instructions were sufficiently favorable to the defendants; and the six first requests were properly refused. The seventh request was properly refused as inconsistent with the doctrine of *Perry v. Stowe*, above cited; and we see no foundation for the eighth request.

Exceptions overruled.

[5 Wait's A. & D. 481-4; 25 Alb. L. J. 438.]

NOYES v. JOHNSON.

June 19, 1885.

CONTRACT OF SALE — TITLE BY ADVERSE POSSESSION.

Under a contract for the sale of land implying that the purchaser should receive a good title by record.

Held, that a title by adverse possession was not such a title, and that the purchaser was not bound to accept it.

Bill in equity for the specific performance of a contract for the sale of land in Nahant. The terms and conditions of the sale were as follows: "Ten days given to examine title, and if, upon examination of the records, it shall appear that any material act or thing is necessary to be done or performed, in order to perfect the title to said premises, which the seller is unable to do or perform within a reasonable time, not exceeding sixty days from date hereof, then the sale to be void at the option of either party. Purchaser to pay all of the taxes for the current year as assessed on the 1st of May, 1883. The whole amount of

the purchase-money to be paid in cash on delivery of the deed. Five hundred dollars to be paid down into the hands of the auctioneer to bind the bargain, and to be forfeited to the use of the seller in case the purchaser shall fail to comply with the residue of the terms of sale, or be refunded to him in case of material defect in the title, which cannot be remedied as above provided. But a forfeiture of said sum shall not release the purchaser of his liability under the contract. Interest to be made square to the day of settlement. Settlement to be made and deed to be delivered at the office of _____, at or before the expiration of ten days from day of sale." The defendant, on being tendered a deed, refused to accept the same on the ground that the title to one of the lots was defective. The case was heard by a single justice, FIELD, J., upon pleadings and agreed facts, and was by him reserved for the consideration of the full court.

F. V. Balch & E. M. Johnson, for plaintiff. *C. H. Fiske & G. A. Dary*, for defendant.

C. ALLEN, J. By the terms and conditions of the sale, it was implied that the purchaser should have a good title by record. No purchaser could reasonably be held to expect, from these terms and conditions, that a title by adverse possession depending upon a long and difficult investigation of facts, would be offered to him. The title may be good; but a purchaser, under such terms and conditions, ought not to be held bound to accept it, and assume the burden of defending it against all comers. *Butts v. Andrews*, 136 Mass. 221.

Bill dismissed.

CAVANAGH v. CITY OF BOSTON.

June 19, 1885.

NUISANCE — ABATEMENT — POWER OF CITY GOVERNMENT — EMINENT DOMAIN.

The city has no power to appropriate private property, without the owners consent, for the purpose of abating a nuisance existing on adjacent lands. Such power can only be conferred by statute providing due compensation for the property taken.

Such acts being beyond the power and authority of the common council the city cannot be held responsible in damages.

It seems, that the liability, if any, rests upon the individuals who performed the acts.

Action of tort to recover damages by reason of the construction of a dam across South bay in the city of Boston. At the trial in the superior court, the plaintiffs offered evidence tending to show that they were at the time of doing the acts complained of, and had ever since been, the owners in fee of Wales island and the flats adjacent thereto, situated in South bay; that at a meeting of the common council of the city of Boston, held June 3, 1880, the following order was passed: "Ordered, that the board of health be requested to cause to be abated the nuisance, at present existing in the South bay east of the New York and New England railroad, and the expense attending the same to be charged to the appropriation for health." At a meeting of the board of aldermen, held June 10, 1880, the said order was referred to the committee on health, in concurrence with the vote of the council, passed June 3. At a meeting of the common council, held July 12, 1880, the committee on health recommended the passage of the following order:

"WHEREAS, The board of health has declared a nuisance exists, consisting of effusive flats on the territory between the track of the New York and New England Railroad Company and Dorchester avenue, which can be abated by the construction of a dam, at an estimated cost of \$4,600, and as the annual appropriation, granted to said board, does not contemplate such an expenditure, it is hereby

"Ordered, That the committee on finance be directed to furnish the means for the abatement of the aforesaid nuisance."

This report was accepted and the order passed by both branches of the city government. At a meeting of the board of aldermen, held July 26, 1880, the committee of finance reported the following order granting the request:

"Ordered, That the auditor of accounts be, and is hereby authorized to transfer from the reserve fund, the sum of \$4,600, and that said sum constitute a special

appropriation for the purpose of constructing a temporary dam across South bay between the New York and New England railroad track and Dorchester avenue, for the abatement of the nuisance on the flats therein located; and that the board of health is hereby authorized to have said temporary dam constructed at an expense not exceeding the sum herein provided."

At a meeting of the common council, held July 29, 1880, the report and order of transfer of \$4,600 from the reserved fund for the abatement of the nuisance was passed in concurrence.

Upon the petition of the city engineer, the State board of harbor commissioners also granted a license to construct the dam. The defendants offered as evidence, subject to the plaintiff's objection, the record of the board of health of the city of Boston, from which it appeared that, at a meeting of the board, held September 6, 1880, it was ordered that the city engineer be requested to abate the nuisance, by erecting a dam, according to the plan proposed, at a cost not exceeding \$4,600.

Upon all the evidence in the case, the court ruled that the action could not be maintained, and directed a verdict for the defendant, and the plaintiffs alleged exceptions.

W. E. L. Dillaway, for plaintiffs. *T. M. Babson*, for defendant.

C. ALLEN, J. The difficulty with the plaintiffs' case is, that neither the board of health nor the city government had any authority to abate the nuisance in the manner which was adopted. That manner was by the erection of a dam, the easterly portion of which was built across the flats and upon the upland of the plaintiffs, for the purpose of raising the water so as to flow over other flats away from the flats of the plaintiffs'; the plaintiffs' evidence tending to show that no nuisance existed on their own flats. This was an occupation of the plaintiffs' land, which the city had no power to make without the plaintiffs' consent. No statute conferred the power of appropriating the plaintiffs' property for public uses, nor provided compensation to them for damages sustained by such appropriation. When the preservation of the public health has been thought to require such acts as the filling of land or raising the grade over a considerable extent of territory, or the covering of land with water, or the removal of dams from streams in order to allow better drainage, or to prevent the accumulation of offensive materials, it has been usual to pass statutes giving the requisite authority and making due provisions for the protection of the property of individuals. Instances of such legislation may be found in Stat. 1867, chap. 308, which was before the court for consideration in *Dingley v. Boston*, 100 Mass. 544; and *Cobb v. Boston*, 109 id. 438; S. C., 112 id. 181. In Stat. 1869, chap. 378, which was under consideration in *Phillips v. Co. Comm'rs*, 122 Mass. 258; S. C., 127 id. 262. In Stat. 1872, chap. 299, which was before the court in *Cambridge v. Munroe*, 126 Mass. 496; *Bancroft v. Cambridge*, id. 438; and *Read v. Cambridge*, id. 427. In Stat. 1873, chap. 340, which was considered in *Farnsworth v. Boston*, 121 Mass. 173. The general power vested in boards of health and the city governments is not adequate to dealing with such cases if it is impossible to come to an agreement with the owners of property to be affected. There is no general statute vesting in these bodies the right of eminent domain or making provision for the compensation of persons whose property may be taken. The general phrases contained in the city ordinances which have been referred to, authorizing the city council to exercise the powers vested in them for the preservation of the public health in any manner which they may prescribe, cannot be held to give them authority to take private property for public uses. No such power existed in the body which enacted the city ordinances. In the present case, the acts of which the plaintiffs complain amount to an occupation of their land for the purposes of building a dam thereon in such a manner that clearly it was an appropriation of the land to a public use. It was not a mere transient entry and occupation, though the dam was styled temporary, but there was a substantial and practically exclusive occupation of a portion of the plaintiff's land. Such an act was clearly illegal. It does not fall within the principle upon which a brief or momentary occupation of private lands is sometimes justified through necessity, as for example, for the purpose of making an arrest, or for the perambulation of the boundaries of towns

by the selectmen, or of ascertaining boundaries for public purposes. *Winslow v. Gifford*, 6 Cush. 327. The present case is a much stronger one than *Brigham v. Edmonds*, 7 Gray, 359. See, also, *Baker v. Boston*, 12 Pick. 194. No doubt the plaintiff might have obtained an injunction to restrain the prosecution of the work if he had sought his remedy in that form. *Boston Water Power Co. v. Boston and Worcester Railroad*, 16 Pick. 525. The acts done having been beyond the authority and power of the city to do, the city cannot be held responsible in damages for what was done under the supposed authority of illegal and void votes. *Spring v. Hyde Park*, 137 Mass. 554; S. C., 50 Am. Rep. —; *Lemon v. Newton*, 184 id. 476; *Cushing v. Bedford*, 125 id. 526. But the liability, if any, rests upon the individuals who performed the acts, as in *Brigham v. Edmonds*, 7 Gray, 359.

Exception overruled.

[29 Eng. Rep. 148.]

CLARK v. THE EASTERN RAILROAD CO.

June 19, 1885.

BAILMENT — NEGLIGENCE — GRATUITOUS BAILEE.

Failure to provide suitable store-room, with reference to safety from fire, and proper means for extinguishing fire, is not of itself such gross negligence as renders a gratuitous bailee liable for loss occurring from accidental fire.

Action of contract to recover damages alleged to have been caused by the destruction of the plaintiffs' goods by a fire occurring at the station of the defendant at Salem, on the night of April 6-7, 1882. At the trial in the superior court it appeared that on fast day, April 6, 1882, one Nicholson, a commercial traveler for the plaintiff's firm, came from Gloucester to Salem on the Eastern railroad; buying his tickets and checking his two trunks containing hats, caps and straw goods at Gloucester. He arrived at Salem at about 6:10 P. M., and not finding the kind of conveyance necessary to carry the trunks to the hotel, they were left at the station and placed in the baggage-room. That night there was a fire in the baggage-room of the station. The plaintiffs contended that the baggage-room in which his goods were placed, was unsuitable and the contents in the room were of an inflammable character; and also, that the means provided for the extinguishment of a fire in such circumstances were grossly insufficient. At the close of the evidence in the case the court ruled, that there was no evidence upon which the jury could find a verdict for the plaintiffs, and directed them to return a verdict for the defendant. The plaintiffs alleged exceptions to the ruling of the court.

S. J. Thomas, for plaintiffs. *R. Olney & S. Butler*, for defendant.

C. ALLEN, J. The plaintiffs' case rests on the proposition that the baggage-room provided by the defendant was not a suitable place for the storage of trunks, with reference to safety from fire, and that the defendant did not provide proper means for extinguishing fires. Such omission is not of itself gross negligence for which a liability can be imposed on a gratuitous bailee to make good a loss, happening from an accidental fire. The defendant, in point of fact, appears to have put the plaintiffs' trunks in the only place it had for the purpose of keeping trunks, and certainly it was under no obligation to the plaintiffs to provide a better place. In this view it is not necessary to consider the further proposition of the defendant, that since the plaintiffs' property was put into the defendant's custody without its consent, and solely through the wrongful and fraudulent conduct of the plaintiffs themselves, all the consequences must be borne by them exclusively.

Exceptions overruled.

[Moak Van Sant. Pl. 858; 3 Wait. A. & D. 617; 26 Am. Rep. 330.]

MAGUIRE v. PARK.

June 20, 1885.

REPLEVIN — MACHINERY — FIXTURES.

Machinery separately constructed, and secured to a building by bolts, screws, nails or cleats, which is adapted for use in any building and which can be removed without injury to itself or the building, and it not appearing that the machinery was placed in the building to carry out the purposes for which it was erected, or to permanently increase its value for occupation, is not a part of the realty.

Action of replevin to recover certain machinery in a planing-mill and wheelwright-shop at Woburn. The case was heard on agreed facts. The superior court gave judgment for the plaintiff, and the defendant appealed. The facts appear in the opinion.

W. B. & J. P. Gale, for plaintiff. *G. C. Abbott*, for defendant.

FIELD, J. The plaintiff is the assignee in insolvency of Lawrence B. Norris, and claims title under a mortgage of the machinery, as personal property, given September 18, 1875. The defendant claims title to the machinery under, a mortgage of the land and building, given November 29, 1870. There was no engine, boiler or machinery in the building when this mortgage was given. The engine, boiler, shafting and a part of the machinery were put in the building by the mortgagor, and a part of the machinery was subsequently put in by Norris, who was the third mortgagee of the land and buildings, and took possession under, and foreclosed his mortgage June 22, 1877. The defendant took possession April 30, 1883, having purchased the land and buildings at a sale under the power of sale, contained in the first mortgage. The question is whether the machinery was so affixed to the building that it became real property, as between mortgagee and mortgagor. The parties filed an agreement that the auditor's report might be taken as an agreed statement of facts. On this report and agreement the superior court found for the plaintiff, and assessed damages in the sum of \$1, and ordered judgment for the plaintiff, from which the defendant appealed. The description in the auditor's report of the machinery and of the manner in which it was affixed to the building is somewhat brief, and it is plain that all the facts are not before us that were before the auditor, as his view of the premises would be evidence before him. There are no questions of law raised in his report, and the auditor found for the plaintiffs. It is not found for what purposes the building was erected, and to what uses it was by its construction adapted, or that the removal of the machinery would in any way injure the building or impair its value for any of the uses to which it was adapted.

All of the machines appear to have been separately constructed and adapted for use in any building in which they could be placed, and were secured in position by bolts, screws, nails or cleats, and could be removed without injury to themselves or the building. The engine, boiler and necessary shafting are not included in the writ and are not replevied. It has been said that "the object, effect and the mode of annexation must all be considered in determining whether any specific articles are removable fixtures." *Leonard v. Stickney*, 131 Mass. 541; *Allen v. Mooney*, 130 id. 155.

It does not appear in the present case that the building was a mill or machine-shop when the mortgage under which the defendant claims was given. It does not appear that this machinery could not be removed and other machinery of a different kind put in and the building be used as beneficially for the new business as for the old. It does not appear that the machinery was put into the building "to carry out the obvious purpose for which it was erected or to permanently increase its value for occupation." *McConnell v. Blood*, 123 Mass. 47; S. C., 25 Am. Rep. 12.

There is great difficulty in determining, as matter of law, upon an agreed statement of facts, whether articles of the kind here described have or have not become a part of the realty, particularly when all the facts which would be competent upon the question are not contained in the agreed statement. The indications, afforded by the mode of annexing a machine to a building and by the

use made of it, must clearly show an intention of permanently making it a part of the building to enable the court, from these facts alone, to declare that as matter of law it is a part of the realty in cases where the machine is portable, complete in itself, and can be used elsewhere as well as in the building, and can be removed without injury to itself or to the building. If this case had been submitted to the superior court upon the auditor's report without other evidence, it would certainly have been competent for that court to have affirmed the finding of the auditor, in favor of the plaintiff. It is not entirely clear what the effect is, of the parties submitting the case to that court upon the auditor's report as an agreed statement of facts, if the auditor has found that the plaintiff is entitled to the property, and if that is a finding upon a material question of law and fact. However that may be, we are inclined to think that the case falls within the principles of the decision of *Hubbell v. East Cambridge Savings Bank*, 132 Mass. 447; 8 C., 42 Am. Rep. 446, and that the judgment must be affirmed.

Judgment affirmed.

ADAMS, JR., Trustee, v. ADAMS.

June 20, 1885.

WILL — CONSTRUCTION OF — DISTRIBUTION.

Trustees under a will were directed to pay the net income of the residue of the testator's property (not required for the payment of two annuities) to his wife during her life, and at her death to distribute the fund (except so much as might be required to pay the two annuities) among those who would take as distributees of his personal estate had he died intestate, immediately after the death of his wife. At the death of his wife the trust fund contained bonds for the payment of money with semi-annual interest coupons attached, payable at different times. The surviving trustee had collected the coupons as they matured.

A bill in equity being brought by the trustee for instructions as to whether the amount received by the trustee in payment of the first set of coupons which matured after the death of the testator's widow were apportionable between her estate and the distributees under the will, and if so, in what manner the apportionment should be made.

Held, that the moneys received by the trustee from the coupons not payable at or before the time of her death, being coupons for interest for six months, which had begun to run at the time of her death, should be apportioned according to the proportional part of the six months which in each class of coupons had elapsed at the time of her death.

Bill in equity by the surviving and remaining trustee of the will of Peter Chardon Brooks, for the instructions of the court as to the disposition of the trust fund. The bill was taken for confessed by some of the defendants, and the case was reserved for the consideration of the court, upon the bill and answer of the other defendants. The facts sufficiently appear in the opinion.

F. C. Welch, for plaintiff. *F. E. Parker & C. E. Stratton*, for different defendants.

FIELD, J. Peter C. Brooks, who died June 3, 1880, by his will gave the residue of his property to trustees, upon trust to pay all the net income (not required for the payment of two annuities) to Susan Oliver Brooks, his wife, so long as she should live, and, at her death, to distribute the fund (excepting so much as might be required for the payment of the two annuities), among those who would take as distributees of his personal estate by the laws of this Commonwealth, if he had died intestate, immediately after the death of his wife. His wife died February 2, 1884. At her death the trust fund contained bonds for the payment of money issued by different corporations, or by the United States, with semi-annual interest coupons attached, payable at different times, determined by the day when the principal sum of each of the different classes of bonds became payable. These coupons the trustee has collected as they matured. The bonds themselves were not over-due. The question is whether the amounts received by the trustee in payment of the first set of coupons, which matured after the death of Mrs. Brooks, are apportionable between her estate and the distributees under the will of Mr. Brooks; and, if they are apportionable, in what manner the apportionment should be made. If they are apportionable it is by virtue of Pub. Stats., chap. 136, § 25; Gen. Stats., chap. 97, § 54, as they are not apportionable at common

law or in equity. *Dexter v. Phillips*, 121 Mass. 178; S. C., 23 Am. Rep. 261. That the coupons can be severed from the bonds and thus become separate and independent obligations with all the incidents of debts that are distinct from the principal obligation is true; and one suggestion is that each bond and its coupons are, in legal effect, so many distinct obligations, payable without interest, at different fixed times, and that an investment in such obligations is an investment in non-interest bearing securities. If this view were adopted in its full scope, the result would be that a trustee under such a trust ought not to make such an investment, and that the amounts received from coupons that matured and were paid during the life of Mrs. Brooks ought not to be regarded as wholly income, although the question would remain, whether the present worth of each obligation, at the time it was purchased, ought not to be computed in order to ascertain what portion of the sums received should, as between successive takers, be regarded as principal, and what, as income. It is evident, however, that this is not the real nature of the obligation of a coupon bond. The coupons are promises to pay certain sums of money at certain times expressly as interest on the bond. They differ from the ordinary promise to pay interest semi-annually, contained in promissory notes, only in their capacity of being detached from the bond and thus acquiring all the incidents of a distinct negotiable written promise. If a trustee should, immediately on the purchase of a coupon bond, cut off the coupons and sell them, the question might not arise of the proper distribution of the proceeds, as between principal and income of the trust fund, because the proceeds might be regarded as a part of the principal to be re-invested, but questions would arise of the propriety of the trustees holding as a part of the trust fund a bond payable on time without interest, or of the duty of the trustees to pay, thereafter, to the life tenant the accretions in the value of such a bond occasioned by lapse of time. While the trustee holds the bonds and its coupons, as part of the same investment, the coupons, as they mature and are paid, are regarded as income received from an investment of the trust property. *Iaraden v. Iarabee*, 113 Mass. 430. In *Granger v. Bassett*, 98 id. 462, the court held that "the General Statutes (chap. 97, § 24) do not change the rule of law, which held dividends from the profits of business of incorporated companies, not to be apportionable. *Foote, Appellant*, 22 Pick. 299. The distinction between dividends and coupons is not only that dividends are contingent and uncertain in amount, but that they do not in any sense exist as dividends or as the separate property of the stockholders until they are declared. The many cases in which stock dividends have been declared to be capital, and dividends payable in money to be income, all proceed upon the ground that it is the declaration of the dividend which creates it as a dividend, and the form of the declaration, as shown by the votes of the corporation, construed in the usual way, determines the character of the dividend, whether it is a distribution of capital stock or a division of profits. *Minot v. Paine*, 99 Mass. 101; *Daland v. Williams*, 101 id. 571; *Rand v. Hubbell*, 115 id. 461; S. C., 15 Am. Rep. 121; *Gifford v. Thompson*, id. 478.

But coupons attached to bonds are absolutely due and certain to become payable at a fixed time; and although the amount payable, in the technical language of the law, cannot be said to accrue from day to day, yet the proportionate part of the coupon, which, at any time within the half year covered by it, is earned as interest, on the principal sum of the bond, can be exactly computed, and its character as interest becoming due, is not and cannot be changed by subsequent events so long as the coupons remain attached to the bonds or are held by the same person who holds the bond as a part of the same purchase or investment. The words "annuity, rent, interest or income," in Public Statutes, chap. 136, § 25, were rightly held not to include dividends of corporations, because dividends are not fairly within the natural meaning of these words, and undeclared dividends differ substantially from interest or income. But, so long, at least, as the bond itself, with the coupons, is held by the trustee as part of one purchase or investment, the coupons are promised to pay interest on the principal sum of the bond and the amounts received in payment of such coupons, at or after their maturity, are literally and substantially amounts received for interest, payable on the principal obligation, and we have no doubt these amounts are within the meaning

of the words "interest or income" in Public Statutes, chap. 136, § 25. There was much criticism at the bar upon the phraseology of Public Statutes, chap. 136, §§ 24, 25, which were doubtless intended as a re-enactment of Stat. 1848, chap. 310. It was said that the first section of Stat. 1848, chap. 310, was only declaratory of the common law, and that the second section excepted from its operation the first year from the death of the testator, and treated rent, interest, and income as well as annuities payable yearly and having each a "current year." We are concerned with these criticisms, only so far as it is necessary to determine the meaning of the words "such annuity, rent, interest or income, for the then current year, shall be apportioned, and such person, or his representatives, shall be entitled to receive a proportional part thereof." The general purpose of the statute was, not to take from the life tenant any thing which, by the common law, was absolutely his property, but to give to him or his representatives a share of an annuity or of rent, interest or income, which the common law, refused to give, on the ground that the annuity, rent, interest or income could not be apportioned. The language of the statute is appropriate to an annuity given by the testator and payable yearly from his death, and grammatically the provisions of the statute attach equally to annuities, not payable yearly, and to rent, interest and income, but the general intent of the statute must prevail over the grammatical construction. A trustee's account would usually be made up yearly, reckoning from the death of the testator, and the "then current year" may be taken to refer to the year running when the life tenant died, or the contingent event happened, and the statute may be taken to provide for the apportionment of the income in making up the accounts for that year. The established method of making an apportionment is to divide the amount received (when money is payable periodically at fixed times), according to that proportional part of the whole period, for which the money is payable, which had elapsed at the time of the death of the life tenant, or at the time of the happening of the event which terminated the right of the tenant. We are satisfied that the statute did not intend to abolish this rule and establish a different one. The amounts received by the trustee from the coupons not payable at or before the time of the death of Mrs. Brooks, and which were coupons for interest for six months, which had begun to run at the time of her death, must be apportioned, according to the proportional part of the six months, which in each class of coupons had elapsed at the time of her death.

So ordered.

[14 Eng. Rep. 419; 25 Id. 799; Id. 172.]

ROGERS v. ROGERS.

June 20, 1885.

CONTRACT—BREACH—SUBSTITUTION OF NEW CONTRACT.

When, upon the refusal of one party to fulfill an agreement, the same parties enter into another agreement which is fully carried out, covering substantially the same grounds as the first but on different terms, it will be deemed, unless it appears that such was not the intention of the parties, a substitution of a new contract for the old.

Action to recover damages for breach of a contract to sell and deliver goods to the plaintiffs in Boston. At the trial in the superior court, without a jury, the plaintiffs introduced testimony tending to show that on or about July 8, 1879, the defendant, a manufacturing corporation in Connecticut, by its agent, orally agreed to sell and deliver to the plaintiffs, in Boston, from time to time, as ordered by them, such silverware as they might need in their business and order during the season, that is between July and January 1, 1880, at stipulated discounts from certain list prices, and that the goods were to be paid for at the end of each month; that pursuant to this contract, and on the day of the date of it, and at different times previous to October 14, the plaintiff ordered goods, a part of which were delivered and paid for according to the contract; that on October 14, the defendant, by letter of that date, repudiated its contract and refused to fill any of the unfilled orders, or to receive and fill future orders, except upon the express promise on the part of the plaintiffs to pay for the goods at a less rate of dis-

count than that stipulated in the contract, the effect of which was to advance the price of the goods; that the plaintiffs, not being able to buy the goods elsewhere, agreed to buy them of the defendant during the remainder of the "season" upon the new terms demanded by the defendant, having telegraphed acceptance of the terms October 24. It was also in evidence that the plaintiffs, from time to time, during the remainder of the "season," ordered goods of the defendant and they were shipped and paid for according to an agreement contained in the defendant's letter of October 14, and plaintiff's telegram of October 24. It was also admitted that the orders unfilled October 14, were subsequently filled and paid for at the advanced prices. The defendant contended that there was no contract between the parties; that if their dealings resulted in a contract no action can be maintained thereon under the statute of frauds; that the defendant's letter of October 14 and plaintiff's telegram of October 24 constituted a rescission of the same; that the defendant's revocation of the contract, if any, by the letter of October 14 was lawful; that the payment of such advanced prices were voluntary payments, and that upon all the evidence the plaintiffs could not maintain their action. At the request of both parties the case was reported for the consideration of the supreme judicial court for the determination of the questions of law.

D. C. Linscott, for plaintiffs. *Boardman & Tyng*, for defendant.

FIELD, J. We infer from the report that the court found that the contract was not merely an offer by the defendant to sell, which would have been revocable at any time, except so far as it had been accepted by the plaintiffs in giving orders, and would thus be a contract only to the extent of those orders; but that it was a contract, whereby the plaintiffs agreed to buy, and the defendant agreed to sell, such of the goods dealt in by the defendant as the plaintiffs needed in their trade during the time specified. See *Dickinson v. Dodds*, 8 Ch. Div. 463; S. C., 16 Eng. Rep. 854.

The plaintiffs were bound in law to pay for the goods sent after the new agreement was made, according to the prices stipulated in that agreement. In this Commonwealth the delivery of the goods by the defendant under the new agreement, whether they were sent to fill the orders given before October 14, or the orders given after, is considered a sufficient consideration for the new promise of the plaintiff. Whether the new agreement was substituted for the old, and thus operated as a rescission or discharge of it, must be determined by the intention of the parties, to be ascertained from their correspondence and conduct. *Cooke v. Murphy*, 70 Ill. 96; *Laurence v. Dover*, 28 Vt. 264; *Stewart v. Keteltas*, 36 N. Y. 388; *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Peck v. Requa*, 13 Gray, 407; *Munroe v. Perkins*, 9 Pick. 298; *Holmes v. Doane*, 9 Cush. 135; *Stearns v. Hall*, 9 Cush. 81; *Cummings v. Arnold*, 3 Metc. 486.

If we assume that the original agreement was sufficiently definite to constitute a valid contract, as it was a continuing contract, the parties could clearly substitute for it a new contract, which should determine their rights and liabilities after the new contract was made, and this would operate as a waiver or discharge of the first contract as to future orders and deliveries, unless it appeared that the first contract had been broken by an absolute refusal on the part of the defendant to perform it, and that the new contract was not intended to be a discharge of the breach. As to the orders given before October 14, which the defendant had refused to fill, if the new contract by its terms covered those, we think the same rule holds. If the parties agreed that these orders should be filled at the prices stipulated for in the new contract, without considering whether the new agreement would of itself be a discharge of these partial breaches, performance of the new agreement would operate as a discharge, or an accord and satisfaction, unless it appeared that such was not the intention of the parties. Such a substantiated agreement, *prima facie*, takes the place of the original agreement as to every thing remaining unperformed. Our construction of the correspondence and conduct of the parties is that it was not understood or intended by both parties that the plaintiffs should retain their right of action, if they had any, for the alleged breach of the original contract.

Judgment for the defendant.

BENTON v. TRUSTEES OF THE CITY HOSPITAL OF BOSTON.

June 20, 1885.

NEGLECTANCE—TRUSTEES OF PUBLIC CHARITY.

The trustees of the City Hospital of Boston, as such, possess no property. They are only managing agents for the city in a work from which no profit or advantage is received.

No negligence being shown on the part of the trustees in the appointment of a superintendent they are not liable for an injury caused by his negligence.

Action of tort to recover for personal injuries sustained by falling down a flight of stairs at city hospital in Boston, by reason of the alleged unsafe condition of the board covering on the stairs. At the trial in the superior court there was evidence tending to show that the stairs consisted of eleven or twelve steps, made of plain hewn granite and were on the outside of the building and leading from the main floor to a paved walk and drive-way leading directly out of the grounds to Harrison avenue; that the superintendent had charge of the stairs, and about a week before the accident, covered them, or caused them to be covered, with boards; that these board coverings were put on in an improper and unsafe manner, and were, at the time of the accident, negligently left in an unsafe condition, and by reason thereof the plaintiff was injured; that the plaintiff was in said building on that day by an invitation, express or implied, from the superintendent of the hospital, elected by the defendant corporation under authority given by an act of the legislature, passed April 7, 1880, creating the defendant a corporation, and that in going over said stairs, she was in the exercise of due care.

It also appeared that the defendant is a corporation, created by an act of the legislature, passed April 7, 1880; ordinances, passed by the city of Boston, pursuant to such act; the act of the legislature, passed March 27, 1858, authorizing the city of Boston to establish the city hospital; and the by-laws and regulations of the corporation, showing the various officers chosen or appointed and their general duties, were made a part of the case. The court ruled that the action could not be maintained and directed a verdict for the defendant, and the plaintiff alleged exceptions.

C. G. Keyes, for plaintiff. T. M. Babson, for defendant.

FIELD, J. If the trustees are regarded as the trustees of a public charity then the case falls within the decision in *McDonald v. Mass. General Hospital*, 120 Mass. 432. There is no evidence of negligence on the part of the trustees as a corporation. There is evidence of negligence on the part of the superintendent, but there is no evidence that he was not a proper person to be appointed superintendent. But we think this is a hospital maintained by the city with such aid as may be derived from donations, and the sums received from paying patients. And that the trustees are, in a sense, managing agents, only in maintaining the hospital, subject to the laws and to the ordinances of the city. The donations, if any are ever made, must be made according to the terms of the gift. The money appropriated by the city of Boston must be used according to the terms of the appropriation. The sums received from paying patients are by the ordinance to "be credited to the account of the hospital," and by the exceptions are "used in the support of the hospital." All the funds are used for the purpose of maintaining the hospital in accordance with Stat. 1858, chap. 113. The corporation of the Trustees of the City Hospital of the City of Boston has in fact no property. Stat. 1868, chap. 113, is a special act and not a general statute. And it is permissive and not imperative; but these distinctions do not render the city liable for negligence in the management of the hospital. *Tindley v. Salem*, 137 Mass. 171. The trustees are a body created for the performance of a duty which, under the authority of the statute, the city of Boston has assumed for the benefit of the public, and from the performance of which no profit or advantage is received either by the trustees or the city. The trustees are no more liable for the negligence of their officers and agents than the city would be. *Hill v. Boston*, 122 Mass. 344; S. C., 23 Am. Rep. 332.

Exceptions overruled.

[85 N. Y. 117, 185; 29 Alb. L. J. 13; 29 Eng. Rep. 13.—Ed.]

MAGEE v. BOSTON CORDAGE COMPANY.

June 20, 1885.

MASTER AND SERVANT — NEGLIGENCE OF FELLOW SERVANTS.

While it is the duty of the master to furnish suitable machinery and keep it in proper repair, the making of such ordinary repairs as the use of the machinery required from day to day, may be intrusted to servants; and if a master employs competent servants for that purpose and supplies them with suitable means, the master performs his duty, and such servants are fellow servants with those employed to use the machine.

Action of tort in the plaintiff's name, by his next friend, to recover for a personal injury, sustained by the plaintiff, while at work upon hemp passing through a drawing machine, preparatory to being spun at the defendant's rope-walk. At the close of the charge to the jury in the superior court, the plaintiff requested the court to instruct the jury, "that persons charged with keeping the machinery in repair are not the fellow-workmen of the plaintiff, but are the agents of the defendant, charged with the execution of their duty to the plaintiff." The court declined so to rule, but instructed the jury "that for the purposes of this case, the persons charged with keeping the machinery in repair, if the repairs that they are charged with are simply the replacing of the parts of the machine, or straightening the parts of the machine which may have got out of shape by use, if those repairs are to be made from time to time in a mill, and when a machine is in place, such persons would be the fellow-workmen of a person employed upon the machine, although the machine is so out of repair as to require the reconstruction of its parts, the rule is different, and in that case the persons whose duty it would be to see to such reconstruction, would not be the fellow-servants of the persons employed upon the machine, the risk of whose negligence the employee assumes in taking the employment." The jury returned a verdict for the defendant and the plaintiff alleged exceptions.

S. J. Thomas, for plaintiff. *N. Morse & H. G. Allen*, for defendant.

FIELD, J. The exceptions describe a machine of such a kind, that the fact that it became clogged with the hemp was not necessarily evidence of negligence on the part of anybody. No evidence is recited in the exceptions that the machine was not a good one of its kind, and in good order up to the time the "hemp became entangled and passed over the drum and adhered to the teeth underneath." In the ordinary use of the machine the heckle pins would get out of order, and it does not appear that the pins were actually out of order when the plaintiff began work with the machine on the afternoon of the day of the accident, or at any time thereafter, until the hemp became entangled and was carried over the drum. The exceptions therefore failed to show that the instruction requested at the close of the charge was applicable to any evidence in the case.

But assuming that some instructions on the subject were necessary or appropriate, the instruction requested was too broad, while it was the duty of the defendant to furnish suitable machinery, and to keep it in proper repair, the making of such ordinary repairs as the use of the machine required, to keep it in order from day to day, may be intrusted to servants, and if the master employs competent servants for that purpose, and supplies them with suitable means, the master performs his duty, and such servants are fellow-servants with those employed to use the machine. *Johnson v. Boston Tow-boat Co.*, 135 Mass. 209; 8 O., 46 Am. Rep. 458.

The instruction given as applied to the evidence was substantially a correct statement of the law.

Exceptions overruled.

[21 Eng. Rep. 520; 30 Id. 347; 31 Id. 287; 34 Am. Rep. 621.—Ed.]

SUPREME JUDICIAL COURT OF MAINE.

MACHIASPORT v. SMALL.

February 11, 1885.

BOND—TAX COLLECTOR—PLEADING—BURDEN OF PROOF—ILLEGAL ASSESSMENT—INVALID WARRANT.

In an action on the bond of a collector of taxes the plaintiff must show that the collector was clothed with a legal assessment and warrant, or that he has actually collected taxes. Then upon plea of performance, the burden is upon the defendant to show that he has faithfully performed the duties of his office, or duly accounted for taxes actually collected. If he fails judgment should be entered for the penal sum of the bond. After such judgment the defendant may have the bond chancered, by the aid of an auditor, and execution will issue for the sum found due.

When the penalty of a bond of defeasance is sued for and breaches are not assigned, the defendant may have over of the bond, and if it have a condition, the court on motion will order the plaintiff to assign, the breaches upon which he relies, and the defendant may interpose his defense by way of brief statement under the general issue.

When only two assessors have been qualified the assessment is illegal.

An assessor's warrant, which fails to show what year's State tax is included, or the date of the town meeting at which the town tax was voted, or the dates when the collector should pay the State and county treasurers respectively, is invalid.

John C. Talbot, for plaintiffs. *McNichol & Sargent*, for defendants.

HASKELL, J. Debt upon the bond of a collector for taxes for the town of Machiasport, conditioned for the faithful performance of his duty for the year 1876.

The plea was *non est factum* with a brief statement of performance.

The plaintiffs read in evidence the bond, the record of the assessment of the tax for the year 1876, the commitment of the same to the collector, and the warrant to him for the collection of the tax. It was admitted that defendant Small was collector of taxes for the plaintiffs for that year. There was no other evidence showing a breach of the bond. The case comes forward on report.

Had the taxes been legally assessed, and the commitment and warrant been in legal form, the collector would have been chargeable under his bond for the taxes so committed to him for collection. *Inhabitants of Trescott v. Moan*, 50 Me. 347. And the plaintiffs would have made out a *prima facie* case. The burden would then have rested upon the defendant to substantiate the plea of performance by showing a faithful discharge of the duties of his office. This he is not required to do, until the plaintiffs have shown him legally bound to perform those duties. The law did not require him to execute a precept that could afford him no protection, nor to collect a tax illegally assessed; until he is shown to be legally bound to perform official duty, he is not called upon to justify its performance. Under a plea of performance to a suit upon an official bond, the defendant is not required to justify, until he is shown to be legally bound to perform faithfully some particular duty, or to be chargeable with some particular property. In this case, the defendant Small is not chargeable with the collection of any tax, until he is shown legally bound to collect it, that is, until he has been provided with a sufficient precept, giving him lawful authority so to do.

Much confusion has arisen as to when proof is required to support a plea of performance to a suit upon a bond. This is largely due to the relaxation of the common-law rules and methods of pleading. When a special plea of performance is interposed in such cases, the plaintiff is required to make replication assigning the breach relied upon, and if the bond is for the performance of covenants and agreements, several breaches may be assigned, and the jury must assess the damages, when on issue framed to them, they find the condition broken. R. S., chap. 82, §§ 30, 32.

After replication, the defendant must either demur or rejoin, and, if the rejoinder is a traverse, then on issue taken the burden rests upon the plaintiff to prove the breaches assigned, and, if the bond be one for the performance of covenants and agreements, to prove the damages. *Philbrook v. Burgess*, 52 Me. 271; *McGreg-*

ory v. Prescott, 5 Cush. 67. See *Bailey v. Rogers*, 1 Me. 186. But, if the rejoinder is an affirmative plea supporting a plea of performance, the burden rests upon the defendant to maintain the truth of his plea, unless the bond is conditioned for the performance of covenants and agreements, when the burden rests for the plaintiff to prove both the breach of it and the damages. *Philbrook v. Burgess*, *supra*, and cases cited. So when performance is pleaded by brief statement to a suit upon a bond, if it be conditioned for the performance of covenants and agreements, the burden rests upon the plaintiff to prove its breach and the damages; but if the bond is simply a bond of defeasance, then the burden is upon the defendant to prove performance as alleged in his brief statement, and the issue is for the jury to find whether the condition has been broken; and if they find that it has, the judgment goes for the penalty of the bond, and, on motion that the penalty be chancered as the equitable rights of the parties may require, the court, with the aid of necessary auditing officers, fixes the amount for which execution should issue.

The bond in this case is of the latter class. It is conditioned to be void upon the faithful performance of official duty. If it is suggested that no further proof is required under the rule above stated, than for the plaintiffs to read in evidence this bond, a sufficient reply is that the bond, when so put in evidence, shows an official duty, upon the performance of which the bond is to be void. The law does not cast that duty upon the collector until the plaintiff shows him legally chargeable therewith. That is, until a condition of things appears upon which the bond becomes effective, the defendant has no performance required of him. So if the plaintiffs are unable to charge the defendant Small with a legal duty to perform for want of a legal tax, a legal commitment, or a legal warrant to collect the tax, they must prove that he actually received taxes, that is money, touching which the bond can operate, and then he is put to proof of his plea of performance. If he fails upon the issue, the penalty of the bond is forfeit, and the court will award execution for the actual damages sustained. *Philbrook v. Burgess*, *supra*; *Clifford v. Kimball*, 39 Me. 413. The same burden would rest upon the plaintiff if the issue was reached after a special plea of performance, for in that method of procedure, after the plea of *omnia performavit* the plaintiff would reply, either a legal tax, a legal commitment and a sufficient warrant, or that the defendant recovered certain moneys in the discharge of his office for which he had not accounted, and then, if the defendant denied either the sufficiency of the tax, or of the commitment, or of the warrant, or that any such documents existed, or that he received the moneys specified, it would be a negative plea, either raising an issue of law or fact, which the plaintiff must sustain and prove; but if the defendant confessed these issues, and rejoined that he had performed his duty under his warrant, or had accounted for the moneys with which the plaintiffs had charged him, then he would have tendered an offer motive plea, and if the plaintiff took issue thereon, the burden would rest upon the defendant to prove his performance. So in suit upon a bond of defeasance, where the penalty is sued for, if breaches are not assigned in the declaration. The defendant may have oyer of the bond and an order from the court that the plaintiff specify the breaches upon which he relies, and then the defendant, by way of brief statement, can state the defense, showing how many of the affirmative facts alleged by the plaintiff he denies, and how far he takes upon himself the burden of proving his own performance of the conditions of his bond. This latter method is one that has been adopted in some of the important causes of this nature recently tried in this State.

The assessment, commitment and warrant in this case appear to be signed by only two assessors. It does not appear that the plaintiffs elected or had another assessor duly qualified to act during the year 1876. "Two assessors are not authorized to assess a tax when they alone have been qualified." *Inhabitants of Williamsburg v. Lord*, 51 Me. 599. Nor can they issue a warrant. *Sanfason v. Martin*, 55 id. 110. The warrant fails to show what years State tax was included in the assessment, also the precise date of the town meeting at which the town tax was voted, also when the collector should account to the State and county treasurers for the State and county taxes respectively. It authorizes the arrest of tax payers for want of property whereon to make distress immediately, without waiting twelve days as required by statute. Nor does it authorize the arrest of any

tax payer if he is possessed of "tools, implements and articles of furniture, which are by law exempt from attachment for debt." It is so unsound that a discussion of its merits would be idle. *Inhabitants of Orneville v. Pearson et al.*, 61 Me. 552; *Pearson v. Canney*, 64 id. 188; *Inhabitants of Harpswell v. Orr*, 69 id. 333.

The plaintiffs have failed to make out a *prima facie* case from the insufficient authority with which they clothed their collector to perform his duty, and he is chargeable under his bond only for taxes which he has actually received and for which he has failed to account.

The agreement of the parties does not stipulate what disposition shall be made of the case under the conclusions of this opinion; therefore, to afford complete justice to both parties, it is ordered that the action stand for trial.

PETERS, C. J., DANFORTH, VIRGIN EMERY and FOSTER, J.J., concurred.

RANDLETTE v. JUDKINS.

February 13, 1885.

TRESPASS — RAILROAD CONDUCTOR — STOLEN PROPERTY.

A railroad conductor, who permits a passenger to travel on his train, taking with him goods known by the conductor to be stolen, is not liable to an action therefor by the owner of the goods.

J. W. Spaulding & F. J. Buker, for plaintiffs. *Drummond & Drummond*, for defendants.

LIBBEY, J. The declaration in this case is clearly bad for want of a description of the property for the loss of which the action is brought. In trespass or case for the loss or injury to personal property, the thing taken or injured must be described with reasonable certainty. 1 Ch. Pl. 327; Oliver's Prec. 493, note. Here there is no description. The word "property," the only designation, is the most general that can be used, and it embraces every thing susceptible of ownership. But this defect may be cured by amendment.

The great question to be determined is the liability of the defendant, assuming the property to be sufficiently described. The averments in the declaration are, in substance, that the defendant on the 21st of January, 1883, was in the employ of the Maine Central Railroad Company as conductor of the night passenger train from Bangor to Portland; that on the night of that day four men boarded said train, run by the defendant as conductor, at Richmond, taking and carrying with them on board said train a large amount of stolen property, of the value of \$500, which was the property of the plaintiffs; that the defendant, knowing said property to be stolen, did willfully, corruptly, negligently and unlawfully permit said men to ride on said train, and convey and escape with said property; and that the defendant unlawfully took a portion of said stolen property as payment of their fares. It is not alleged that the four passengers had stolen the property, or that they were unlawfully in possession of it, or that the defendant knew that it was the property of the plaintiffs.

Assuming that the property consisted of chattels, the title to which could not pass by a delivery from a trespasser or thief to one taking for value without notice, does the declaration present a case of liability of the defendant? If the defendant took a part of the chattels in payment of the fares of the passengers he is liable as a trespasser to that extent, but that is a small matter. The main question is, whether the defendant is liable for permitting the four men to travel over the road with the property as their baggage, upon the facts averred in the declaration. If liable, upon what grounds does the liability rest? It is not claimed that there was a privity of contract between the plaintiffs and defendant, by reason of which the defendant owed any duty to the plaintiffs. Did the defendant owe the plaintiffs any duty as conductor of the train or otherwise? If not, he cannot be liable for a negligent performance or omission of it. "A legal duty is that which the law requires to be done or foreborne, to a determinate person, or to the public." Whart. on Neg., § 24. No such duty on the part of the defendant is averred, unless the law implies it from the facts alleged.

The defendant was conductor of the train. As such it was his duty to direct and control the running of the train in accordance with the regulations prescribed by the corporation and the requirements of law. The railroad is a public highway, over which all members of the public who are in a proper condition to travel in a public car, who pay the established fare, and conduct themselves properly, have a legal right to travel with luggage. It is the legal duty of the conductor to permit all such persons to enter the cars and travel over the road. For sufficient cause he may stop the train and eject a traveler from the train. He owes no legal duty to the public to stop his train and eject a traveler who is guilty of a felony; or to arrest such traveler, and hold him as a prisoner, and seize the property he may have in his possession. As a citizen he may have the right, if he see fit, to arrest a traveler guilty of a felony, and hold him till he can be properly prosecuted; but not being an officer, charged with the duty and having no legal warrant therefor, he is under no legal duty to do so, and thereby take upon himself the burden and hazard of justifying his act. Nor does he owe any duty to any member of the public to arrest a thief and seize and hold the stolen property he may have in his possession. Or to seize and hold for the owner, whoever he may be, goods which a traveler on the road may have taken and is carrying away as a trespasser. At most, under the plaintiffs' averments in this case, the four men were mere trespassers, carrying away the plaintiffs' property, the defendant having no authority from the plaintiffs to interfere with the property in any way. The defendant was not only under no legal duty to take the property, but he had no legal right to do so, for the possession of a trespasser is sufficient to give him the legal right to resist the taking by one having no authority from the owner.

The fact that the defendant took a part of the property for the fares of the passengers created no duty on his part toward the plaintiffs. It makes him liable only for the portion taken.

We have discussed the question involved, upon principle, there being no authorities directly in point cited by the learned counsel on either side; and it is said there are none. If so, the inference is pretty strong that the common law will not sustain an action against a railroad conductor on the facts alleged in this case.

Exceptions sustained.

Demurrer sustained. Declaration bad.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

FOUNTAIN v. WHELPLEY.

February 16, 1885.

ATTACHMENT — NOTICE OF TITLE — ESTOPPEL.

In an action against an attaching officer, it appeared that the plaintiff on the day of the attachment, on inquiry, informed the attorney who made the original writ and the officer who made the attachment that the property belonged to another person. He did not then know of a claim against the other person or of an intention to attach it as the property of such person. On receiving the information, the defendant told the plaintiff that he had a writ against such other person upon which he attached the property. Within ten minutes thereafter the plaintiff notified the officer of his own title, demanded the property and attempted to take it but was prevented by the officer.

Held, that the plaintiff was not estopped from showing the title in himself.

Bates & French, for plaintiff. *A. McNichol*, for defendant.

LIBBEY, J. This case comes before this court on a report of the evidence. From the report we find the facts material to the determination of the case as follows: September 13, 1882, the plaintiff was the owner of the boat in suit. He bought her of Thomas Richardson about two years before, paying a part of the price agreed, and gave Richardson a bill of sale of the boat to secure the payment of the balance, which had been fully paid prior to September 13, but the bill of sale had not been given up by Richardson. On that day the attorney for the attaching creditor asked the plaintiff who owned the boat, and he told him Thomas

Richardson owned her, had a bill of sale of her. The attorney told him he had no demand against him, but did not tell him he held a demand against Richardson and gave him no information that he intended to attach her as Richardson's. On the same day the attorney made the writ on which the boat was attached and gave it to the defendant for service, the defendant went with it to the wharf where the boat lay and there found the plaintiff, and asked him who owned the boat and he gave him the same answer which he gave the attorney. The question and answer were repeated. The defendant then informed the plaintiff that he attached her on a writ against Richardson, and on request of the plaintiff he exhibited to him the writ. The plaintiff left the wharf but within ten minutes returned, before the defendant had taken actual possession of the boat, and informed the plaintiff of his title, demanded the boat and attempted to move her, but was prevented from doing so by the defendant. The defendant gave the plaintiff no intimation that he intended to attach the boat till after the declarations that she was the property of Richardson.

The only question is whether the plaintiff is estopped from denying Richardson's title and asserting his own. We think it clear that he is not. The case of *Morton, Ex. v. Hodgdon*, 32 Me. 127, is precisely in point. The facts in that case were quite as strongly against the plaintiff as in this. In discussing the point involved *WELLS, J.*, says: "But before one can be conclusively bound by a declaration made in relation to his interest in property, such declaration must be designed to influence the conduct of the person to whom it is addressed, and must have that effect. Morton had no knowledge of any intention on the part of Jenness or his attorney to attach the oxen as the property of Clark, and could not, therefore, have designed to influence him in that respect. If it had been communicated to him he might have then stated the existence of the mortgage, and the particular provisions of it. There could have been no willful purpose to mislead Jenness, or his attorney, for he did not know that Jenness had any demand against Clark, nor that Jenness needed or had any occasion for information on the subject." So here, the plaintiff had no knowledge that the attorney had a demand against Richardson, or that there was any intention on the part of the attorney or the defendant to attach the boat as his when he made the declarations. Up to that time it did not appear that they had any interest in knowing the truth about the title, and the plaintiff owed them no duty to state it. Within a reasonable time after he was informed of the purpose to attach the boat as the property of Richardson, he did inform the defendant of the true state of the title and demanded him. This was all the law required of him. *Piper v. Gilmore*, 49 Me. 149; *Sullivan v. Park*, 33 id. 488; *Allum v. Perry*, 68 id. 232; *Pierce v. Andrews*, 6 Cush. 4.

The value of the boat when taken by the defendant is variously estimated by the witness from \$225 to \$125. She was sold in the fall after she was attached for \$125. Upon the whole we think a fair estimate of the damages is \$175.

Judgment for the plaintiff for \$175 damages.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

ACTON v. COUNTY COMMISSIONERS.

February 16, 1885.

COUNTY COMMISSIONERS — CATTLE — PASSES — PETITION — JURISDICTION — COMMITTEE — MAJORITY DECIDES.

A majority of a committee, appointed by the court to revise the doings of the county commissioners in the location of a way, may decide, when all the committee participate in the view and hearing.

A statute, giving the county commissioners power to "grade hills" in a way located by them, authorizes them to require fills as well as to cut down hills.

The county commissioners have no authority to require cattle-passes to be constructed in a way located by them, and such a requirement renders their proceedings bad.

A petition to the county commissioners for a way "beginning at the terminus of the new road now building in Newfield to Balch's mills, thence in a western direction to the N. H. line," is sufficient under the statute of Maine to give the commissioners jurisdiction.

R. P. Tapley, for appellants. Luther S. Moore & Harry V. Moore, for petitioners.

LIBBY, J. When the report of the committee was presented for acceptance two objections were taken to it.

1. That where all of the committee acted, it was not competent for two of the committee to decide questions before it, the third not agreeing with them.

2. That the county commissioners in their proceedings requiring the way to be graded and cattle-passes to be built, exceeded their powers, and that the action of the committee affirming such proceedings is without authority.

As to the first objection, the committee derives its powers from the statute, and act under its authority. While the statute provides that the county commissioners may act by majority, it is silent as to the committee which, on appeal, is appointed to revise their proceedings. But the R. S., chap. 1, § 6, clause III, provides that "words giving authority to three or more persons authorize a majority to act, when the enactment does not otherwise determine."

We think the case is clearly within this rule, and that the objection is untenable.

Under the second objection it is claimed that the county commissioners and the committee exceeded their powers in requiring the way to be graded in the manner specified in their report. The learned counsel for the appellants claims that while the commissioners have power to require hills to be cut down, they have no power to require the earth taken from the cut, to be filled in the valleys and hills.

Prior to 1875, the county commissioners had no power to require the way, or any portion of it to be graded; but in that year, by chapter 25 of the public acts, such power was conferred upon them. By the first section, section 1 of the R. S., chapter 18, was amended so as to give the commissioners power to "grade hills in any such way." It is contended that this language gives the power to require hills in the way to be cut down, but no power to require a fill. We think this construction is too narrow. To grade means "to reduce to a certain degree of ascent or descent." This embraces fills in the valleys as well as cuts in the hills. The grade may be made by a cut in the hill, or a fill in the valley, or, as is more usually the case, by both combined. If there could be any doubt as to the power of the commissioners, under this section, to require the earth taken from the cut in the hill to be filled in the valley, it is removed by section 7 of the same act, which gives them the "power to direct the amount of such grading, which shall be stated in their return."

But the action of the commissioners requiring several cattle-passes to be constructed in the way, at different points, presents a more difficult question. By the statute the commissioners have power to locate a way, require it to be graded, and to fix the time, not exceeding three years, within which it shall be constructed and opened for public travel by the town; but it gives them no power to prescribe and direct the manner in which it shall be constructed, except as to grading. The duty is cast upon the town to so construct it that it shall be safe and convenient for travelers; but the manner of constructing it is for the determination of the town, and it is responsible for it. The county commissioners derive all their powers over ways from the statutes, but no power is given them to require the construction of cattle-passes in a way.

It is contended, however, by the counsel for the petitioners, that, admitting the commissioners had no such power, still their requirement in this respect, in excess of their powers, may be rejected, and the rest of their proceedings affirmed. Upon this point we think the rule is correctly stated by *SHAW, C. J.*, in *Commonwealth v. West Boston Bridge Co.*, 13 Pick. 195. "If the proceedings are so independent of and disconnected with each other, that a part may be quashed and leave the remainder, an entire beneficial and available judgment to the purpose for which it was intended, the court may quash that which is erroneous and affirm the remainder." But here the proceedings were all had at one time, relate to the same subject-matter, to location of the way, and are an entirety. The part requiring the cattle-passes cannot be separated from the rest. If that be done the way will not remain such as was located. The court cannot say that the commissioners would have made the location, and appraised the land damages as they did without the requirement of the cattle-passes. How much influence that may have had upon their judgment cannot be known. In this respect the case is like *Braintree v. County Commissioners*, 8 Cush. 546. The re-

port must be recommitted to the committee. *Shattuck v. County Commissioners*, 76 Me. 167.

Another question not directly presented by the exceptions has been elaborately argued, and as it is vital to any further proceedings in the case it is proper that we should decide it now. It is contended that the original petition is not sufficient to give the county commissioners jurisdiction to act in the matter, inasmuch as it does not appear that the way prayed for extends from town to town. The description of the way in the petition is as follows: "Beginning at the terminus of the new road now building in Newfield to Balch Mills, thence in a westerly direction to the New Hampshire line." It is said that the way described lies wholly in Acton, but it connects with a way leading into Newfield. We think that the jurisdiction of the county commissioners is fully sustained by *King v. Lewiston*, 70 Me. 406, and cases there cited.

Case recommitted to the committee for further proceedings in accordance with this opinion.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

[20 Eng. Rep. 522.—Ed.]

KELLEY v. KELLEY.

February 17, 1885.

LIEN—R. S., CH. 91—PERSONAL SERVICES—INCLUDES THAT OF "TEAM"—JUDGMENT IN REM.

The lien given by the statutes of Maine to one who labors at hauling logs, attaches to his personal services and the services of his team, if he has the rightful possession of the team, and is entitled to its earnings during the time the services were performed, though he may not own the team.

When it appears that such services were not performed upon the logs or hauling of them, or that his claim for services upon the logs is so mingled and intermixed with other claims for which he is entitled to no lien, that it is impossible to distinguish between lien and non-lien items, then no valid judgment *in rem* can be rendered.

John Varney, for plaintiff. *A. W. Paine*, for log-owners.

FOSTER, J. These are actions of *assumpsit* on account annexed for labor alleged to have been performed by the plaintiffs, who seek to secure a lien for their personal services, and for the services of their teams, under R. S., chap. 91, § 38.

The father of the plaintiffs, the principal defendant in these suits, by whom they were employed and for whom the labor was performed, makes no appearance or defense, but the State of Maine Spool Wood Company, as owner of the lumber, appears and defends, contesting, upon several grounds, the right of these plaintiffs to any lien.

It appears that the defendant was employed under a contract in writing with said company to operate in cutting and hauling spool wood and other lumber in the winter season of 1883-4.

That the plaintiffs labored for the defendant in the operation does not seem to be denied, and the principal ground of defense set up to the first action, in which Frank B. Kelley is plaintiff, is to the amount of labor performed by him and his team, consisting of two horses, and for which he claims to recover a balance of \$77.16, the amount due for sixty-three and one-half days' work at the stipulated price of \$40 a month, after deducting a credit of \$20.75. It is not denied that he was to receive the sum of \$40 a month for himself and team, as this appears to have been the price agreed upon at the commencement of the service.

It is claimed on the part of the company that inasmuch as the legal title to the horses employed by the plaintiff was not in him but was in one Crooker, he can not recover for the services of the same.

We do not think this defense is tenable. The plaintiff had bargained for the horses, agreeing to pay \$150, and had in fact paid \$90 to the party of whom he purchased them, and there remained but \$60 more to be paid. It is in evidence, also, that the right of control and possession of the horses was in the plaintiff, and that he had the right to their services during the time in which this labor was performed, and, so far as any thing to the contrary appears from the testi-

mony in the case, such is the fact. It is no defense, therefore, that the legal title was in a third party, against whom the owners of the lumber have no cause of complaint.

Furthermore it is urged that one of the horses was lame and unable to work during a portion of the time. But the evidence uncontradicted shows that the plaintiff, after the first month's service and prior to the time of the alleged lameness, had exchanged one of the horses, replacing it by another, and that the pair thus "matched" were driven by him the remainder of the time for which he claims pay for "his personal services, and the services performed by his team." Here, too, the possession and control were rightfully in the plaintiff who was entitled to the services and earnings of the team, and whatever loss of service arose on account of the lameness of the horse exchanged must have been borne by the defendant, the party with whom the exchange was made.

The plaintiff, as against the defendant in this suit, would be entitled to recover for his services and for the services of the team which he employed in hauling the lumber and over which he had personal superintendence, notwithstanding the fact that the legal title to one or both of the horses might not have become vested in himself. It could make no difference in law that he might be only a bailee, so long as he was the person entitled to the compensation for their labor.

Nor is there, as against these claimants of the lumber, any valid reason why the plaintiff in this case, so far as the question of title to the horses is involved, should not be entitled to the benefit of the statute relating to lien claims. To hold otherwise would be doing violence to the spirit, if not to the letter, of a statute remedial in its objects, and calculated to make certain the payment for the labor which has actually gone to increase the value of the lumber. *Oliver v. Woodman*, 66 Me. 57, 58; *Spofford v. True*, 33 id. 291; *Hale v. Brown*, 59 N. H. 558.

When we come to consider the second suit, the plaintiff, John J. Kelley, stands in a more unfavorable light. He claims to recover \$117.73 for eighty-five days' work for himself and horse at a stipulated price of \$36 a month, and for an account of \$12, making in all \$129.73, and for which a credit of \$52.29 is given, leaving a balance of \$77.44.

The argument in defense of this suit is founded upon the alleged fact that the plaintiff has no claim to the benefit of the statute, inasmuch as the services for which this suit is brought were not of that character for which the timber should be holden by virtue of any lien thereon. It is also urged that, notwithstanding the plaintiff may have some claim against the defendant by whom he was employed, yet the labor was not in any way performed in cutting or hauling the timber, and that whatever services were by him rendered were done in and about the camp, felling saws, repairing sleds, keeping the time, acting as clerk, and, in his own language, rendering himself "generally useful."

With the view of the case which we have taken, it is not deemed necessary to consider these propositions to any great extent. We can very properly say, however, that one of the misfortunes of the plaintiff's case is the fact that from the evidence it is impossible to discover that the horse ever performed any services upon the lumber drawn that season. On the contrary, it appears that this horse was not used by the plaintiff but by the defendant as occasion required in doing general work, hauling supplies, going to Bangor and elsewhere.

And, so far as relates to the services of the plaintiff, we have carefully examined the testimony in the case, and find it contradictory from beginning to end, and, although we may feel satisfied that he may have performed more or less labor in one way and another, and may possibly have rendered service to some extent for which he might have been entitled to a lien had he not so mingled it with that for which he is entitled to none, *Jones v. Keen*, 115 Mass. 185; *Brainard v. Shannon*, 60 Me. 344; yet, from his own testimony, as was said by DANFORTH, J., in *Baker v. Fessenden*, 71 id. 293, "he has so intermixed and interwoven it with that for which he has shown none, that it is utterly impossible for the court and probably for the parties to make any such distinction between the two kinds as to authorize a lien judgment for any definite amount."

The charge of \$12, account for labor of Edward Barrows, should be stricken from the plaintiff's account sued, and judgment rendered for the balance of

\$65.44, with interest from the date of the writ, against the personal defendant, but not against the logs.

In the first suit, wherein Frank B. Kelley is plaintiff, there should be judgment against the personal defendant for the sum of \$77.16 and interest thereon from the date of the writ, and a judgment *in rem* against the logs attached for the same amount.

Judgment accordingly.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

[See 47 Am. Rep. 224.—Ed.]

HUBBARD v. JOHNSON.

February 20, 1885.

ATTACHMENT—SPECIFIC PERFORMANCE—REPRESENTATIVES BROUGHT IN BY REVIVOR—PARTIES AS TRUSTEES.

When a bill in equity for the specific performance of a bond for the conveyance of real estate has been inserted in a writ on which an attachment has been made prior to the decease of the sole defendant, the administrator with the will annexed, the heirs of the testator and the residuary devisee may be brought in by a revivor although no service had been made upon the testator prior to his decease.

Where the testator died possessed of a large amount of real estate other than that embraced in his bond, and his widow is residuary devisee, the complainant may bring in the heirs of the testator together with the residuary devisee. If the heirs disclaim all interest in the land embraced in the bond the bill may be dismissed as to them.

When the bill prays for an accounting between the original parties the administrator with the will annexed is a proper party, and the case will be sent to a master to state the accounts. And the bill must contain an offer to pay any balance found due from the plaintiff.

The plaintiff and his wife are incompetent witnesses as to matters which happened prior to the decease of the defendant, unless the administrator first testifies thereto, or the books or other memoranda of the deceased party relating thereto are first used in evidence.

Compensation in damages for not conveying land in accordance with the obligations of a bond is not regarded as an adequate relief, and the obligee may maintain a bill for specific performance.

J. H. Potter, for plaintiff. *Bean & Beane*, for defendants.

VIRGIN, J. In the original bill, the plaintiff, as obligee, sought against the obligor, specific performance of his bond for the conveyance of three certain parcels of real estate. The bill was inserted in a writ of attachment, and an attachment of the obligor's real estate was made; but before service was made on the obligor, he died. Thereupon a supplemental bill in the nature of a revivor was filed making the obligor's heirs, administrator with the will annexed, and the residuary devisee parties defendant, and service was made upon them.

The general rule in equity is, that strictly speaking, there is no cause in court as against a defendant, until his appearance. 2 Dan. Ch. (5th ed.) 1523. But in this State since a bill may be inserted in a writ of attachment (R. S., chap. 77, § 11) as this was, and a suit is commenced when the writ is actually made with intention of service (R. S., chap. 81, § 95), an executor may be brought in by a revivor, although no service has been made on the testator. *Heard v. March*, 12 Cush. 580.

All of the parties defendant, save three minor grandchildren of the obligor, have answered, alleging *inter alia* that all of the real estate in controversy was devised to the widow of the obligor, that the will has been duly probated and that the heirs have no interest in it. Still we think the plaintiff was warranted by the circumstances in making them parties; for the testate died possessed of a large property, including real estate other than that devised to his widow and now in controversy; and the question might have arisen, whether that in question passed by devise to her. The probate of the will did not determine that question. "The probate of a will," said Mr. Justice STORY, "is conclusive only as to the sanity of the testator, his competency to make it, and its actual lawful execution. As to the construction of its terms, the estates devised by it, and the parties to whom they are devised, these are questions which the probate does not assume to decide; but they remain open for contestation whenever put in issue." *Slack v. Wolcott*,

8 Mason, 508, 514. By being made parties, their rights will be concluded by the decree.

Whether or not an original rather than a supplemental bill in the nature of a revivor should have been filed, inasmuch as the title was transmitted by devise and not by law, *Slack v. Walcott*, *supra*; *Pingree v. Coffin*, 12 Gray, 288, 317-18, we shall not attempt to decide, as the parties have not thought fit to raise it, and they are all before us. R. S., chap. 82, § 36. See R. S., chap. 111, §§ 8 *et seq.*

It is objected, however, that the penal sum of the bond affords ample remedy at law. But compensation in damages in such a case is not regarded as adequate relief, *Jones v. Robbins*, 29 Me. 351; *Foss v. Haynes*, 31 id. 81; *Snowman v. Harford*, 55 id. 199; hence courts of equity act upon such a bond as an agreement, and will not suffer the party thereto to escape from a specific performance by offering to pay the penalty. *Fisher v. Shaw*, 42 Me. 32, 40.

The testator took the title from the original holders at the request, and for the accommodation of the plaintiff in order to give him time for making the payment. Time has never been considered by the original parties to the bond as of the essence of the contract, *Snowman v. Harford*, 55 Me. 197; *Jones v. Robbins*, 29 id. 351; *Hull v. Noble*, 40 id. 459; the testator agreeing, as appears from the answers, to accept labor, merchandise, etc., from time to time, as well as money in payment.

There is no question that the devisee can be held to convey the land in controversy. The fundamental maxim in equity — "Equity looks upon things which ought to be done as actually performed," considers the vendor as trustee of the vendee, holding the vendee's legal estate on a naked trust. *Linscott v. Buck*, 33 Me. 530; Sug. Vend. (Perk. ed.) chap. 5, § 1; Pom. Eq. Jur. §§ 364 *et seq.* The equitable title changes when the contract is completed. The consequences follow. As the vendee's legal estate is held on a naked trust by the vendor, this trust, impressed upon the land, follows it in the hands of his heirs and devisees. *Woodbury v. Gardiner*, *ante* 103, to appear in 77 Me., and cases there cited.

The plaintiff alleges that he has fully paid the stipulated price and prays for an accounting between the original parties. This will necessitate the sending of the case to a master to ascertain the facts and state the accounts between them; and the administrator is a necessary party.

If the report shall show a full payment by the plaintiff, the devisee will be decreed to convey. If it shall appear that a balance is still due and unpaid, the bill must be amended to meet this exigency as it contains no offer to pay any such balance.

As the answers of the heirs disclaim all interest in the land, but allege the title to be in their mother, by virtue of the devise, the bill must be dismissed as to them, with a single bill of costs, each taxing for his answer; and sustained as to the administrator and devisee. But before final decree, the plaintiff must make the guardian *ad litem* of the minor grandchildren party, although it is quite apparent from the answers of the other heirs that it will be a mere matter of form. *Scribner v. Adams*, 73 Me. 542.

The testimony of the plaintiff and his wife relating to any matters which happened before the decease of the testator is incompetent, unless the administrator testifies or puts in the testator's books, when they may testify in relation thereto.

Case to be sent to a master to hear and state the accounts between the plaintiff and the late Holman Johnson.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

CURTIS v. PORTLAND SAVINGS BANK.

March 5, 1885.

GIFT—SAVINGS BANK DEPOSIT.

By direction of her aunt, who died in four days afterward, C. took the key from a bureau drawer, unlocked the trunk and took therefrom a savings bank book. Her aunt said: "Now keep this; and if any thing happens to me, bury me decently and put a headstone over me, and any thing that is left is yours."

Held, that this constituted a gift *causa mortis* coupled with a trust.*

VIRGIN, J. When the plaintiff, by direction of her aunt, took the key from the bureau drawer, unlocked the trunk and took therefrom the savings' bank book, her aunt said: "Now keep this; and if any thing happens to me, bury me decently and put a headstone over me, and any thing that is left is yours." This, in our opinion, constituted a gift *causa mortis*.

The former entry of "subject also to Cath. E. Curtis," which the depositor caused the bank officer to make, in March, 1878, in her savings bank book and also in the book of bank, showed that she then had in contemplation a gift to the plaintiff, but it was not completed by delivery. *Northrup v. Hale*, 73 Me. 66. But in May 30, 1883, only four days before her death, the declaration above quoted, accompanied by the manual delivery of the deposit book, rendered unmistakable her intention. The delivery was sufficient. *Hill v. Stevenson*, 63 id. 364; S. C., 18 Am. Rep. 231; *Pierce v. Five Cent Sav. Bank*, 129 Mass. 425; S. C., 37 Am. Rep. 371; *Tillinghast v. Wheaton*, 8 R. I. 536.

Nor did the special qualification annexed to the gift defeat it. This was only coupling the gift with the trust that the donee should provide for the funeral of the donor. 2 Sch. Per. Prop. (2d ed.), § 195. *Hills v. Hills*, 8 M. & W., is precisely in point, and has been approved by the court in *Clough v. Clough*, 117 Mass. 85. See, also, *Davis v. Ney*, 125 id. 590; S. C., 28 Am. Rep. 272. If there are any debts, the plaintiff must see them paid. *Pierce v. Five Cent Sav. Bank*, *supra*.

Judgment for the plaintiff for the amount due on bank book.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

SEGAR v. LUFKIN.

March 4, 1885.

EXECUTOR AND ADMINISTRATOR — PARTY PLAINTIFF — DISCONTINUANCE — ADVERSE PARTY AS WITNESS.

After the plaintiff, who is an administrator, has discontinued as to one of two defendants, because of his insolvency, such person may be a witness in behalf of the other defendant.

Where a witness who has testified to the payment of money to a person since deceased, also testified to another fact as occurring the same day, it is competent, as tending to contradict the witness as to the payment of the money, to disprove the other fact.

HASKELL, J. Farnum was not a defendant to the action, after the discontinuance was entered as to him. The action then stood the same as though it had been brought against the other defendant alone, upon his several promise. Parties only are excluded by statute from testifying in causes where the adverse party is an administrator. In such cases persons not parties, although directly interested in the result of the suit, are competent witnesses. Their interest does not exclude them from being witnesses, but goes to affect their testimony. Farnum was a competent witness, and rightfully allowed to testify. *Haskell, Adm'r, v. Hervey*, 74 Me. 192, and cases cited.

The issue tried was, whether Farnum had paid the plaintiff's intestate a part of the note in suit. Farnum, in behalf of the defendant, testified to making the payment at his own store, upon a day when the plaintiff's intestate waited there for some flour, that he, Farnum, had sent his boy to the railroad for. Upon pertinent cross-examination Farnum testified that he did not furnish the plaintiff's intestate with the flour, but saw him afterward load a barrel of flour into his wagon on the same afternoon, at a neighbor's store.

The neighbor was called by the plaintiff to prove that the plaintiff's intestate did not procure and load flour on, or near, the day testified by Farnum. To the exclusion of this evidence the plaintiff has exception. Farnum testified to a transaction with a deceased person, who cannot give his version of it. As a part of the same transaction he testified to a fact fixing the time when the payment was made. The disproving of that fact would tend to show the absence of the

* 22 Eng. Rep. 436; id. 287; 30 Am. Rep. 486; 31 id. 453; 51 Am. Dec. 362. [Ed.]

plaintiff's intestate at the store of Farnum, when he says the payment was made, and ought to have been considered by the jury.

Exceptions sustained.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and EMERY, JJ., concurred.

PACKARD v. DORCHESTER MUTUAL FIRE INSURANCE COMPANY.

March 5, 1885.

INSURANCE — MISDESCRIPTION — KNOWLEDGE OF AGENT — WAIVER OF WRITTEN ASSENT.

Where a person assumes to be the agent of an insurance company and writes an application with his name upon it as agent, and the company receives it, writes a policy upon it with the name of the assumed agent on the back, sends it to him to deliver and collect the premium, the assured (himself believing in the agency) may well consider these facts as a recognition, on the part of the company, of the agency.

The agent of an insurance company may bind the company by waiving written assent to material alterations in the property insured where the assured does not know of any restriction of the agent's authority.

VIRGIN, J. The policy stipulated that "it shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured, or if, without the assent in writing of the company, the situation of circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks."

The testimony showed that the application contained a misrepresentation as to the contiguity of other buildings; and that an alteration of the building insured was subsequently made, causing a material increase of the risk.

It was not controverted that the plaintiffs made their application through one Holman, an insurance agent, believing him to be the agent of the company; that he assumed to act as its agent, wrote the application, sent it to the company with his name as its agent upon it, that the company received it, acted upon it, issued the policy in pursuance of it, wrote Holman's name upon the back of it, sent it to him for delivery and received the premium through him. Thereupon the presiding justice ruled that Holman was the agent of the company.

It was admitted that Holman knew of the misdescription in the application written by him, and that the alterations were made with his knowledge and consent. Whereupon the presiding justice ruled that, notwithstanding the misdescriptions, the company was bound; and that Holman's verbal consent to the alterations were obligatory upon the company under the statute.

We perceive no error in these rulings. To be sure the mere fact that Holman signed the application as agent, was not enough to show him to be the company's agent. *Campbell v. Mon. F. Ins. Co.*, 59 Me. 430. The defendant could not prevent such an act on his part done in its absence. But that fact, carried home to the company's knowledge by sending to it the application with his assumed official signature thereon, combined with its subsequent acts, including the indorsing of his name on the policy, might well be construed by the plaintiffs as an official recognition of his assumed character at common law, but also to bring his authorization within Rev. Stat., chap. 49, § 18. *Dunn v. G. T. Railway*, 58 Me. 187; S. C., 4 Am. Rep. 267; *Ins. Co. v. McCain*, 96 U. S. 84.

The company could doubtless waive written assent to the material alterations. *Adams v. McFarlane*, 65 Me. 152; *Wood v. Poughkeepsie Ins. Co.*, 32 N. Y. 619. In the absence of any known restrictions of authority the agent could do the same. It is common knowledge that the authority of an agent comprises not what is expressly conferred, but also, as to third persons, what he is held out as possessing. Hence the principal is frequently bound by the acts of his agent performed in excess or even in abuse of his actual authority; but this is only true as between the principal and third persons, who, believing, and having a right to believe, that the agent was acting within the scope of his authority, would be prejudiced if the act was not considered that of the principal. *Barnard v. Wheeler*, 24 Me. 412, 418; *Clark v. Metropolitan Bank*, 3 Duer, 248. This doctrine is established to prevent fraud, and proceeds upon the ground that when one of two innocent persons

must suffer from the act of a third, he shall sustain the loss who has enabled the third person to do the injury. Story on Ag., § 127.

Of course, when restriction of authority is brought home to the knowledge of those with whom the agent deals, his acts in excess of such restricted authority will not bind the principal. *Ins. Co. v. Wilkinson*, 13 Wall. 222. Thus, where one of the express conditions of a policy was that "no officer, agent or representative of the company shall be held to have waived any of the terms and conditions of the policy, unless such waiver shall be indorsed hereon in writing," it was held that this limitation of power of the agent to waive the conditions was brought to the knowledge of the insured by the policy itself, and any attempted waiver otherwise than therein stipulated was not binding upon the company. *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5, 9. There is no such clause in the policy now before us.

According to the stipulation in the bill of exceptions, the entry must be, defendant defaulted. Interest to be added from January 22, 1885.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

[30 Hun, 473; 32 id. 365; 26 Am Rep. 370, *nota*.]

THOMPSON v. HALL, Judge of Probate. SAME v. TIBBETTS.

March 6, 1885.

PRACTICE—PROBATE COURT—GUARDIAN REFUSING TO QUALIFY—NEW APPOINTMENT.

When a person has been adjudged by the probate court, on proper petition and by appropriate proceedings, to be of unsound mind and incompetent to manage his own affairs or protect his rights, and the person who was appointed guardian refused to qualify for that trust, the judge of probate may, upon a petition therefor by a friend, stating the facts, after notice, appoint another person as guardian of the *non compos*.

W. Gilbert, for plaintiff. C. W. Larrabee, for defendant.

DANFORTH, J. The first-named case is a petition for a writ of *certiorari* to issue to the probate court for the county of Sagadahoc, asking that its records relating to the appointment of a guardian for Frances J. G. Thompson be quashed.

The second case is a petition that the guardian so appointed be prohibited from the further exercise of his duties as such.

In *Peters v. Peters*, 8 Cush. 529, SHAW, C. J., in a very able and exhaustive opinion, held that the supreme court of Massachusetts was not authorized under the statutes of that Commonwealth to issue a writ of *certiorari* to the probate court in any case. The reasoning of that opinion will apply equally well to the law of this State, and seems to be conclusive in favor of the conclusion there reached. It is true that the case there under consideration, differed materially from that now before this court, and the authority of the court to issue such a writ was not necessary to the disposal of the case, yet the argument is none the less convincing.

But if the court were authorized to issue such a writ we are satisfied that there is no such error in the records in question as to require it. The objection raised here, is that the record of the proceedings under which the guardian was appointed does not show jurisdiction in the court so appointing. Were the petition of Joseph M. Trott the initiation of the proceedings complained of, the objection would be clearly well founded. *Overseers v. Gullifer*, 49 Me. 360. But such is not the case. It is true that the previous proceedings are not incorporated into this petition nor is that necessary. It does refer to them. It is addressed to the "Judge of Probate of the county of Sagadahoc." It alleges that the petitioner is a "friend of Frances G. Thompson who has been adjudged by the honorable court to be of unsound mind and incompetent to manage her own affairs, or to protect her rights, and that Orville A. Robinson, who was appointed guardian of the said Frances, has refused to qualify for said trust." Here is a direct reference to the prior proceedings of the court, and to proceedings which were unfinished and still upon the docket of the court, for they could not be finally disposed of until the appointee had not only accepted, but qualified by giving the required bond. Here was a sufficient description to enable the court to identify its own

unfinished record, and to the respondent notice of the adjudication of the unsoundness relied upon. The petition of Trott was not, therefore, the commencement of a new process, but the continuation of one already pending. Upon examining these prior proceedings, no defect is found in them, none has been pointed out or claimed to exist. Both sides rely somewhat upon R. S. 1871, chap. 67, § 23. Revision of 1883, chap. 67, § 26, giving the probate court authority to appoint a new guardian in case of the death, resignation, or removal of the guardian, "without further intervention of the municipal officers." But this section is not applicable. Here is neither a death, resignation, or removal. That could be only after the guardian had been legally qualified and the proceedings finished. Here was a refusal to accept, leaving the proceedings unfinished, the purpose in view unaccomplished. If Robinson had been present and declined the appointment when made, there can be no doubt that the respondent being present, the court could have appointed another person. It can make no difference that the case was continued one or more terms to await the result, except perhaps the necessity of giving a new notice, as was done here, for it would be proper that the respondent should be heard as to the person to be appointed, as well as upon the question of the necessity of appointing any one. In either case, the decree as to unsoundness already made, is the foundation of the appointment.

It is true that the last decree is informal and of itself insufficient. So far as it relates to the unsoundness of the respondent it is unauthorized by the petition. That does not ask for any inquiry into that question. It simply alleges that she has already been decreed unsound in the language of the statute authorizing the appointment of a guardian; that the attempted appointment had failed by reason of non-acceptance, and that the work may be completed by the appointment of another. That part of the decree which is in conformity with the petition and which has a legal basis to rest upon cannot be made invalid by another part which is not authorized and which is not necessary to the disposition of the case.

The result is the records of the probate court taken as a whole, so far as they relate to this case, show that the guardian has been legally appointed and therefore neither the writ of *certiorari* or prohibition can be granted.

Exceptions in petition for *certiorari* overruled. Petition for prohibition denied. PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

COOLBROTH v. MAINE CENTRAL RAILROAD COMPANY.

March 7, 1885.

MASTER AND SERVANT — "USUAL RISKS."

When a servant of mature age and common intelligence engages to serve a master, he undertakes, as between himself and master, to run all the ordinary and apparent risks of the service.*

S. C. Strout, H. W. Gage & F. S. Strout and *N. & H. B. Cleaves*, for plaintiff. *Drummond & Drummond*, for defendant.

LIBBEY, J. It is the well-settled law that a servant of mature age and common intelligence, when he engages to serve a master, undertakes, as between himself and master, to run all the ordinary and apparent risks of the service. This rule is so well and uniformly settled that no citation of authorities is needed.

There are exceptions to this general rule, but the facts averred in the plaintiff's declaration do not take the case out of it. The allegations are, in substance, that on the 15th day of October, 1879, he was, and for a long time prior thereto had been in the employment of the defendants, and for three weeks prior thereto had been stationed at the transfer station near Portland, and required to throw into the train of the defendants, going east by said station, mail bags while the train was in motion, "which service, as was well known to the defendants and not well known to the plaintiff, was a dangerous service," and on said fifteenth day of October, while in the performance of that service, in carefully attempting to throw the

* See 21 Eng. Rep. 519; 30 id. 338; 31 id. 287.—Ed.

mail bags into the mail car while the train was in motion passing said station, he was thrown down under the train and was injured.

Here are no allegations of any unusual or extraordinary occurrences on that occasion, or of any unusual danger that caused the plaintiff to fall, but, at best for him, his fall and injury were caused by the ordinary and apparent dangers of the service, apparent to any man of ordinary capacity for such service. True, it is alleged that the service, "as was well known to the defendants and not well known to the plaintiff, was a dangerous service," but it is not alleged that the defendants did not inform the plaintiff that the service was dangerous. Such an allegation is necessary to show the defendants in fault. The fact cannot be implied from the allegation that the dangers were not well known to the plaintiff. But we feel clear that in this case such an allegation would not help the plaintiff. The dangers were as apparent to the plaintiff as to the defendants. If the plaintiff did not understand them when he commenced the service, he had been performing it for three weeks, with all the dangers apparent every time he threw the bags into the car, without protest or complaint; and, by so doing, must be held to have taken upon himself the hazard which caused his injury. *Shanny v. And. Mills*, 66 Me. 420; *Yeaton v. Boston & L. R. Company*, 135 Mass. 418; *Huthaway v. Mich. Cent. R. R. Co.*, 51 Mich. 253; S. C., 47 Am. Rep. 569; 12 A. & E. R. R. Cases, 249; *Thompson on Neg.* 976, § 7.

Exceptions sustained. Demurrer sustained. Declaration bad.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

PHILBROOK v. CLARK.

March 17, 1885.

MORTGAGOR AND MORTGAGEE — PRESUMPTION OF PAYMENT.

The holder of a mortgage permitted the mortgagee, his mother, and the assignee of the equity, his sister, to occupy the mortgaged premises for more than twenty years because of the relationship; and he testified, without contradiction, that the mortgage debt had not been paid.

Held, That the presumption of payment was overcome by these facts.*

W. P. Young, for plaintiff. S. & L. Titcomb, for defendant.

EMERY, J. The defendant's title is based on the mortgage from Sarah Ladd to Nathan Weston, dated October 18, 1858, to secure two notes of the same date on one and two years respectively. The tenant claims the mortgage debt is paid, and relies upon the presumption of payment, arising from the lapse of more than twenty years from the maturity of the mortgage, to-wit: October 18, 1860, the writ being dated September 27, 1883. The defendant offered evidence to rebut the presumption, and claims that it is rebutted.

The defendant was assignee of the mortgage through mesne assignments, and he put in evidence the mortgage and both notes secured thereby. George W. Ladd, a son of the mortgagor, testified that he bought the mortgage of Weston August 29, 1862, and held the mortgage and notes as his own till he assigned them to his nephew in 1877; that he then held them for his nephew till 1879, when they were assigned to the defendant, his daughter; that he has been his daughter's agent, and as such kept the mortgage and notes till produced at the trial; that nothing has ever been paid on the notes; that his mother lived on the premises till her death in 1874 or 1875, and after her death his sister Mary lived on them; that he permitted them so to do because they were his mother and sister. The tenant claims under Mary. This testimony is uncontradicted, and there was no other material testimony on this point. The ground of presumption of payment growing out of lapse of time is that a man is always ready to enjoy his own. Whatever will repel this "will take away the presumption of payment, and for this purpose it has been held sufficient that the party was insolvent, or a near relation." *Wanamaker v. VanBuskirk*, 1 Saxton, 685; 23 Am. Dec. 755. Here the

*7 Wait's A. & D. 390; 50 N. Y. Super. 450; 46 Am. Rep. 153; 103 Penn. St. 238; 11 Lea (Tenn.), 88; 51 Mich. 435.—Ed.

holder of the mortgage from 1862, was the son of the mortgagor and the brother of Mary. The son seems to have had control of the matter, and he says the mortgage has not been paid, and that he permitted his mother and sister to occupy the homestead without enforcing payment. The proof to rebut the presumption should always be ample and explicit. We think it is so in this case.

The tax title is not valid. The tax was assessed to "estate of Sarah Ladd." *Fairfield v. Woodman*, 76 Me. 549. Indeed the claim by tax title is not insisted on. Judgment for demandant.

PETERS, C. J., WALTON, DANFORTH, LIBBRY and FOSTER, JJ., concurred.

DANFORTH v. CUSHING.

March 17, 1885.

FRAUD AND DECEIT—TENANCY AT WILL.

C. represented to D. that they were to have the same rights in a store into which both were to move, that a prior tenant had. The prior tenant had occupied the store for years under an oral agreement with the owner.

Held, 1. That the representation amounted simply to a statement that they were to have a tenancy at will.

2. And the fact that the owner ejected D., after thirty days' notice, gave him no right of action against C.

Without proof of actual loss resulting from deceit, no action is maintainable therefor.*

H. L. Mitchell, for plaintiff. *Barker, Vose & Barker*, for defendant.

EMERY, J. The evidence put in by the plaintiff makes out a case, briefly stated, as follows: For years prior to April, 1831, Daniel White had been carrying on a jewelry and fancy goods business, as tenant at will only, in a store owned by Hollis Bowman. Cushing, the defendant, had a small business in the same store, as tenant under White. In March, 1881, Cushing asked Danforth, the plaintiff, to help buy out White, telling him it was a grand, good place for business, and they could make some money there. They agreed with White to buy him out at an appraisal. It was first proposed to take the business as partners, but at the time of the purchase they made a division of the store and the goods for a separate business. When they came to the point of the payment to White, Danforth wanted the lease of the store made certain, and proposed to go to Bowman for a lease. Cushing told him Bowman would not give a written lease, but that he had seen Bowman and Bowman had agreed they should have the same rights there as White. White, upon being appealed to, said all the occupants in the block owned by Bowman were tenants at will only, and that Bowman's word was as good as a written lease. Thereupon, Danforth, relying upon Cushing's assurance that the matter of the lease was fixed all right, paid over his money and took his share of the goods. Danforth understood, as Cushing knew, that Cushing had spoken to Bowman in behalf of the two, and that they were to be tenants in common to Bowman. In fact, however, Cushing had only spoken for himself, and intended that Danforth should be his tenant. Cushing and Danforth took possession of their respective portions of the store about April 1. Soon trouble arose, and Danforth applied to Bowman for a lease to him or to him and Cushing, and was refused. Cushing verbally requested Danforth to leave, but Danforth refused to go. July 1, following, Cushing procured Bowman to give his father, James N. Cushing, a written lease till April 1, 1882. Proceedings were then begun in the name of James, but for the benefit of defendant, to eject Danforth, which failed. 76 Me. 114. Danforth remained in the store a little over a year, when he was put out by an officer on a writ of possession in favor of Bowman against James N. Cushing. Danforth offered to pay rent to Bowman, who refused to receive it, as he looked to Cushing only. Danforth refused to pay Cushing after the first month, and has not paid any rent since. Danforth's business was broken up, and he became insolvent immediately after the ejection. The defendant's evidence made out an entirely different case, but we have need only to consider the plaintiff's case.

The action is deceit, and the deceit mainly alleged and relied upon is the rep-

* See *Cowley v. Smyth*, 46 N. J. L. 388; S. C. 50 Am. Rep. —

resentation by Cushing that he had arranged with Bowman for the two to have the same rights as White, to-wit, those of a tenant at will, whereas he had only arranged for himself to have those rights. The representation, in legal effect, was as to what estate in the store Danforth was to have.

All the estate the plaintiff would have acquired, had the representation been true, was a tenancy at will, and he did obtain a tenancy at will as it was. Upon the facts as claimed by the plaintiff, Cushing was a trustee of the estate for the plaintiff. He held the tenancy in trust for the plaintiff as well as himself; he was estopped from denying plaintiff's tenancy. *Cushing v. Danforth*, 76 Me. 114. The plaintiff's estate was of the same legal value, whether he held directly of Bowman or immediately through Cushing, trustee. The extent of that estate in either or any event was thirty days. Had the representation been true the plaintiff would have had no legal assurance of any thing more. Bowman might have changed his mind at any time. The plaintiff in fact had the use of the store for a year after the first month, without paying any rent, and was finally ejected by Bowman. He certainly obtained all he could have recovered in law had the representation been true. He therefore suffered from the misrepresentation no such loss as the law can weigh, and hence cannot maintain this action of deceit therefor. *Pasley v. Freeman*, 8 T. R. 51. If after misfortunes of the plaintiff were the direct result of his ejectment by Bowman they were very remote from the misrepresentations of Cushing, made over a year before. Bowman had a right to eject the plaintiff upon a proper process had the representation been true. The truth or falsity of the representation did not affect Bowman's nor plaintiff's legal rights in the store. That Cushing induced Bowman to eject the plaintiff does not save this action, which is only for the original deceit. If that ejectment was illegal the plaintiff must resort to other remedies, and he has already sued the officer therefor. *Danforth v. Stratton*, 77 Me. 000.

The business proved unprofitable, but we do not understand the plaintiff's counsel to claim that Cushing's statements, that the business could be bought at a bargain, that it was a good place for business, that money could be made there, are actionable. These were Cushing's opinions only, and Danforth could have seen White's books, the case shows, and examined for himself. *Martin v. Jordan*, 60 Me. 532; *Farrell v. Lovett*, 68 id. 326.

Plaintiff nonsuit.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

LOW v. LOW.*

March 17, 1885.

WILL—LEGACY CHARGED WITH A PAYMENT.

A testatrix coupled the following condition to a legacy "the same to be indorsed on a note given by him to my daughter Emily aforesaid, in the year 1878."

Held, that the executor should appropriate the legacy to the payment of such note, and pay the residue, only, to the legatee.

Edmund F. Webb & Appleton Webb, for Emily L. Chase. *Brown & Carter*, for Francis Low, the legatee.

EMERY, J. In order to ascertain what a testator intended by any clause in his will, courts will place themselves, so far as practicable, in his position, and look at matters as they appeared to him. They will endeavor to discuss the probable motives, objects and desires, and so ascertain what he was thinking to effectuate by his will. This leading purpose, as indicated by his words, construed with reference to all the attending circumstances, is to have sway unless some rule of law forbid.

Without giving our analysis of the testimony which is rarely advisable in a judicial opinion, we gather from the testimony and the will, the following facts: The testatrix and her husband had four children. One of these Francis Low, Jr., was something of a spendthrift, and was in a chronic state of indebtedness. He had

* See ante p. 61.

received many advances from his father, amounting, according to his written acknowledgment, to at least \$15,000. In 1878 he applied to his father for a gift of \$500, but was refused on the ground he already had more than his share. His sister Emily then loaned him \$500 and took his note therefor. Francis claims the money really came from his father, and was not Emily's, but we regard this as immaterial. He received \$500 and gave his note for it. It was a debt he owed, and was represented by that note, no matter who was the real creditor. In 1879, the father bought his peace of Francis, and took a sealed release of all claims upon his estate. We think the above facts were known to the testatrix when she made her will in February, 1880, and that the \$500 note appeared to her as a debt due to Emily from Francis. The father died in May, 1881.

In her will the testatrix, Mary Jane Low, of Clinton, gave to her "beloved son, George Low," five-tenths of her estate,—to her "beloved son, James Low, two undivided tenths and to her beloved daughter, Emily Chase," two undivided tenths, and to her "beloved son, Francis Low, Jr., of Clinton aforesaid, one undivided tenth of my estate, the same to be indorsed on a note given by him to my daughter Emily aforesaid, in the year 1878." This one-tenth, as the bill alleges, amounted to about \$500, the face of the note. She gave nine-tenths to the other three children, two of them residing in distant States. She gave only one-tenth to Francis, who lived in the same town with her, and whose natural share would have been more than twice as much. She gave the nine-tenths absolutely. She gave the one-tenth for a specific purpose, to be indorsed on a note given by the legatee. She evidently thought from past experiences it would be of little use to leave any property to Francis. It would soon be spent, or taken by his creditors. She wanted the debt to her daughter to be paid however. That was her leading purpose. A subsidiary purpose was to give Francis the benefit of the surplus, if any.

It is the duty of the executor to effectuate that purpose. The executor is not only to administer the estate, but to execute the will of the deceased, when that will is ascertained. Were the devise to Francis, with the added direction that the amount be paid into a bank to his credit, the executor could pay it into the bank, and thereby discharge himself. Were there a similar devise with the added direction that the amount be converted into U. S. bonds, the executor could so do. Here the command is that the amount be paid on the note, that is, paid to the holder of the debt, to the creditor of Francis. That would be a payment to Francis. He would have the benefit of it. It would be a meritorious disposition, and the disposition intended by the testatrix.

We know no rule of law that forbids the executor to carry out this purpose of the testatrix. The counsel for Francis contends that the devise is in fee, and that any limitation is void. It is true that a proviso that the property shall not be aliened, or shall not be liable for the devisee's debts, has been often held void, as inconsistent and contrary to public policy. Here there is no such restraint. The devise is not unconditional in the first instance, with a subsequent illegal restriction. The testatrix has not undertaken to tie up the property from alienation, nor to devote it to any illegal purpose. The authorities cited do not apply.

There are more than precatory words in this devise, though such words from one having power to command what shall be done with his property amount to a command that should be obeyed. *Dashwood v. Peyton*, 18 Ves. 41; *Pushman v. Filliter*, 3 id. 8. In *Emerson v. Willard*, 1 N. H. 217, there was a devise of all the estate in fee to J. W., the executor, with the clause, "I desire that the said J. W. should at his discretion appropriate a part of my estate aforesaid, not exceeding \$50 a year, to the support of the widow M. E., etc." *Assumpsit* was brought against the legatee who was also executor, and recovery was had, upon the ground there was a trust for M. E.

Our conclusion in this case is, that the amount of the note should be paid by the executor to the owner of the note or the judgment recovered thereon, that being the intent of the testatrix. The costs in the suit on the note have been added since the death and are not to be paid by the executor. The balance of the one-tenth, if any, is to be paid to Sylvester the assignee, who can stand no better than his assignor. The complainant's costs are to be paid out of the estate of the testatrix.

Decree of interpleader affirmed. Decree in favor of Sylvester reversed. Decree to be made in accordance with this opinion.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and FOSTER, JJ., concurred.

AMES v. SHAW.

March 17, 1885.

CONTRACT — PARTNERS — AMENDMENT.

When it appears that two or more parties were interested as partners in a contract upon which a suit is brought by one member only, a verdict for the plaintiff will be set aside and a new trial granted.

In such a case an amendment will be allowed under the statute of Maine by adding the other partners as co-plaintiffs.

Lynch, for plaintiff. *Harvey & Gardner*, for defendants.

PER CURIAM. Upon the question whether the action was maintainable by Ames alone, the judge instructed the jury as follows: "If he made it (the contract), for himself and another, or others, equally interested with him, and acted for them, and they were to share in the responsibility and receive the pay, then they would be equally interested with him, then it would be a joint contract. If made in that way, it would not be a contract with a single individual. But of these other persons who might be joint owners with him in the township of land upon which he operated, he might make an arrangement with them, so that he might act upon his own responsibility regardless of them. The question is how these parties viewed it at the time, because the contract must be by the mutual agreement of the parties, the mutual agreement and concurrence of two minds; so that, if the contract was made on the side now represented by the plaintiff here, and he had associates in that contract; if it was made jointly with him and others, though the others acted through him possibly as their agent, it would be a joint contract and he could not recover upon it."

It appeared that Ames, Holway and Pope were owners of the township on which the bark was to be peeled; whether there were also other owners does not appear. Mr. Ames testified that Mr. Pope had nothing to do with this operation, but that Mr. Holway paid a part of the expense of it. Then he said (to quote his words): "We paid him (Pope) stumpage. Mr. Holway paid a few men of one team. Mr. Holway carried on operations jointly on our land. When I had this talk with Belmore (defendant's agent), on May 27, I was contracting for Mr. Holway and myself. I was not the agent for the others. I did not say any thing about anybody else. I think I did not say any thing about the owners of No. 37 (township)." Again in answer to a question whether in a talk with Belmore, any thing was said about his dealing for other people, he said: "I think I said Mr. Holway was interested." Again, while denying that he said any thing about "owners," he says he spoke of Mr. Holway in connection with the contract. Again: "Q. You disclosed to Mr. Belmore that it (the contract) was negotiated in behalf of yourself and Mr. Holway? A. I think it was so understood when I put it on there" (referring to a written memorandum of the contract beginning "John K. Ames and others"). Mr. Ames also testified that at one stage of the talk, he said he must consult Holway before acceding to some proposition of Belmore's, and did consult him. Mr. Belmore had before had dealings with Ames and Holway. This testimony of the plaintiff, while it negatives the theory that he was acting for the owners of the township, makes it clear that Holway was his partner in this bark operation, and had a joint interest with him in the contract which was known to Belmore. The judge instructed the jury that in such case Ames, alone, could not recover. The case is within the principle of *Robinson v. Cushing*, 11 Me. 481, and we are reluctantly impelled to set aside the verdict as against the law given to the jury by the court. The court can permit an amendment by adding Holway as a co-plaintiff (R. S., chap. 82, § 11), and so finally save his action if he be found entitled thereto upon the minutes.

Motion sustained. New trial granted.

LUQUES v. INHABITANTS OF DRESDEN and others.

March 17, 1885.

WILL — DEVISE.

A testator devised as follows:

"Item. I give, bequeath and devise unto the town of Dresden in the county of Lincoln, to have and to hold forever in trust, and upon the conditions hereinafter stated, all my real estate, situated in said town of Dresden, and all my meeting-house property in said town owned by me; also in addition to the above, the sum of five thousand dollars (\$5,000), provided that the said town of Dresden shall create and establish a fund of three thousand dollars (\$3,000), to be known as the Lithgow Pine Grove Cemetery fund, to be kept in trust, and held in trust by said town. The interest of which shall be paid annually to the owners or proprietors of such cemetery....."

Held, 1. That the testator intended to establish a fund of \$8,000 and the real estate named for the benefit of the cemetery.

2. That the rejection of the real estate by the town was a rejection of the whole devise.

3. That the condition could not be performed, since the town had no legal authority to raise a fund or a part of a fund, the income of which was to be a gratuity to a private corporation or to individuals.

4. That the devise falls into the residuum of the estate.

5. That the residuary legatees take the real estate in common and personal property in severally under a further clause of the will reading as follows: "Should any one of the aforesaid devisees or legatees refuse to accept the devised estate upon the conditions named in said devise, then such part together with the remainder of my estate I then give, bequeath and devise one-half to the said town of Dresden, and the remaining half to the city of Augusta."

S. W. Luques and S. & L. Titcomb, for plaintiff. *J. W. Spaulding and F. J. Baker*, for the inhabitants of Dresden. *W. S. Choate*, city solicitor, and *E. S. Fogg*, city solicitor, for the city of Augusta. *J. W. Bradbury*, for the trustees of the Lithgow Library and Reading Room.

DANFORTH, J. The answers to the first three questions propounded in this bill, depend upon the construction of the item in the will which is as follows: "I give, bequeath and devise unto the town of Dresden, in the county of Lincoln, to have and to hold forever in trust, and upon the conditions hereinafter stated, all my real estate situated in the town of Dresden; and all meeting-house property in said town owned by me. Also, in addition to the above, the sum of \$5,000, provided that the said town of Dresden shall create and establish a fund of \$3,000, to be known as the Lithgow Pine Grove Cemetery fund, to be kept in trust and held (in trust) by said town, the interest of which shall be paid annually to the owners or proprietors of said cemetery forever, to be by them applied to keeping the same in good order and condition, with a good fence around the whole lot. Provided further, also that \$12 of said interest shall be expended annually for the purpose of decorating with flowers, etc., for putting, and for keeping in perfect order and condition forever the small lot owned and occupied by my brother, Alfred G. Lithgow, and myself in said cemetery. This legacy and devise, if accepted by said town of Dresden, upon the conditions aforesaid, a copy of the vote of acceptance shall be filed with my executors on or before two years from the time of my decease."

A further provision is that "should any one of the aforesaid devisees or legatees refuse to accept the devised estate upon the conditions named in said devise, then such parts, together with the remainder of my estate, I then give, bequeath and devise one-half to the said town of Dresden, and the remaining half to the city of Augusta."

That the testator intended by the above-named legacy and devise to secure the establishment of a fund, the income of which was to be appropriated to the repair of Pine Grove cemetery, is clearly enough expressed; the amount of that fund is left in uncertainty. On the one hand it is claimed that it was to be the real estate with the \$5,000 and \$3,000, and on the other, that it was but \$3,000. There are serious difficulties in either view. If the former is correct then the town has rejected the legacy. The acceptance of the "legacy and devise," in the manner designated in the will, is a condition precedent, without the performance of which the town would not be entitled to receive it. There was an at-

tempted performance, but the vote of the town filed distinctly rejected the "devise" of real estate. If that constituted a part of the fund from which the income was to come, whether much or little, it was a virtual rejection of the legacy given. It certainly was not an acceptance as required by the condition. The town could not elect a part to accept and a part to reject, but must treat it as a whole. This might be doubtful, perhaps, if the real estate was not a part of the fund, for in that case its rejection would not diminish the income, and the testator or his intended beneficiaries would have no cause of complaint.

Was it then a part of the legacy given to the town upon the condition named? In other words, did the testator intend that the land and \$5,000 should be a part of the fund to be established, to which the \$3,000 were to be added by the town, or was the \$3,000 to be the whole fund which the town might establish from the \$5,000 and the land? The latter view is clearly sustained by the language used in the will in the immediate connection with the establishment of the fund. But the whole item in the will must be taken together. The land and the money must be treated as one, as given upon the same trust and the same conditions. Both were given in trust and both upon a condition. That trust was to continue forever. This was recognized by the town, for it was upon that ground that the land was rejected, that the trust imposed burdens too heavy to be borne. Hence the land would be inalienable, the money must be kept for all time. Whatever is to be done with the income the town could receive no benefit from it, for that which is given in trust is not for the use of the trustee, but for that of the *cestui que trust*, and here no *cestui que trust* is named except the cemetery. It could not, therefore, have been given to operate as an inducement upon the town to create or establish a fund of \$3,000, for that which produces no benefit can be no inducement. Besides, no apt words to show such an intention on the part of the testator are used. To enable that inference to be drawn there must be something to show that the trust as to the legacy must cease when the fund was established.

The language used imposing the burden upon the town tends to the same conclusion. It is that the town shall "create and establish a fund of \$3,000, to be known," etc. If the fund were to be taken from the legacy it would be the creation of the legacy rather than that of the town. Certainly, the town could, in no proper sense, be said to have created and established a fund which was given to it by another.

It is true, with this construction of the will, the legacy was one which the town could not legally accept and perform the conditions attached. It will be noticed that the income of the fund is to be "paid to the owners or proprietors of said cemetery." Hence, we must infer, and this inference is confirmed by the answer of the town, that the cemetery is not the property of the town, but of individuals, or a private corporation. Although a cemetery may be one of those things which a town may provide at its own expense, it cannot, for that purpose, make an assessment for the benefit of one over which it has no control and which operates as a gratuity for the benefit of individuals who may or may not be inhabitants of the town. So, too, while the statute (R. S., chap. 15, § 14) authorizes a town to accept and hold forever a legacy for the benefit of any burial lot or ground, it does not authorize the town to create a fund or a part of a fund for any such purpose.

It may seem incredible that any person of so much intelligence as was the testator in this case should have made a legacy not only with conditions that could not be legally complied with, but also such, as in this case, to make it more profitable for the legatee to reject than to accept, and thereby hold out a strong temptation to the legatee to thwart his intention by a refusal to accept. But we are not to construe this or any other written instrument in accordance with what we might think it proper to be done, but the intention must be learned from the language used, and if we are to give this will any other construction than that above indicated, we must omit words that are used and insert others of a very different import. If the testator had intended that the \$3,000 was to be taken from the \$5,000 and be the limit of the fund in amount, it certainly would have been easy to have used apt words to express that intention. But he has not done so and we cannot disregard the language used and impute to him an intention he has not expressed. It is, however, creditable to the town that at the risk of a

considerable pecuniary sacrifice, it has made all the efforts possible to accept the legacy and carry out the known wishes of the testator so far as the law will allow.

Under this conclusion that the town has rejected a legacy which it could not legally accept, the next question is what is to be done with the property so devised? Upon this point we find no difficulty. The legacy having failed, whether from rejection or illegality, is immaterial, the property so devised falls into the residuum. It is clear that the testator intended to dispose of all his property by his will, and that which failed of disposition in any other item must, of necessity, be included in the residuary clause.

That the residuary devise does not depend upon the acceptance or rejection of any legacy is apparent from the reading of the will. That condition applies only to the legacy rejected and settles the question as to whether that shall go into the residuum. While, therefore, it may affect the amount disposed of by the residuary devise, it does not affect the validity or force of that devise. The result is that the city of Augusta and the town of Dresden are the residuary legatees under the will and are entitled to all the residue, including the devise and legacy referred to in the first three questions.

As we find no authority given in the will to sell any real estate, the fourth question must be answered in the negative. The two legatees become tenants in common of the real estate disposed by the residuary clause and take the personal property in severalty.

Decree accordingly, costs to be charged upon the estate.

PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

WRIGHT v. HUNTRESS.

March 17, 1885.

INSOLVENT LAW — FOREIGN ATTACHMENT.

All attachments made within four months of the commencement of proceedings in insolvency, under the Insolvent Law of Maine, are dissolved by the assignment of the judge of the court of insolvency of the property of the insolvent to the assignee.

James Wright, for plaintiff. *S. S. Brown*, for defendant.

EMERY, J. The attachment by this trustee process was made August 13, 1881. The defendant filed his petition to be adjudged an insolvent October 4, 1881. He was adjudged an insolvent. An assignee was appointed, and a deed of assignment to him in due form, according to section 66 of the Insolvent Law, now R. S., chap. 70, § 33, was made by the judge November 1, 1881. By the express provision of that section such an assignment dissolved any attachment made within four months before the commencement of the proceedings, and of course dissolved an attachment made August 13, 1881. Attachment by trustee process is dissolved as well as any other. *Wilmarth v. Richmond*, 11 Cush. 463. The fact that the property attached would not, upon dissolution of the attachment, pass to the assignee, but to some adverse claimant, will not save the attachment. *Grant v. Lyman*, 4 Metc. 470.

The plaintiff urges that the insolvency proceedings were instigated by the trustee, and were begun for the express purpose of depriving him of his attachment, and so are void as to him on the ground of fraud. Whatever the motive the proceedings will have the same effect. Insolvency proceedings are usually begun for the express purpose of dissolving attachments. Indeed, that was the purpose of the Insolvent Law, to break up attachments and other liens and secure equal distribution.

Trustee discharged.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and FOSTER, JJ., concurred.

INHABITANTS OF BRIGHTON v. INHABITANTS OF ST. ALBANS.

March 17, 1885.

PAUPER SETTLEMENT — EVIDENCE.

The declaration of an overseer of the poor, unconnected with any official act, are inadmissible against his town upon the question of a pauper settlement.

Walton & Walton, for plaintiff. *D. D. Stewart*, for defendants.

EMERY, J. The act of Sullivan Lothrop, one of the overseers of St. Albans, in paying or allowing to Cornville a bill for supplies furnished the pauper, assuming him to have been acting for the board, was properly admitted as evidence, tending to show the pauper's settlement in St. Albans, though it was by no means conclusive. *Weld v. Farmington*, 68 Me. 801; *Fairfield v. Oldtown*, 78 id. 573. But the casual remark of John Field, another overseer of the poor of St. Albans, unconnected with any act, is not within the principle of those cases. It is the acts, and not the words of the overseers, that are evidence. Their words are only admissible evidence when accompanying their acts, and as part of their acts. *Corinna v. Exeter*, 13 Me. 821. The letter which was admitted in *Fairfield v. Oldtown*, *supra*, was written in the course of official correspondence. Its statements were *res gesta*, made while transacting official business and as a part of the business. It was in the nature of a document.

In the case before us there was no talk with Field about official business. The meeting with him was casual in a distant town. Judkins did not accost him to talk about the business. He only complained of Lothrop's treatment of him and of the refusal to give him a receipt. He did not ask any thing of Field. Field did not assume to do any thing. The business had been done. He only answered Judkins' remark about his treatment. He said "it" (the treatment, not giving the receipt) "was all right, that they were in hopes of getting rid of Cooley some time." This was the most casual remark, unofficial and unconnected with any act. It was simple opinion and hearsay at that. No authority has been cited for its admissibility, and we think its admission was an error, harmful to the defendant town of St. Albans.

Exceptions sustained.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

WEBB v. COUNTY COMMISSIONERS.

March 17, 1885.

WAYS — REPORT OF COMMITTEE ON DAMAGES.

The report of a committee, appointed under the statutes of Maine to appraise the damages of the land-owner for the location of a way, may be to the supreme judicial court when it is finally completed. It is not required to be made at the first term next after the appointment of the committee.

Philo Hersey, for plaintiff. *Wm. H. Fogler & George E. Wallace*, for defendant.

EMERY, J. The question is whether the committee agreed upon under R. S. 1873, chap. 18, § 8, upon petition for increase of damages for land taken for roads, must make their report to this court at the term next after their appointment, or at the term next after their final decision. By section 18 of the same chapter, the jury (if no committee was agreed upon), were to view the premises, hear the testimony and the arguments of the parties, and their counsel, and render a verdict signed by all of them, which was to be inclosed in an envelope, with an indorsement thereon stating the contents, and delivered to the officer having charge of them, "who is to return it to the supreme judicial court at the next term thereof to be held in the same county." The officer clearly was to return it to the next term after he received it, and the term meant, is the term next after the verdict signed and sealed up.

After detailing what is to be done with the verdict in court after it is returned, the same section provides: "If the matter is determined by a committee as pro-

vided in this chapter, their report shall be made to the next term of said court held in same county." The committee's report was to be made no earlier than the jury's verdict was to be returned. We think the language of the statute does not require either to be done at the first term after the appointment.

In the matter of a committee appointed by the supreme judicial court in road cases, under section 38, the legislature expressly stipulated in words, that the report should be made, "at the next or second term after their appointment." In providing in the same chapter for the report of the committee appointed by the court of county commissioners, the words "after their appointment," are omitted. The difference in the language is noticeable, and we think there is an equal difference in the intent.

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

NEW YORK COURT OF APPEALS.

GENET v. BROOKLYN.

June 9, 1885.

TAXATION—LOCAL ASSESSMENT—CONSTITUTIONAL GUARANTY—OFFSET.

Under the act chapter 631, of the Laws of 1868, for the widening of portions of Sackett and other streets in the city of Brooklyn, land-owners, part of whose property has been taken for the improvement, are only entitled to receive the balance of award over the assessment against their property. But where several lots are owned by the same person, which are treated in the proceedings as distinct and separate parcels, the city is not entitled to aggregate the whole amount of the awards and assessments and set off one against the other. An assessment can only be enforced against the land assessed.

The imposition of local assessments for benefits is an exercise of the taxing power of the legislature, and the reduction of an award by applying thereon an assessment not measured by actual benefit is not in conflict with the constitutional provision that private property shall not be taken for public use without just compensation.

George C. Genet, for appellant. *Joshua M. Van Cott*, for intervenors. *John A. Taylor*, for respondent.

ANDREWS, J. The act chapter 631 of the Laws of 1868, for the widening of portions of Sackett, and other streets in the city of Brooklyn, defined the land to be taken for the improvement, and appropriated it for public use. It made provision for the appointment of commissioners to estimate and ascertain the expense of the improvement and the damages sustained by the land-owners for the lands taken, and also for the apportionment and assessment of such damages and expenses upon a limited assessment area to be fixed by the commissioners of Prospect park (§§ 4, 5). It provided that the proceedings subsequent to the appointment of commissioners of estimate, should be governed by the laws then in force relating to street openings in the city of Brooklyn, so far as they were not inconsistent with the act (§ 7). There was no express provision embodied in the act itself, for paying the land-owners for the lands taken, but the duty of payment was cast upon the city by force of section 16 of the fourth title of the charter of 1854, which was incorporated into the act of 1868, by force of the seventh section. This was expressly adjudged in the case of *Sage v. Brooklyn*, 89 N. Y. 189.

There are two questions, upon the determination of which this case depends, not involved, or at least not decided in *Sage v. Brooklyn*. The plaintiff sues to recover from the city of Brooklyn the sum of \$9,576, being the aggregate damages sustained by his predecessor in title, and interest, by the taking for the improvement of a part of several city lots owned by him, embraced in a single tract, as estimated by the commissioners of estimate appointed under the act, whose report was confirmed, November 24, 1869. Each lot was separately described and numbered in the report, and the value of the part taken from each was separately stated. The same commissioners who estimated the damages, after their

report thereon was confirmed, proceeded, in pursuance of the further authority conferred by the act, to assess the expense of the improvement upon the property benefited within the district of assessment. They separately assessed the residue of each of the lots above referred to (that is, the part of each lot not taken for the improvement) for benefits. The assessment for benefit on such residue in some cases exceeded, and in other cases were less than the damages previously awarded for the parts taken. The commissioners' report of assessments was tabulated as required by section 15 of the charter of 1854, as amended by chapter 68 of the Laws of 1862, and in their report the commissioners stated in respect to each lot of which a part had been taken, the amount awarded for damages for the part so taken, the assessment for benefit on the residue, and the balance of award over assessment, or of assessment over award, as the case might be. In respect to five lots, the awards exceeded the assessments thereon in the sum of about \$1,035, and in respect to five other lots the assessments exceeded the awards by about the sum of \$1,020. The final report of the commissioners was confirmed February 28, 1870.

The two questions to be determined are, *first*, whether by the true construction of the statute of 1868, a land-owner, part of whose land was taken for the improvement, is entitled to recover the whole sum estimated by the commissioners in their first report as his damages for the land taken, or only the balance of award over assessment stated in their final report, and whether in the case of several lots owned by the same person, but treated in the proceedings as distinct and separate parcels, in respect to some of which the assessment exceeds the award, and in others the award exceeds the assessment, the city is entitled to have the balances each way aggregated and set off, the one against the other.

The other question is, whether the scheme of the statute for ascertaining and providing compensation to the land-owners, satisfies the constitutional provision and guaranty that private property shall not be taken for public use without just compensation (Const., art. 1, § 6). The general scheme of street openings in the city of Brooklyn seems to contemplate that assessments for benefits upon residues of lots, part of which are taken for the improvement, shall be applied to reduce and limit the awards for the parts taken, and that the liability of the city to pay awards to the land-owner in such cases shall be limited to the excess of award over assessment, but that in ascertaining such liability each lot or parcel is to be separately considered, so that an assessment on one lot, will not reduce an award in respect to another lot, although both lots may be owned by the same person. By the charter of 1854 (Laws of 1854, chap. 384), power was conferred on the common council to cause streets and avenues to be opened, under certain limitations, and to fix a district of assessment. The act provided for the appointment of Commissioners of Estimate and assessment, and it was made their duty to ascertain the damages for land taken, and to assess the expenses of the improvement upon the land embraced in the district of assessment, according to benefit (tit. 4, §§ 3, 6). The commissioners were required to designate in their report the pieces of land required to be taken, by the map number, and any residues; the pieces assessed for benefits, the names of the persons interested in the property taken or assessed; the awards made; the amount assessed on each piece of land, and the balance of award over assessment, or of assessment over award, in each case (§ 7). In case part only of the land of any person should be taken, the residue was subject to assessment for benefit (§ 9), and it was provided, that when only a part was required, the excess of damages for the part taken over the assessments for benefit on the residue "shall be assessed and be a lien on other lands and premises according to the estimated benefit to be derived by them from the improvements." Upon the final confirmation of the report of the commissioners the common council was authorized to cause the improvement to be made (§ 15), and by section 16 it was made the duty of the comptroller to pay to the persons to whom damages were awarded in the report of the commissioners the amount of such damages, without deduction by way of "fee or commissions." These provisions in the act of 1854, plainly indicate that it was the intention that the assessment on the residue of a lot, for benefit, should be applied by the commissioners in reduction of the estimated value of the part taken, and that the

award to be paid by the city under section 16 was the balance remaining after such application. It was to accomplish this purpose that the statute required that the balances to be received, and to be paid respectively, should be stated by the commissioners in the report. Any other construction would leave the act incomplete, since by the tenth section it is only the excess of damages which is to be assessed, and is made a lien upon the lands and premises.

The amendment of 1862 (Laws of 1862, chap. 63) separated the functions of the commissioners of estimate and assessment, which, as has been seen, under the charter of 1854 united in the same persons. By the amendment the damages for land taken, were to be ascertained by commissioners, and the assessment was to be made by the board of assessors (§§ 14, 17). But the provision for ascertaining and stating balances was preserved, that duty being devolved upon the assessors, and it was only upon confirmation of their report that the rights of land-owners to awards became fixed. There was no departure in the act of 1868, under which the proceedings in question were taken, from the policy of the charter acts, that awards should be reduced and limited by assessments on residues. Under the act of 1868, both awards and assessments were to be made by the same commissioners, as under the charter of 1854, but the awards were to precede the assessment. The expense of the improvement was to be determined before the assessment should be made. After the report of the commissioners estimating the expense of the improvement and the damages of the land-owners had been made and confirmed, the same commissioners were then to proceed to make the assessment, and in making their assessment and report the provisions of the charter acts are to govern when not inconsistent with the act of 1868. The form of the report, including the stating of balances, is governed by the charter acts, and the same policy of reducing awards by assessments is by force of the seventh section applied to proceedings under the act of 1868.

It is insisted by the counsel for the plaintiff, and it is conceded by the counsel for the city of Brooklyn, that under the improvement acts, an assessment is not a personal charge against the owner of the land, and is enforceable only by a proceeding *in rem* against the land assessed. The exemption of the owner of land from personal liability for an assessment does not, however, conflict with the policy of charging against an award, an assessment against a residue. An assessment for benefit proceeds on the assumption that the land assessed, is increased in value by the improvement, and the extinguishment of the award in whole or in part by the assessment, relieves the land assessed from the burden of the assessment. In theory, the canceled assessment is the exact equivalent of the amount by which the award is reduced.

But we think the court below erred in aggregating the balances of awards and the balances of assessments, and offsetting the one aggregate against the other. The lots were separately valued and separately assessed. In cases where the assessment exceeds the award, the owner may prefer that the land should be sold for the assessment, rather than pay the lien. This we think he has the right to do. The statute only contemplates the reduction of an award by an assessment, when both relate to the same lot, and the balance is to be ascertained and struck by the commissioners and embodied in their report. The plaintiff was not personally bound to pay the assessments, and no general right of set-off is given by the act, and in the absence of a statutory provision we perceive no equity upon which such right can rest. See *Hatch v. The Mayor*, 82 N. Y. 436.

The constitutional objection is based upon the claim that the authority given to the commissioners of assessment by the act of 1868, to reduce the award for the land taken, by the assessment for benefit on the residue of the same lot or parcel, is not just compensation within the constitutional requirement. It is not claimed that actual benefit to a residue of land owned by a person whose land has been taken in part for a local improvement may not, if the legislature so direct, be set off against the value of the land taken, and the money payment limited to the balance of the award remaining after such application. This course has been sanctioned by a uniform course of legislative and judicial precedent, commencing at an early period. By the street opening act relating to the city of New York, re-enacted in the Revised Laws of 1818 (2 R. L. 408), it was provided (§ 178), that

the commissioners of estimate and assessment shall proceed to make a just and equitable assessment of the loss or damage to any person by reason of the taking of land, over and above the benefit or advantage, or of the benefit and advantage over and above the loss and damage, and that the commissioners "should estimate and report the excess and surplus only of the said loss and damage over and above the value of said benefit and advantage, as and for the compensation and recompense to such owner or owners for his loss or damage, etc., and for relinquishing the said lands," etc. The validity of the mode of compensation provided by this act was considered and approved in the case of *Livingston v. The Mayor, etc.*, 8 Wend. 85, and the decision in that case has been frequently approved. *People v. Mayor, etc.*, 4 N. Y. 435; *Betts v. Williamsburgh*, 15 Barb. 225; *L. I. R. R. Co. v. Bennett*, 10 Hun, 91. The principle of the New York act, has been incorporated into very many of the acts subsequently passed, authorizing the laying out and opening of streets in cities and villages.

But the particular point of objection now made, is that the statute of 1868 does not limit the reduction of the award by the actual estimated benefit resulting from the improvement to the lands of the owner, other than those taken, but that under the scheme of the statute, the assessment for benefit may exceed the actual intrinsic benefit to the land assessed, and it is claimed that a law permitting an award to be reduced by the deduction of such arbitrary sum, not measured by actual benefit, does not provide just compensation within the purview of the Constitution. The facts upon which the argument proceeds may be briefly stated. The act requires the commissioners of Prospect park, before any assessment is made, to fix a district of assessment, beyond which, the act declares, the assessment shall not extend (§ 5). The whole expense of the improvement is to be estimated by the commissioners of estimate and assessment, including the damage to the land-owners (§ 16). When this estimate is made and confirmed, the commissioners of estimate and assessment are then required to assess the amounts so ascertained upon the lands embraced in the district of assessment which they deem benefited by the improvement, and as they shall deem just and equitable. (Id.)

The argument is that under this plan the whole expense must be assessed upon the lands embraced in the assessment district fixed by the park commissioners, although the aggregate benefit to such lands from the improvement may not in fact, or in the judgment of the commissioners of assessment, equal the aggregate expense, the only duty resting upon the commissioners being to make the assessment relatively equal and just as between the different parcels in the assessment district, so, as is claimed, it may result that the assessment on each parcel may exceed the actual benefit thereto. It is insisted that the reduction of an award by applying thereon an assessment not measured by actual benefit is not just compensation.

We think the argument fails in omitting to separate the two powers exercised by the legislature in forming the act of 1868, viz.: the power of taxation, and the right of eminent domain. The constitutional requirement that just compensation shall be made for lands taken for public use must be absolutely performed, and a mere colorable compliance will not satisfy the constitutional guaranty. The right to compensation is the right of the citizen whose land is taken, which the legislature can neither ignore nor deny. The power of taxation, on the other hand, is vested in the legislature and is practically absolute, except as restrained by constitutional limitation. The power of taxation being legislative, all the incidents are within the control of the legislature. The purposes for which a tax shall be levied; the extent of taxation; the apportionment of the tax; upon what property or class of persons the tax shall operate; whether the tax shall be general or limited to a particular locality, and in the latter case, the fixing of a district of assessment; the method of collection, and whether the tax shall be a charge upon both person and property, or only on the land, are matters within the discretion of the legislature, and in respect to which its determination is final. *Livingston v. The Mayor, supra*; *People v. Brooklyn*, 4 N. Y. 419; *Thomas v. Leland*, 24 Wend. 65; *Town of Guilford v. Supervisors of Chenango*, 13 N. Y. 143; *In re Church*, 92 id. 1.

There is no constitutional guaranty that taxation shall be just and equal, although a law plainly departing from the principle of equality in the distribution of public burdens would be justly obnoxious as contrary to natural equity and as practical confiscation, but the remedy must ordinarily be found in an appeal to the justice of the legislature.

The principle of local assessments for public municipal improvements has been recognized and applied during the whole history of the State, although its absolute justice has been sometimes questioned. The legislature may itself fix a district of assessment, or the power may be delegated by the supreme legislative body to the authorities of subordinate political and municipal divisions or other official agencies, as may also the incidents of the power, such as the apportionment and distribution of the tax as between persons and property upon which it is laid.

The learned counsel for the intervenors is compelled to admit that the legislature may distribute the burdens of public improvements on its own notions of policy, its own sense of justice, and its own assumptions of benefit.

The imposition of local assessments for benefits is an exercise of the taxing power, *People v. Brooklyn*, *supra*; *Matter of Van Antwerp*, 56 N. Y. 261; *Litchfield v. Vernon*, 41 id. 123, and it is clear that the legislature may in its discretion make assessments a personal charge against the owners of the land assessed, and impose upon them the duty of payment. The assessment district, under the act of 1868, was fixed by the park commissioners under its authority, and, although the act does not in terms require them to include therein all the property which in their judgment would be specially benefited by the improvement, this is the fair intentment. In executing this authority, the commissioners may have erred in judgment, as the legislature might have done, if it had itself defined the district of assessment. But the judgment of the commissioners was final, unless it was subject to revision in a direct proceeding upon review as to which it is not necessary to inquire.

The assessments imposed upon the lands of the plaintiff's grantor was, as has been said, a tax, and represented the proportion of the aggregate sum which, in the judgment of the commissioners exercising by delegation the power to distribute the tax, should be charged upon the several parcels as their respective contributions to the aggregate expense. Assuming that the charge exceeded the benefit, it was, nevertheless, made under the authority and direction of the legislature in the exercise of an undoubted legislative power, and it cannot be invalidated by proof that the charge was unjust or unequal, or even arbitrary.

Bringing together then, the two proceedings under the act of 1868, we are of opinion that there is no constitutional objection to a legislative decision setting off against an award made to an individual for lands taken for public use, an assessment for benefit against his other lands, made in the same proceeding. The act provides in the first instance for the ascertainment, through constitutional commissioners, of the full value of the land taken. It next provides for the assessment by the same commissioners, acting as representatives of the taxing power, of the whole expense of the improvement upon a limited district, defined by the commissioners, of Prospect park. There can be no doubt that the assessment when made became a valid charge on the lands assessed. It was competent for the legislature to have made the owners personally liable for the assessment. It does not adopt this general policy. But in respect to the owners of lands taken, and also of lands assessed, it declared in substance that the claim for compensation ascertained in the mode defined by the Constitution should be satisfied in whole or *pro tanto* by the satisfaction, in the manner pointed out by the statute, of a valid and legal charge for benefit imposed upon his other lands. This, we think, was just compensation within the principle of *Livingston v. The Mayor*, *supra*, and the cases following it. If there is any departure from sound principle in the method of adjusting compensation in the act of 1868, it is sanctioned by a long line of legislative and judicial precedents, which the court are not at liberty to disregard.

There are no other questions which require particular notice.

The result is, that the judgment must be reversed for the error of the court below in aggregating the balances and setting off the one aggregate against the

other. The subtractions in the copy of the tabulated report as printed seem in some respects to be inaccurate. Upon a new trial, the parties will have an opportunity to correct any amendable error in the computation.

All concur, except MILLER and DANFORTH, JJ., not voting.

SIPPLE v. STATE OF NEW YORK.

June 9, 1885.

NEGLIGENCE — CLAIM AGAINST STATE — BOARD OF CLAIMS — EVIDENCE.

By the act, chapter 321, Laws of 1883, giving authority to the board of claims to hear and determine all claims against the State for damages sustained from the canals or their use and management, the State assumed the same measure of liability incurred by individuals engaged in similar enterprises, and is liable for damages resulting from the negligence of a lock-tender in the management of the lock.

The court is not bound to give implicit credit to the testimony of a witness, even in the absence of affirmative evidence contradicting him, when it appears that he has a personal motive to misstate the facts.*

D. O'Brien, attorney-general, for appellant. *W. H. Bowman*, for respondent.

RUGER, C. J. It must be conceded that the State can be made liable for injuries arising from the negligence of its agents or servants only by force of some positive statute assuming such liability. *Lewis v. The State*, 96 N. Y. 71. It is claimed by the respondent that such an assumption has been made by section 1, chapter 321, Laws of 1883. This gives authority to the board of claims "to hear and determine all claims against the State, of any and all persons and corporations for damages alleged to have been sustained by them from the canals, or from their use and management, or resulting or arising from the negligence or conduct of any officer of the State having charge thereof, or resulting or arising from any accident or other matter or thing connected with the canals. But no award shall be made unless the facts proved shall make out a case which would create a legal liability against the State were the same established against an individual or corporation."

It is contended by the attorney-general that this act should be so construed as to exempt the State from any liability occurring through its management of the canals, except that arising from the negligence of some person described by law, as an officer of the State. We think such a construction is uncalled for either by the letter or spirit of the statute. Its plain reading makes the negligence of a State officer but one of the alternatives upon which the liability depends. Thus the State assumes liability for damages arising from the use and management of the canals, or from the negligence or conduct of its officers having charge thereof, or from any accident "or other matter or thing connected" with them. It is not essential to a recovery under the act that the damages should be caused by the negligence of such an officer; but, if the same were occasioned by "any accident or other matter connected with the canals," or from "their use or management," no matter what the immediate cause may be, its express terms authorize an award; provided, under similar circumstances, the law would adjudge a liability against an individual or corporation. The act was conceived in the plainest principles of justice, and was intended to afford a substantial and not a delusive remedy to parties who might be injured by the careless and negligent conduct of those who were intrusted by the State with the execution of its work. The canal was a State enterprise and was managed and controlled by its servants, and reason and justice require, when it engages in public enterprises from which a revenue is expected to be derived, and in the prosecution of which private property is required to be taken, and individual interests jeopardized, that it should compensate those whose property rights are thereby invaded. The object in view was the protection of the citizen, and not the exemption from liability of the State; and it is quite evident that the State thereby intended to assume, with reference to the management of the canals, the same measure of liability incurred by individuals and corporations engaged in similar enterprises, and to afford to par-

*85 N. Y. 377; 2 Abb. N. C., 239; 36 N. J. Eq. 183.

ties injured, the same redress which they would have against such individuals and corporations for similar injuries. The use of the terms "the negligence or conduct of any officer of the State having charge thereof" were obviously descriptive, and intended to embrace all those persons in the employ of the State intrusted with the performance of duties relating to the canals, and from a neglect or omission to perform which, damages might occur to individuals. It is unreasonable to suppose that the State intended to confine its liability to cases arising from the negligence of those officers having the duty of general supervision only to perform, and deny relief in cases where damages arose from the neglect of others having practical control of its operations. It is unquestionably the duty of all State officers to scrutinize closely the authority under which claims are made upon the public treasury, and defeat such as are not clearly warranted by law, but it is unbecoming the dignity and honor of a great State to attempt to evade the fulfilment of its obligations according to their spirit and meaning, or to stint the payment of a proposed indemnity by a constrained or illiberal construction of the language in which its promise is framed. The act is broad and comprehensive in its language, and should be construed in the spirit which inspired its enactment.

The only inquiry under it, therefore, is whether the claimant made out such a case by evidence, as entitled him, if it had been proved against an individual or corporation, to have recovered against them. The proof shows that the injury occurred in consequence of the opening of the paddle gates to lock No. 65 on the canal between the hours of half-past twelve and two on the night of December 5th and 6th, 1883, whereby a large quantity of water was let into the lower level of the canal, its banks were breached, and the premises of the claimant adjacent were overflowed and greatly damaged.

It is not claimed by either party to this controversy that these paddles could have been opened by accident or without human agency, and the inference is unavoidable that they were intentionally or inadvertently left open either by the tender in charge of the locks, or by some third persons.

It is contended that the board of claims are legally bound, in the absence of affirmative evidence showing the actual offender, to find the latter to be the guilty parties by reason of the evidence of the lock-tender, that he closed these paddles at half-past twelve o'clock and did not again open them.

We do not think this is so. This witness was not disinterested, and the trial court might well have regarded his evidence on that point with suspicion and incredulity. He had been charged in a criminal prosecution, with liability for the mischief occasioned by the act in question, and although discharged from that accusation, still remained liable to a civil action for damages, and to prosecution for felony under section 479 of the Penal Code, and to other punishment under section 480. He was, therefore, influenced by the most serious considerations, not only to repel the imputation of neglect as against himself, but to throw the suspicion of guilt upon others. Under the circumstances surrounding this man, the trial court was under no legal obligation to give implicit credit to his testimony. *Wolfahrt v. Becker*, 92 N. Y. 490; *Elwood v. W. U. Tel. Co.*, 45 id. 549. So far as the proof shows, he was the only person known to have had any thing to do with these paddles on the night in question; and from the shortness of time elapsing between the hour when he left the lock and the appearance of the flood in the surrounding country, it is not an unnatural or an improbable inference that the opening of the paddles was synchronous with the time of the departure of the lock-tender.

The trial court found upon the evidence "that the break was the result of want of proper care on the part of the lock-tender in charge of said lock No. 65, and in leaving said lock without any one in charge thereof." We think it authorized such a finding. It was supportable not only upon the theory suggested, but also upon the ground of an omission to perform a duty enjoined upon them by the instructions under which they were acting, and which duty the exercise of reasonable care and prudence in the management of the canals enjoined upon the master. The gates in question opened into a level of only half a mile in length, constructed upon an embankment overlooking a large stretch of country, and where a breach in the bank was liable to occur and occasion great damage.

It was competent for the trial court to find that the exercise of reasonable care required a constant watch upon these levels during the period of their use for purposes of navigation, and that an omission to keep such watch was an act of negligence. The evidence showed that it was the custom of the State to keep lock-tenders on guard at all times during the season of navigation, at the lock in question, to assist boats in passing through, and to regulate the height of water in the level below; that during that time these paddles, when not raised, were pulled back and fastened with a ring or pin, but upon the close of navigation and removal of the lock-tenders, they were always securely locked, so as to be immovable without the possession of a key, or the use of force and violence upon the locks.

The evidence further shows that on the night in question the only lock-tender on duty left the locks at midnight, leaving the paddles unlocked and the premises unguarded. The canals had been officially ordered to be closed on the 7th of December, and they were actually frozen over at the time in question.

It is claimed by the appellant that the lock-tenders were justified in leaving the locks unguarded on account of the proximity of time for closing navigation and the unnavigable condition of the canal. Perhaps that is so, but if they had any right to act on the assumption that the canals were in fact closed, did not the same assumption impose upon them the duty of taking those precautions which were customary at the close of navigation? If they are to be believed, these damages occurred either in consequence of their neglect to lock the paddles, or because they neglected the duty of remaining on guard through the night and until the close of navigation. Their duty required them to guard the locks during the season of navigation and until the paddles were locked by the proper authorities. This duty did not cease with the running of boats, but it continued so long as the presence of water in the canal required its effect upon the respective levels to be watched and provided for. This duty they violated, and to the consequences of such violation the damages are directly attributable.

Under such circumstances, a master would certainly be responsible for the act of the servant. Then how can the State escape from it?

As between individuals the doctrine of *respondet superior* applies where a servant who is employed to perform a duty, and while acting within the scope of his employment, performs it so carelessly and negligently that injuries occur to another. It was in this case the specific duty intrusted to the lock-tenders in question to regulate the height of water in the levels adjoining the locks, and it cannot be questioned but that if they had been in the employ of an individual having the canal in charge as owner that he would have been liable for the consequences of their neglect. It is said in *Shearman and Redfield on Negligence* (§ 258) that "the obligations of a canal company do not exist in favor of those only who navigate the canals; or for whom it transports persons or property. It owes a duty to the public at large to see that its canals, locks, bridges and other property are so constructed, maintained and managed as not to cause injury to others."

These obligations, we think, were assumed by the act in question on the part of the State toward all persons affected by its management of the canals, and should govern its liability in this case.

The award of the board of claims should be affirmed.

All concur, except MILLER, J., who reads dissenting opinion, and DANFORTH, J., who concurs.

HAIGHT v. MAYOR, ETC., OF NEW YORK.

June 9, 1886.

TAXATION — ASSESSMENT-ROLL — WRONG NAME INSERTED.

In the city of New York a failure to insert the name of the owner of real estate in the assessment-roll, or inserting the name of one who is not the owner, does not invalidate the assessment, but simply confines its enforcement to the land assessed.

J. A. Davenport, for appellant. D. J. Dean, for respondent.

RAPALLO, J. We are of opinion that in the city of New York it is not essential to the validity of a tax upon land, that the name of the owner should be inserted

in the assessment list. The tax may be assessed directly upon the land, properly describing it, and the only effect of omitting to insert the name of the owner, or of inserting the name of one who is not the owner, is to deprive the city of the right to collect the tax from the owner personally or by distress of goods and chattels, etc., and to confine its remedy for the collection of the tax to the enforcement of its lien therefor upon the land assessed. In this respect the system of taxation upon land in the city of New York differs from that provided in the Revised Statutes for other parts of the State. The general provisions in regard to taxation require that the taxable inhabitants of each town be assessed in the same assessment-roll or list in respect to both their real and personal estate, though the assessments are to be made in separate columns (R. S., art. 2, tit. 2, chap. 13, part 2), and the inhabitant so taxed is personally liable, not only for the taxes imposed upon his personal estate, but also for those upon his real estate. Taxes on real estate thus imposed, besides being collectible out of the personal property of the inhabitant taxed, constitute a lien upon the land for which he has been taxed. Under this system it has been repeatedly held that unless land is assessed to the real owner or occupant by his name the tax is void.

But with respect to the city of New York a different system has been established. Personal taxes are separated from taxes upon lands, and are placed upon a separate list or roll, alphabetically arranged. Laws of 1867, chap. 410, § 5. With respect to taxes upon land it is expressly provided by the same act that "no tax or assessment shall be void in consequence of the name of the rightful owner or owners of any real estate in said city not being inserted in the assessment-rolls or lists." But in such case no tax shall be collected except from the real estate so assessed."

This provision clearly indicates that the tax is to be imposed upon the land, and that it is immaterial to its validity that the owner's name should appear upon the list, except for the purpose of imposing upon him a personal liability for the tax. The insertion of the word "rightful" does not affect the sense of the provision. There would be no utility in inserting the name of any one but the rightful owner, and it cannot be supposed that the insertion of a name other than that of the real owner was intended to be required. Such a course could tend only to mislead and would serve no useful purpose.

In the present case the name inserted in the list opposite the description of the property was "est. R. K. Haight." This was not the name of any person, and the assessment in this form could not authorize the collection of the tax from the personal property of any individual. Still it was a legitimate element in the description of the property and no one could have been misled by its use.

The judgment should be affirmed.

All concur.

PEOPLE, *ex rel.* SHORT v. BACON, Sheriff.

June 9, 1885.

FORECLOSURE — JUDGMENT LIEN — EQUITY OF REDEMPTION — ASSIGNMENT.

A conveyance under the foreclosure of a mortgage is a complete bar to the lien of a judgment creditor acquired subsequent to the mortgage; and such judgment creditor who is made a party to the foreclosure proceedings afterward, has no right in the equity of redemption.

A general assignment vests the whole of the assignor's estate in the assignee, subject only to the execution of the trust; and no title or interest remains in the assignor to which the lien of a subsequent judgment can attach.*

The relators sought by *mandamus* to compel the sheriff of Ontario county to treat with them as judgment creditors of one George M. Spring, and as such, entitled to redeem certain lands theretofore owned by him, and known as lot five in East Bloomfield, Ontario county. They failed, because in the opinion of the court their judgment was not a lien upon the premises.

The facts are not disputed and in substance, as related by the trial judge, are:

First. That Spring became the owner of the lands in question on the 11th of April, 1872.

* *Childs v. Kendall*, 30 Hun, 227. — Ed.

Second. On the 25th of August, 1876, one Mark W. Powell recovered a judgment in the supreme court of this State, against the said George M. Spring, for the sum of \$338.75, damages and costs, which judgment was docketed in the clerk's office of Ontario county, on the 29th of September, 1876; on the 4th of October, 1880, execution was issued upon the judgment, to the sheriff of Ontario county, who by virtue thereof, on the 20th of November, 1880, sold the premises in question to the judgment creditor, Powell, for the sum of \$340.50, and the usual certificate was executed, filed and recorded, and on the 22d of November, 1880, the execution was indorsed, satisfied and filed.

Third. On the 5th of October, 1876, he mortgaged them to one Benjamin D. Spring, and the mortgage was then duly recorded.

Fourth. He was then insolvent and afterward, but on the same day, made a general assignment of all his property for the benefit of his creditors to one Gallup.

Fifth. On the 23d of November, 1876, the relators recovered a judgment in the supreme court against the said George M. Spring for the sum of \$613.94, damages and costs, which was docketed in the Ontario county clerk's office on that day.

Sixth. Afterward the mortgage above referred to, was foreclosed, the relators being made parties defendant in the action. Judgment of foreclosure and sale was obtained on the 30th of April, 1879, and the premises duly sold by virtue thereof on the 25th of August, 1881, to Benjamin D. Spring for less than the amount of the mortgage, and he thereupon received a deed of said premises and still retains the title thereto.

Seventh. On the 20th of February, 1882, the relators tendered the amount of the Powell judgment, with interest thereon, to the sheriff of Ontario county, and demanded a deed of the premises, which was refused, and the sum tendered was afterward deposited in bank.

T. M. Howell, for appellants. *W. H. Adams*, for respondent.

DANFORTH, J. It is impossible to find any error in the decision which followed these findings. The effect of a judgment at law, and the right of a judgment creditor are defined by statute, and the learned counsel for the appellant shows no provision upon which his claim can stand.

First. The foreclosure; the relator's lien or right, whatever it may have been, upon the land or interest of the mortgagee or judgment debtor, was subsequent to the mortgage. *Spring v. Short*, 90 N. Y. 538. They were parties to the foreclosure, and the conveyance in pursuance of it was an entire bar against them as well as against the mortgagor. Neither could after that have any right or interest in the equity redemption. If the sale had produced a surplus, a different question would have been presented, and the case cited by the learned counsel for the appellants, *Fliess v. Buckley*, 90 N. Y. 291, would be authority for upholding a lien upon it, provided one had previously existed upon the land.

On the other hand, if the relators, as they claim, were not proper parties to the foreclosure, it was because the assignment had transferred the title from the debtor to his assignee before the recovery of their judgment. *Spring v. Short*, *supra*.

Second. The assignment. It created a trust for the benefit of creditors of the assignor and not only in terms, but by force of the statute, vested the whole estate in the assignee in law and in equity, subject only to the execution of the trust. 1 R. S., part 2, chap. 1, art. 2, §§ 55-60. The assignor, however, might have declared to whom the lands to which the trust related, should belong in the event of its termination, and subject to its execution, he might have granted or devised it. *Id.*, § 61. But no title or interest remained in him, and consequently there was nothing to which the lien of a judgment could attach. *Briggs v. Palmer*, 20 Barb. 392; *Briggs v. Davis*, 20 N. Y. 15; *Leonardsville Bank v. Willard*, 25 id. 574; *Martin v. Smith*, 46 id. 571.

It does not follow, however, that the assignor could not discharge the trusts by payment of the debts before sale of the assignee, or become entitled to the residue remaining unsold after the debts were discharged, *Wintringham v. Lafey*, 7 Cow. 735; *Briggs v. Davis*, *supra*, and the contention of the learned counsel for the appellant seems to be, that there was therefore, a reversionary interest in the

assignor upon which the relator's judgment might attach. This, however, is going too far. The right which an assignor might exercise for these purposes is merely an equitable one, and in no sense impairs or diminishes the estate of the assignee, which remains perfect and exclusive until the purposes of the trust have in fact been accomplished.

Nor are we able to see that the omission of the judgment debtor or his assignee to redeem from the sale under the Powell judgment gave to the relators any additional right, or to their judgment any new virtue. The debtor's right did not pass to them. Nor did the failure of his assignee to redeem make their judgment a lien upon the land; and without that, they could not as judgment creditors acquire the interest of the purchaser at the sheriff's sale under the prior judgment. 2 R. S. 371, § 51. That omission and failure had no other consequence than to let in for the purpose of redemption a creditor, who, by decree, judgment or mortgage, had a lien or charge upon the premises so sold. The relator's judgment was not of that character. The argument in their behalf has been carefully considered, but we find no reason in it, or in the cases cited by their counsel, to create a doubt as to the correctness of the judgment appealed from, nor necessity to add more to the opinion of the learned court directing it.

We think the judgment should be affirmed.

All concur.

THE TOWN OF ONTARIO v. HILL and others.

June 9, 1885.

TOWN BONDS—VALIDITY OF—LIABILITY OF COMMISSIONERS.

Bonds issued by a town for the construction of a railroad under an act authorizing the same, upon consent being obtained of a majority of the tax payers, are void unless such consent has actually been given. The affidavits of the assessors certifying that such consent had been obtained, and upon which the bonds were authorized to be issued, are not conclusive as against the town, and in an action brought upon the bonds the town may show that consent of a majority of the tax payers had not been given.*

But no action will lie on behalf of the town against the commissioners for damages sustained by the wrongful issuing of the bonds. The verified certificate of the assessors, made in conformity with the act, is a justification of and protection to the commissioners, acting in good faith, in issuing the bonds.

This action was brought against the defendants to recover damages sustained by the plaintiff by reason of their official misconduct as railroad commissioners, in issuing the bonds of the town of Ontario to the amount of \$85,000 in aid of the construction of "The Lake Ontario Shore railroad," under chapter 241 of the Laws of 1869. The defendants were appointed commissioners December 24, 1870. In May, 1871, they subscribed for \$85,000 of the stock of the road at par, and agreed to pay therefor in the bonds of the town. In September, 1871, they issued \$51,000 of the bonds, and \$34,000 thereof on or before July, 1873. Prior to the commencement of the action suits had been brought in the United States court in favor of holders of bonds issued by the commissioners, against the town of Ontario, and judgment recovered thereon, and collected of the town, which judgments, with interest thereon to the time of the trial of this action, amounted to \$17,710.05.

The second section of the act of 1869 makes it lawful for commissioners appointed under the first section to borrow money on the credit of the town, city, or village, not exceeding twenty per cent of the assessed valuation of its property according to the last assessment-roll, and to execute bonds therefor, but subject to the condition and prohibition that no debt shall be contracted or bonds issued, until the written consent "shall first have been obtained of persons owning more than one-half of the taxable property assessed and appearing upon the last assessment-roll of such town, incorporated village, or city, and a majority of the tax payers as appears by such assessment-rolls respectively, and which fact shall be proved by the affidavits of the assessors, or a majority of them, of such town,"

* 8 Abb. N. Y. Dig. 863, par. 1027, 1034 and notes; 109 U. S. 841; 93 N. Y. 405; 18 Fed. Rep. 719; 19 id. 725; 110 U. S. 162.—Ed.

etc., and it is made the duty of the assessors to make such affidavits. The section further provides that when the consent shall have been obtained, the affidavit, consent and a copy of the assessment-roll shall be filed, and that the same shall be evidence of the facts therein contained and certified in any court of the State, and before any judge or justice thereof. Prior to August 30, 1870, the defendants, acting as citizens, and having at that time no official relation to the town, procured consents to the bonding of the town and presented them on that day to the board of assessors, and the assessors thereupon made the affidavit provided for in section 2 of the act, and the affidavit, consent and assessment-rolls were filed as provided therein.

In August, 1871, after the defendants had been appointed commissioners and after they had subscribed to the stock of the railroad, but before they had issued the bonds, an action was brought by two tax payers of the town, on behalf of themselves and others against these defendants as railroad commissioners, and other parties, to restrain the issuing of the bonds, and in the complaint which was sworn to, it was charged that a sufficient number of consents had not been obtained. In September, 1871, the suit was withdrawn as the result of an arrangement between the plaintiffs therein and the railroad company to reduce the town subscription to the stock from \$107,000, as originally contemplated, to \$85,000. The question whether the requisite number of consents to issuing the bonds had been obtained was litigated on the trial of the present action. It was substantially conceded that the requisite amount of property was represented by the consenters. But upon an analysis being made of the contents of the assessment-roll, and the consents, and after a minute and careful examination instituted by witnesses, and after going through a process of addition and subtraction in respect to the names on the assessment-roll, and a deduction from the consents of names improperly there, it was made to appear that a few less than a majority of the tax payers had signed the consents. The official misconduct charged in the complaint is in substance, that the commissioners issued the bonds, knowing that the majority of tax payers had not consented, and that they procured the assessor to make the affidavit by false representations that the consents contained such majority. The trial judge directed a verdict for the plaintiff for \$17,710.35, and refused to submit the question as to the good faith of the defendants. Other facts appear in the opinion.

W. F. Cogswell, for appellant. *Chas. H. Roys*, for respondent.

ANDREWS, J. The question of the invalidity of town bonds issued under circumstances similar to those in this case is not an open one in this State. The evidence, upon a careful analysis, discloses that, although the signatures to the consent exceed in number one-half of the names on the assessment-roll, nevertheless when they are sifted, and only such names are counted as were legally entitled to be reckoned, there are of qualified signers something less than a majority of those whose names are upon the assessment-roll of 1869. There was a failure, therefore, to comply with the fundamental condition of the bonding acts, that a certain proportion of tax payers, as specified in the particular act, should consent to the bonding before a debt should be created or bonds be issued. The act of 1869 does not substitute the affidavit of the assessors, therein provided for, in place of the fact of consent, or make it conclusive evidence of the performance of the condition. The town bonding acts have usually contained some provision for a verification of the fact of consent by the affidavit of assessors or other persons.

The act, chapter 375 of the Laws of 1852, which came under the consideration of this court in *Starin v. The Town of Genoa*, 23 N. Y. 440, requires that the supervisor and commissioners who, under that act, were charged with the duty of obtaining the consent, or some one or more of them, should make an affidavit, to be attached to the consent and to be filed, to the effect that the persons assenting comprised two-thirds of the resident tax payers on the previous assessment-roll, but there was no provision making the affidavit evidence. The court held that in an action on this bond the affidavit was not competent evidence of the fact certified, and that the plaintiff was bound to prove affirmatively by competent common-law evidence that the required number of tax payers had consented.

The act of 1869, under which the bonds in this case were issued, is broader than the act of 1852, considered in the *Starin Case*. It declares that the fact that the requisite consent had been obtained should be proved by the affidavit of the assessors, and that the affidavit, consent and a copy of the assessment-roll should be filed, and they are made evidence in any court, or before any judge, of the facts therein contained.

A similar provision in the act, chapter 398 of the Laws of 1866, was construed by this court. *Cagwin v. The Town of Hancock*, 84 N. Y. 532. The action in that case was brought against the town to recover the amount of interest coupons on town bonds issued under the act, which the plaintiff had purchased for full value from a holder of bonds, who was also a purchaser for value. The action was defended on the ground that the requisite number of tax payers had not consented to the bonding, and the trial court sustained the defense. The judgment was reversed by the general term on the ground that the affidavit of the assessor made in conformity with the terms of the act, before the bonds were issued, was conclusive of the fact therein stated, in favor of a *bona fide* holder of the securities. This court reversed the judgment of the general term and affirmed the judgment of the trial court on the ground that by the true construction of the act the affidavit was made *prima facie* evidence only of the fact certified, and that the defendant was not precluded thereby from showing that in truth and fact the requisite consent had not been obtained, and further that there could be no *bona fide* holding of bonds issued without consent in fact, which would preclude the town from contesting their validity.

These cases, considered in connection with the proof in this case, establish the proposition that the bonds issued by the defendants never had a legal inception, and were void. The town could have successfully defended against them in the courts of the State, and it would be no answer to the defense that the bonds were held by purchasers for value without actual notice of the defect in the authority of the commissioners. The town has been compelled to pay a portion of the bonds, pursuant to judgments obtained in the courts of the United States, in opposition to the rule and principle established in the courts of this State. But conceding, as we must upon the evidence, that the bonds were issued by the defendants without authority, in the sense that they were issued without the requisite consent having in fact been obtained, so as to make them valid obligations of the town, it does not follow that the defendants, in issuing the bonds, were guilty of official misconduct. The second section of the act of 1869 prescribes a rule of conduct and judgment for the government of the commissioners in determining the question whether the requisite consent of tax payers, in number and in respect of property, has been obtained, so as to justify them in performing the executive and ministerial act of executing and delivering the bonds. They, of course, are bound to act in good faith and without fraud, but so acting, the verified certificate of the assessors, made in conformity with the act, is a complete justification of and protection to them in issuing the bonds, whatever the abstract truth may be, and whether or not the requisite majority of tax payers have consented. The act is incapable of any other reasonable construction. The commissioners are authorized to issue the bonds upon the consent of the majority of tax payers, representing a majority of the taxable property appearing on the assessment-roll. But they are not charged with the duty of procuring the consent or of ascertaining the fact of consent by inquiry, or the examination of witnesses, or from a comparison of the assessment with the consent.

The second section prohibits commissioners from contracting any debt, unless the specified consent shall first have been obtained, and then follows the clause, "and which fact shall be proved by the affidavits of the assessors," etc., thus plainly making the affidavits the evidence upon which the commissioners are to act in determining whether the requisite consent has been given. The affidavit protects the commissioners acting in good faith, because the legislature manifestly so intended. It does not protect the bondholders, because the assessors and commissioners are mere agencies to bind the town on the precedent condition of actual consent, the performance of which purchasers must ascertain at their peril, and while the affidavit of the assessors and the act of the commissioners afford

some assurance of the regularity and validity of the proceedings, they are, as to third persons, the assertions of special public agents, which do not bind the town.

The town is not, however, remediless in case the assessors, contrary to the fact, certify that the requisite consent has been obtained, or, in case the commissioners, acting upon the certificate, issue the bonds. The proceedings may be reviewed on *certiorari*, *People, ex rel. Yawger, v. Allen*, 52 N. Y. 538; *People, ex rel. Haines, v. Smith*, 45 id. 772; the town may bring an equitable action to cancel the bonds and restrain their transfer, *Town of Springport v. Teutonia Sav. Bank*, 75 id. 397; S. C., 84 id. 403; or it may await the bringing of an action to enforce the bonds and defend on the ground of their invalidity. *Starin v. Town of Genoa*, and *Cagwin v. Town of Hancock*, *supra*.

The trial court directed a verdict for the plaintiff for the amount of the judgments recovered and collected of the town, with interest, and refused to submit the question of the good faith of the defendants to the jury. We are of opinion that this direction was erroneous. If there was any evidence of bad faith on the part of the defendants in issuing the bonds, it was, to say the least, far from being conclusive. The defendants testified that they believed that the requisite number of tax payers had consented, and issued the bonds in good faith, relying upon the affidavit of the assessors. It is claimed that they had notice from the complainant in the action brought by Gales and others in 1871, that the majority had not consented. It is true that this was charged in the complaint in that action, but the plaintiffs discontinued the action soon after its commencement upon a settlement between the plaintiffs and the railroad company, which assumed that bonds to some amount had been authorized, and the issue of consent or non-consent was not tried. The defendants were not bound to accept the statement of the plaintiffs in that action, as against the affidavits of the assessors. So also the fact that a paper purporting to be a revocation of consent on the part of certain tax payers was, in 1870, served on one of the persons who was subsequently appointed a commissioner, did not tend to show fraud on the part of the commissioner in acting upon the certificate of the assessors.

The general course of adjudication in this State up to 1873 was adverse to the right of a consenting tax payer afterward to revoke or withdraw his consent. *In re Town of Greene*, 38 How. 515; *People, ex rel. Hoag, v. Peck*, 4 Lans. 523; *People, ex rel. Sayre, v. Franklin*, 5 id. 129. The contrary rule was first declared in *People, ex rel. Irwin, v. Sawyer*, 52 N. Y. 296, decided in 1873.

The claim that the defendants induced the assessors to make the affidavit, by the false representation that a majority had consented, was controverted on the trial. The affidavit was made before the defendants had been appointed commissioners, and if what took place at that time tended to show that their subsequent action as commissioners was not in good faith, it was a matter for the jury.

The same is true in respect to the claim that the defendants knew that the affidavit was made without an actual comparison by the assessors of the consent with the assessment-roll, and if this was known to them, it would not establish that they knew the affidavit was false.

We are of opinion that the plaintiff failed to maintain his action on the merits, and that the verdict was improperly directed. This conclusion renders it unnecessary to consider the other questions in the case.

The order of the general term should be affirmed, and judgment absolute entered for the defendants on the stipulation.

All concur.

SUPERVISORS OF TOMPKINS COUNTY v. BRISTOL.*

June 9, 1886.

TREASURER'S BOND—LIABILITY OF SURETIES—EVIDENCE—RES GESTÆ.

Sureties on a treasurer's bond are liable only for derelictions of duty occurring during the term covered by the bond.

The undertaking of sureties on a treasurer's official bond, that he shall faithfully perform his duties, involves the obligation of making correct reports according to law as well as the payment of funds in his custody. A false report made by a treasurer is a violation of official duty rendering his sureties liable to the party injured thereby.

* 58 How. Pr. 3, reversed.

In an action against sureties for an alleged breach of such a bond the official reports made by the treasurer during the term covered are a part of the *res gesta* and competent evidence, not only of the affirmative facts appearing therein, but also as reflecting upon and illustrating the objects and motives of other official acts which are properly the subject of investigation.

S. D. Halliday, for appellants. *Perry G. Ellsworth*, for respondent.

RUGER, C. J. George H. Bristol, one of the defendants, was elected treasurer of Tompkins county for a term commencing January 1, 1870, and terminating January 1, 1873. Before entering upon the duties of his office he executed with the other defendants, as sureties, the bond required by the statute, which was conditioned that he should "faithfully execute the duties of his office and shall pay, according to law, all moneys which shall come to his hands as treasurer of the said county of Tompkins, and render a just and true account thereof to the board of supervisors or the comptroller of the State when thereunto required." The action is brought against the treasurer and his sureties to recover damages for alleged breach in the condition of the bond. Upon assuming possession of the office in January, 1870, Bristol received, among other funds from his predecessor, certain moneys belonging to Charles Cowen, an infant, realized from a sale of real estate taking place by virtue of a judgment in partition proceedings conducted under the provisions of the statute. Such moneys then amounted to the sum of \$775.65, and were invested as follows: \$317.19 in a mortgage upon unincumbered real estate given by Charles W. Smith, \$450 in the 5-20 government bonds of 1867, and \$108.46 in cash. The care of such moneys was, previous to the Constitution of 1846, given to the register or clerk in chancery; but by chapter 280, section 71 of the Laws of 1847, it was transferred to the clerk of the court of appeals, and by chapter 277, Laws of 1848, to the county treasurer, who were also thereby subjected to all of the provisions of law applicable thereto. The duties pertaining to the management and care of moneys received from the sale of infants' real estate in partition are the subject of careful and stringent provisions, in the statutes and rules of court, and so far as they are material in this case, may be concisely summarized as follows: When received by such treasurer he is required to invest them either in State or United States bonds or in mortgages upon unincumbered real estate worth twice the amount of the sum invested. 2 R. S. (Edm. ed.) 338, § 70; Chy. Court Rules, 180. While waiting for the opportunity of making authorized investments he is required to deposit such moneys in a bank to be designated by the court. Sup. Ct. Rule of 1871, 80; Present Rules, 68. After the investment has been made, no security taken for it can be discharged, transferred or impaired by any act of the treasurer without the order of the court entered in its minutes. 2 R. S. (Edm. ed.) 338, § 70. Such treasurer is required to make and file in the county clerk's office within ten days after the 1st day of July, in each and every year, a report containing a statement of all moneys in his hands belonging to infants, and for whom invested, with a particular description of the securities held therefor, and the amount due thereon, and special and detailed information as to whether they are invested or not, and if not why, and how long they have remained uninvested, and other information relating thereto, which report is required to be verified by the treasurer. § 1, chap. 346, Laws of 1859. For a neglect to make such report a penalty of \$500 is imposed, and the district attorney of the county is directed to prosecute for the same. §§ 2 and 4, same act.

The undisputed evidence in the case shows that Bristol was elected treasurer in the fall of 1872, for a second time, running from January 1, 1873, to January 1, 1876, when he was succeeded in office by one Van Voorhees; that he did not deliver to his successor the mortgage, in which a part of said infant's moneys had been invested, and that said infant had never been able to obtain satisfaction from Bristol, for the moneys represented therein; that said mortgage was paid to Bristol on the 17th day of August, 1871, by the mortgagor, and the same was then canceled and discharged of record, although no order of the court authorizing such cancellation was ever obtained by the treasurer. The official report of the treasurer for the year 1872 described these moneys as still being invested in a mortgage for \$317.19, and negatives the fact that any part of the principal sum had been paid during the year, or that there had been any change in the invest-

ment. It does not appear in the case that these moneys had ever been reinvested after their receipt in 1871.

The referee has found upon this evidence that the amount of the Smith mortgage was converted by Bristol to his own use during his first term of office, and that the defendants are liable in this action for that sum. An exception to this finding and one raising the same question taken to the refusal of the referee to nonsuit the plaintiffs at the close of their evidence constitute, aside from those taken to certain rulings made by the referee upon the admissibility of evidence, the grounds of complaint on this appeal.

It is claimed by the appellants that no sufficient evidence was given that the moneys paid upon the Smith mortgage were converted to his own use by Bristol, during his first term of office, and that his sureties are not liable for any other conversion. It is of course true that the sureties on a treasurer's bond are liable only for such dereliction of duty as occurs during the term of office covered by their bond, but we are of the opinion that the finding of the referee to the effect that the conversion in question occurred during that time was warranted by the evidence. The violation of duty committed by the treasurer in canceling the Smith mortgage without an order of the court therefor, *Farmers' Loan and Trust Co. v. Walworth*, 1 N. Y. 433, together with the falsity of his implied statement that it had not been paid during the year preceding, and still remained an outstanding security for the debt, furnished presumptive evidence of an existing fraudulent intent on his part, and in the absence of explanatory evidence justified the conclusion that the motive for such conduct must have existed in an accomplished misappropriation by the treasurer of the moneys in question. It is quite improbable that Bristol would voluntarily incur the penalty of making a false report, and then punishment following the commission of the crime of perjury if there was no motive for so doing. If he then had these moneys on hand there was no reason for not reporting that fact as he could have committed a subsequent embezzlement if he was inclined to do so, just as easily after a correct as well as a false report. It is a legitimate inference from the facts stated that the embezzlement had already taken place, and that the false report was made to cover or conceal an offense already committed. It is in accordance with the teachings of human experience that the commission of one crime often leads to the perpetration of another in an effort to escape the consequences of the original transgression. The undisputed evidence that these moneys were in fact at some time embezzled and that the treasurer commenced making false reports in regard to them in 1872 affords a strong presumption that they were actually appropriated by him prior thereto. The evidence received for the purpose of raising this presumption was competent and unobjectionable.

The undertaking of sureties on a treasurer's official bond is that he shall faithfully perform his duties, and this involves the obligation of making correct reports conforming to the requirements of the statute, as well as the payment of funds in his custody. In an action against sureties for an alleged breach of such a bond the official reports made during the term covered by them are a part of the *res gesta* and competent evidence, not only of the facts affirmatively appearing therein, but also of such other facts and circumstances bearing upon the liability of the sureties as are legitimately inferable therefrom. *Fenner v. Lewis*, 10 Johns. 88; *Douglas v. Howland*, 24 Wend. 36; 1 Greenl. Ev., § 187. This arises not alone from the principle authorizing the reception of such evidence, not as declarations of the principal but as being an official act performed under the direction of the statute, but also as performed by the officer in pursuance of the stipulations contained in the bond whereby the sureties have assumed the liability of any neglect in the discharge of the duty. *Goss v. Watlington*, 7 E. C. L. Rep. 880; *Whitnash v. George*, 15 id. 295; *Middleton v. Melton*, 10 B. & C. 317. Although the fact of the death of the person making the entries appears in the cited cases, it was not conceived that this was a controlling circumstance, inasmuch as the principle upon which they were mainly determined was the obligations assumed by the sureties in their bond for a proper performance by the officer of the duty of making such entries. The competency of such evidence in an action against sureties, even during the life-time of the officer, as to the amount of

funds in his hands, has been decided in this court. It was, however, also held that such proof was not conclusive of that fact, but was open to explanation and contradiction by the sureties. *Bissell v. Saxton*, 66 N. Y. 55. See, also, *U. S. v. Boyd*, 5 How. (U. S.) 29.

A false report by the treasurer constitutes a violation of official duty and a breach of his bond, rendering the sureties liable to the parties injured for such damages as are the legitimate consequence of the wrongful act. It is, therefore, properly receivable in evidence in an action against the sureties for a breach, not only for the purpose of showing such breach, but also as reflecting upon and illustrating the object and motives of other official acts of the treasurer which are properly the subject of investigation.

The inquiry here is, whether Bristol, in fact, embezzled the funds in question, and, if so, when, and upon that issue his official acts and declarations concerning these funds during his first term are a part of the *res gestæ* and competent evidence of any fact which they tend to establish.

Several reports made by Bristol after the expiration of his first term of office, and showing repeated statements similar in effect to those contained in the report of 1872, were received in evidence by the referee against the defendant's objections and under exceptions. We do not consider it necessary to pass upon the question of the admissibility of this evidence, as it was cumulative only and, in the view we take of the case, wholly immaterial. The first erroneous report was just as conclusive upon the rights of the parties as any number of them could be, and the admission as evidence of the subsequent reports could not increase the force of the first or do the defendants any possible harm.

Several exceptions were also taken to the admission of certain statements made to one Harry Cowen by Bristol, at the time of obtaining a certain worthless mortgage for \$767.19, with a view for substituting it for the funds in question in the hands of the treasurer. These statements were made during the negotiations preceding the giving of the mortgage and tended to show that it was given without consideration and for an improper purpose. They were clearly *res gestæ* and competent for the purpose of showing that the mortgage in question was not taken in good faith and as a legal investment of the funds in controversy. The defendants might very properly have objected to all of the evidence affecting the mortgage in question, but, after allowing it to be proved, they could not successfully exclude the evidence offered to show that it was not such a security as the treasurer was authorized by law to take. At the period of these exceptions the case stood on the same footing as though the proof of the mortgage had been made by the defendants and the burden had been cast upon the plaintiff of showing why it was not a proper security for the moneys in question. The evidence objected to tended to prove this fact and was, therefore, competent.

This action was properly brought in the name of the board of supervisors, and the recovery therein inures to the person for whose benefit it is prosecuted. § 2, chap. 447, Laws of 1879; § 1926, Code of Civ. Pro.

No other material exceptions appear in the case, and judgment must, therefore, be affirmed.

All concur, except FINCH, J., not sitting.

COYKENDALL v. CONSTABLE.*

June 9, 1885.

NEGOTIABLE INSTRUMENT — PAST DUE NOTE — SURETIES — AGENCY — RATIFICATION.

The owner of a past due note payable to bearer, placed it in a bank for collection. The makers of the note were in fact sureties. The plaintiff, at the request of the principal debtor, paid the note to the bank and the bank remitted the proceeds thereof to the owner and delivered the note to the plaintiff.

Held, that the plaintiff obtained a good title to the note and could maintain an action thereon against the sureties; that notwithstanding the bank had no authority to sell the note, yet the owner by receiving and retaining the money had ratified the act of his agent and he was bound by it.

* 19 W. Dig. 169, reversed.

S. L. Stebbins, for appellant. *John Lyon*, for respondent.

FINCH, J. If the note upon which this action is founded was not paid its makers were liable, unless those of them who were sureties became freed from their obligation by reason of some act which changed their contract or imperiled their rights. The referee does not find such payment as a fact, nor as an inference from the facts ascertained. Indeed, it is difficult to see how any such inference could have been possible from the proof. Whatever may be true as to the want of authority to sell the note in the bank which received it for collection, it is quite certain that the transaction between the plaintiff and the collecting agent was a sale or an entirely void proceeding. It could not be transformed into a payment in hostility to the expressed intentions of both parties who acted in the transfer. There was a sale, or an attempt at sale, which utterly failed, but never a payment; and an erroneous supposition by Peters, the payee, as to the fact which produced the money traceable to his ignorance of the truth cannot alter the nature of that truth. The note then being unpaid, is due from the makers to some one, and must be payable to Peters or the plaintiff. The only concern of the defendants, if the rights of the sureties have not been infringed, is to know to which of two parties they may safely pay the debt. If they had paid it voluntarily to plaintiff, could Peters, after full knowledge of the situation, and with the plaintiff's money in his pocket and persistently retained, successfully sue upon it as owner? It is quite certain that he could not. He would be unable to produce the note, and could not force it from plaintiff's possession without return of the purchase-money, and while keeping that would be obliged to admit that he held it as a payment of the note or consideration of its sale; and either alternative would be fatal to his cause of action. The defendants thus can pay the debt which they have not paid to the plaintiff as its holder with entire safety and without danger of being liable to Peters. Why then should they not pay it? If the transaction had been found to be, or shaped upon competent proof as, an advance by plaintiff to De Garmo, the maker, of the money necessary to pay the note, the successful defense would have been payment; but when nothing of the kind was either done or intended or found as a fact, and the note remains unpaid, why should not its makers pay it? It is not claimed that the sureties directed or required its collection, or put the owner, whoever he might be, under a duty to enforce it. Their contract was not changed. They promised to pay to Peters or bearer, and the plaintiff is the bearer and comes to them with that title and in accord with their contract. They agreed that the note might be sold when they made their contract negotiable. No right of theirs was violated, and they suffered no injury. If they desired the note promptly sued they could say so as well to plaintiff as to Peters, or pay it and take their remedy against De Garmo. Their sole defense, therefore, was that which prevailed with the referee; that the bank had no authority to sell, and so plaintiff got no title. Undoubtedly Peters might have repudiated the act of his agent when he learned what it was. The moment he became possessed of that knowledge, he was bound in common honesty to return the money paid him by mistake or retain it as it was given to his agent. The law will not endure that he shall keep the product of the agent's act and yet repudiate his authority. Even in a case of fraudulent representations by the agent, never at all authorized or suspected by the principal, a reception and retention of the proceeds may make the latter responsible for the fraud. *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *Hathaway v. Johnson*, 55 id. 93. No wrong or violence is done to the rights of Peters by the process. His agent obtained plaintiff's money by a pretended sale of the note in excess of the authority conferred, and Peters knows it. If then he keeps the money and avails himself of the fruits of the unauthorized act he cannot be allowed to repudiate it. But he does not repudiate it, or attempt to do so. He sets up no claim to the note, and says only that he wanted the money and did not care how he got it; that is, whether by a sale or a payment. The fact then that the note was not paid, and he knew it, although for a time he thought that it was, followed by his continued retention of the money, his omission to demand the note, or assert any title to it, admit of no other interpretation than a ratification of the sale. It is all the more easily inferred because his interest lay in

that direction. It made the money in his possession lawfully his, and took him wholly out of the controversy. It is just to the plaintiff who parted with his money as purchaser and upon the faith and credit of the note. It does no injustice to the sureties for they have no equity to be discharged without payment. Circumstances might have occurred which would have entitled them to a release. Possibly if they had been lured into a false security by information and a consequent belief that the note was paid and due to the silence and delay of the purchaser, the principal in the mean time becoming insolvent, some just ground might exist for their discharge. But nothing of the kind is in the case. No such defense is pleaded and no suggestion made of any injury resulting from the sale. The evidence shows that Terwilliger, one of the sureties, was notified of a proposed transfer and not only did not object but promised to see his associates. They say only that they never consented to a sale. They do not say that they were not notified of an intended transfer; and since they made no complaint either in the pleadings or the proof that they have been misled or harmed by the transaction treated as a sale and ratified as such by Peters, there is no injustice done to them. Certainly they have no equity to compel the plaintiff in hostility to his intention and against his will to pay their note for which he was in no manner bound.

We find no difficulty, therefore, in applying to the case the doctrine of ratification. Coykendall made the purchase before he had seen the note or the indorsements upon it. Peters knew the whole truth, at least when examined as a witness on the trial, and instead of repudiating the sale said only that he got the money for his loan "and that was the end of it."

The cases cited by the respondent are not inconsistent with our view of the case. Some of them were founded upon statutes relating to corporations and making certain transfers void because illegal. *Gillet v. Phillips*, 13 N. Y. 114; *Houghton v. McAuliffe*, 26 How. Pr. 270. In one of them the agent of the payee did not sell or intend to sell the note, and nothing was said which necessarily gave him notice of a different intention on the part of the person taking the note. *Burr v. Smith*, 21 Barb. 262. Beyond the cases cited, our attention has been incidentally drawn to one which tends in many respects to justify the contention of the respondents. *Fuller v. Bennett*, 21 N. W. Rep. 433. It is observable, however, that the question of payment arose and upon a very debatable state of facts; and also that the payee never knew that his note was not paid until five years after the money was received, and when the situation of the parties had been changed by the intervening death of the maker. Our great respect for the learned judge who wrote the opinion has caused us to give additional reflection to the views we have expressed, but has not shaken our conviction that in this case the title of the plaintiff to the note sued upon was good.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

MACULLAR v. MCKINLEY.*

June 9, 1885

FRAUD — PURCHASING GOODS — EVIDENCE — PRESUMPTIVE KNOWLEDGE.

Although fraud is generally a question for the jury, it should only be submitted to them upon competent and sufficient proof.

It is essential to a cause of action for fraud and deceit in obtaining goods upon credit, that there be some evidence of an intention on the part of the defendant to deceive or mislead the plaintiff.

What a creditor might have known in the common course of business, he must be presumed to have known.

C. C. Prentiss, for appellants. *Robt. W. Todd*, for respondent.

DANFORTH, J. The question in this case arises upon an exception to the ruling of the trial judge that there was no evidence to go to the jury. The action was

*49 N. Y. Super. 5, affirmed.

for an alleged fraud and deceit, by representations stated to have been made by the defendant as to his business and pecuniary condition and by which the plaintiffs were induced to sell him goods in August, September and October, 1881, upon credit. At the trial it appeared that the plaintiffs were wholesale merchants in the city of Boston, and the defendant a small tailor in the city New York; that he was solicited, at his place of business, to make the purchases in question by an agent of the plaintiffs, who as an inducement offered "long time" and then took the orders and transmitted them to the plaintiffs. No representations or statements were made to this salesman, nor was any communication made by the defendant to the plaintiffs. They never saw him. But Wesson, one of the plaintiffs, testified that the particulars of the sales transmitted by their salesman were examined by him and the sale consummated, and that he was led to do so by a report from Bradstreet's Commercial Agency, received in May, 1881, which, so far as material, is in these words: "McKinley, J. W., tailor, New York city, states, 'Have a stock on hand of \$2,500, and no liabilities, as I pay cash for all my purchases.'"

He has been in the above business for the past forty years, during which time it is said he failed twice, the last time some three or four years ago and effected a compromise at fifty cents. His wife is said to own property the income of which supports the family. Parties who have known him many years speak of him as an honest, industrious man; though doing a small close business, and not doing much if any thing more than making a living for himself. Is not known to be asking any credit, as he became so very slow in his payments that those who sold him for years decline selling him except for cash.

"21..... F.....

February 25, 1881.

"November 22, 1881. To Macullar, Parker & Co

"The correctness of this report is not guaranteed, but having been obtained by us in good faith — from authorities deemed reliable — it is transmitted to you in strict confidence for your exclusive use and benefit, and in accordance with the terms of the contract existing between us.

"Respectfully,

"THE BRADSTREET COMPANY."

The statement by defendant was made in February to a reporter of the agency who applied to him for it. Another application was afterward in June made to him by the same agency, but he refused to respond, saying in substance that "a statement would not do him any good if made," and the agency on the 20th of June, 1881, spread upon its books as follows: he declines giving any information; he is believed to be working with his wife's money; it is stated, he has failed two or three times; regarded as of little responsibility, and jobbing houses in the city say they would sell him only for cash." This was distributed to those who inquired.

The goods were not paid for, and the defendant made an assignment for the benefit of creditors, November 21, 1881, by which it appeared that he owed \$1,977 for money borrowed in 1880. It did not appear that he owed any thing for merchandise or stock.

The defendant moved for a nonsuit upon the grounds: First, that there was no evidence of any intent to deceive or mislead the plaintiffs in the sale of the goods; or, second, fraud or false representations to induce them. We agree with the court below in the opinion that the motion was properly granted. Although fraud is a question of fact, and therefore in general for the jury to answer, it should only be submitted to them upon competent and sufficient proof,—in such a case as the present, first, that the plaintiffs in making the sale acted under a mistake or misapprehension, and, second, that the defendant designedly caused the mistake or misapprehension for the purpose of inducing the sale. Here the facts were ascertained, and the court could say as matter of law, *Morris v. Talcott*, 96 N. Y. 100, that there was in evidence no misrepresentation or untrue statement intentionally made by the defendant for the purpose of procuring credit from the plaintiffs. It might be that the plaintiffs made an imprudent sale, but it is impossible to find that the defendant made a fraudulent purchase. The appellants

put the case upon the report made in February by the commercial agency to the plaintiffs, and to sustain it cite *Eaton v. Avery*, 88 N. Y. 31. The doctrine of that case should not be so stretched. There was a direct and an intended connection between the representation and the credit obtained. The report given in August was referred to when application was made for credit in September, and goods delivered upon faith in it. To the creditor in that case it was a present representation. How utterly unlike is the one before us! The plaintiffs were subscribers to the agency, presumably therefore availing themselves of the means of information afforded by it. Their salesman in August, in September and in October undertook to sell to the defendant their goods on credit. They then had, as they assert, knowledge of him through the agency. They knew that the information communicated to them was obtained in February, six months before the earliest of these sales. There seems to be little in it to excite a desire for pecuniary relations; but sufficient certainly to require of the plaintiffs further inquiry at the same source of information, when in six, seven and eight months afterward this same man applied for that credit, which, to their knowledge, his former vendors refused. What a creditor might have known in the common course of business, he must be presumed to have known. In view of these things it cannot be said that the representations of February had any legitimate connection with the credits extended in August, September and October.

But again: we think the point well taken on the motion for a nonsuit, that there was no evidence of an intention on the defendant's part to deceive or mislead the plaintiffs. This is essential to the cause of action and must be proved, not presumed. *People v. Baker*, 96 N. Y. 340; *Ward v. Center*, 3 Johns. 271. The statement of February was not made as a basis of credit, or as by one asking, expecting or desiring credit. On the contrary he says: "I pay cash for all my purchases," implying thereby, "I ask no credit." He did not claim to be desirous of any. Had he then asked for credit it would have been natural and becoming in the one applied to, to have made further inquiry. As it is, the credit seems to have been thrust upon, not obtained by him. In all this there is no excuse for non-payment, but every reason why he should not suffer in this action like a criminal or as for a tort.

The judgment should be affirmed.

All concur, except RUGER, Ch. J., RAPALLO and EARL, JJ., not voting.

BULLOCK v. MAYOR, ETC., OF NEW YORK.

June 9, 1885.

MUNICIPAL CORPORATION — DEFECTIVE SIDEWALK — CONTRIBUTORY NEGLIGENCE.

It is the duty of a city to maintain its sidewalks in a reasonably safe condition for public use.*

Persons have a right to use the sidewalks, although acquainted with their defective condition, and whether guilty of contributory negligence is a question for the jury.†

William Macfarlane, for appellant. *D. J. Dean*, for respondent.

EARL, J. This action was brought to recover damages for a personal injury received from a defective sidewalk in the city of New York. The material facts are as follows: Prior to 1879 One Hundred and Thirty-Ninth street between Alexander avenue and Third avenue was one of the streets of the city of New York and was graded, regulated and used as such, and the sidewalk on the north side of the street had been flagged with stone to the width of four feet. The distance between the two avenues was six hundred feet. In 1879 a contractor with the city raised the grade of Third avenue, and for the purpose of conforming the grade of One Hundred and Thirty-Ninth street with the avenue, the street was also raised for a distance of about three hundred feet from the avenue, and for that purpose the flagging on the northerly sidewalk was broken up and removed for

* 49 N. Y. Super. 360.

† See 28 Am. Rep. 354; 25 id. 278; 31 id. 533; 47 id. 422; 72 Ala. 411; 81 Ill. 300; 54 Miss. 391.

the same distance. Thereafter in wet weather, the sidewalk became very muddy, and for the purpose of escaping the mud persons using that walk threw down small pieces of flagging, about eighteen inches apart, so that pedestrians could step from one to the other; and in that condition the walk remained until June, 1881, when the accident occurred to the plaintiff. She started from Alexander avenue to go to Third avenue, and passed on the northerly side of One Hundred and Thirty-ninth street, walking for three hundred feet upon the flagged walk which had not been disturbed, and then she came to the portion of the walk first described, and in passing from one stone to another she made a misstep and fell, and received the injury of which she complains. These irregular stone carelessly thrown upon the sidewalk had remained there for upwards of a year, and the walk was left open for public use properly flagged for one-half of its distance.

It was the duty of the city to maintain this sidewalk in a reasonably safe condition for public use, and whether it did or not was a question for the jury. *Diney v. City of Elmira*, 51 N. Y. 512; *Todd v. City of Troy*, 61 id. 506; *Clemence v. City of Auburn*, 66 id. 384; *Evans v. City of Utica*, 69 id. 166; S. C., 25 Am. Rep. 169; *Nixon v. City of Rochester*, 76 id. 619; *Weed v. Village of Ballston Spa*, 76 id. 829; *Salsbury v. Village of Ithaca*, 94 id. 27; S. C. 46 Am. Rep. 122; *Dewire v. Bailey*, 131 Mass. 169; S. C., 41 Am. Rep. 219. The plaintiff had the right to use this walk although she knew its condition, and whether she was guilty or any carelessness which contributed to the accident was also a question for the jury.

We are therefore of opinion that the nonsuit was improperly granted, and that the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except FINCH, J., dissenting, and RAPALLO, J., not voting.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

LOUIS CASSIER'S CASE.

June 22, 1885.

INFANCY — ARREST FOR DEBT.

Under the laws of Massachusetts an infant is not liable to arrest for debt upon a civil process.

Petition for a writ of *habeas corpus*. The case was heard by COLBURN, J., who admitted the petitioner to bail and reported to the full court the question whether the petitioner, under the facts, was lawfully held in jail. The facts appear in the opinion.

H. Dunham, for petitioner.

MORTON, C. J. The petitioner has been arrested and imprisoned upon two executions. One is an execution in favor of one Swan, issued upon a judgment in an action of contract for board and lodging for the petitioner, the only affidavit upon the execution being, that the creditor believes, and has good reason to believe, that the debtor has property not exempt from being taken on execution, which he does not intend to apply to the payment of the judgment creditor's claim. The other is an execution for costs in a landlord and tenant process, upon which no affidavit is ordinarily required to justify an arrest. At the time of the arrest the petitioner was an infant, and no guardian *ad litem* was appointed for him in either of the suits, or in any of the proceedings under the executions. The principal question in the case is whether, under our laws, an infant is liable to arrest for debt upon a civil process. It seems to us that most of the statute provisions relative to arrest and imprisonment for debt, cannot be applied to an infant without violating well-known and established principles of law, and therefore we infer that the legislature did not intend to authorize the arrest of infants, either upon mesne process or execution. The provisions were plainly intended to apply to persons who are, *sui juris*, capable of managing their

own affairs and controlling their own property. An infant is deemed in law to be incompetent to enter into contracts or to manage and control his own affairs. He cannot employ an attorney to represent his interests or defend his rights in a legal proceeding. A judgment against him obtained without the appointment by the court of a guardian *ad litem* is a void one, and may be reversed on error. *Farris v. Richardson*, 6 Allen, 118. In *Blake's Case*, 106 Mass. 501, it was held that a spendthrift under guardianship cannot lawfully be arrested on an execution issued upon a judgment in an action of contract, the only charge upon which the certificate authorizing the arrest was granted being that the debtor had property not exempt from being taken on execution, which he did not intend to apply to the payment of the creditor's claim. The reasoning of the opinion applies with equal force to the case at bar. An infant, if arrested, not being capable of entering into contracts or of controlling his property, could not avail himself of the provisions of the statute intended for the relief of arrested debtors. He could not enter into a recognizance. He could not furnish any security so as to obtain sureties on his recognizance. He could not transfer and assign his property, or expose it to be taken on execution, and thus procure his discharge. It is no answer to say that if we construe the statute to include infants, these powers would follow by implication.

It is not reasonable to suppose that the legislature intended to annul the established principles of law as to infancy, and to confer upon infants, by indirection, the powers of persons of full age. The more reasonable inference is that the statute was intended to apply to persons *sui juris* and not to infants. We are, therefore, of opinion that the arrest of the petitioner was illegal in both cases before us, and that he is entitled to be discharged upon *habeas corpus*. *Blake's Case*, *ubi supra*.

Prisoner discharged.

CASSIER v. FALES.

June 28, 1885.

FALSE IMPRISONMENT — INFANCY — PROCESS — LIABILITY OF OFFICER.

An infant is exempt from arrest for a debt upon execution or mesne process; but an action for trespass or illegal arrest will not lie against the officer making the arrest, even if the writ was illegally and irregularly issued, providing it was issued by a court having jurisdiction and was regular and valid upon its face. Under such circumstances the fact that the plaintiff notified the officer of his infancy at the time would be immaterial.

Tort for alleged false arrest and imprisonment. At the trial in the superior court there was a verdict for the defendant, and the plaintiff alleged exceptions to rulings of the court. The facts sufficiently appear in the opinion.

H. Dunham, for plaintiff. *E. C. Bumpas*, for defendant.

MORTON, C. J. This is an action of tort, in the nature of trespass, for an illegal arrest and false imprisonment. The plaintiff is an infant. He was arrested by a constable upon a writ sued out by the defendant, upon which was the proper affidavit and certificate required by law to authorize the arrest of the plaintiff. The defendant aided the constable, at his request, in making the arrest. The plaintiff testified that, at the time of the arrest, he notified the constable and the defendant that he was under the age of twenty-one years, and requested the court to rule that "if the defendant, attorney and constable were notified that the plaintiff was under the age of twenty-one years, after such notification they had no right to proceed with the arrest on mesne process." The court refused the ruling and the plaintiff excepted. For the reasons stated in the case of *Cassier*, petitioner for a writ of *habeas corpus*, *ante*, we are of the opinion that, by reason of his infancy, the plaintiff was exempted from arrest for debt, either upon execution or mesne process, and that upon proper application, after his arrest, he would have been entitled to be discharged upon *habeas corpus*. *Blake's Case*, 106 Mass. 501. But it does not follow that the plaintiff can maintain an action of trespass for the arrest and imprisonment. It is entirely clear that such an action cannot be maintained against the officer making the arrest. An officer is pro-

tected in the service of process, if it is issued by a court having jurisdiction, and appears upon its face to be regular and valid, even if it is fraudulently or irregularly issued. *Wilmarth v. Burt*, 7 Metc. 257; *Twitchell v. Shaw*, 10 Cush. 46; *Fisher v. McGirr*, 1 Gray, 1; *Blake's Case*, *ubi supra*; *Tarlton v. Fisher*, 2 Doug. 671.

But where an arrest is made upon a regular process, regular upon its face, and therefore sufficient to justify an officer, but which has been fraudulently or irregularly obtained and issued, the party who procures it, and directs it or causes it to be served, is not justified by it, he is bound to see to it, before he sets the law in motion, that the process he obtains is regular and valid, and, if it is not, he is liable in an action of trespass. *Emery v. Hapgood*, 7 Gray, 55; *Cody v. Adams*, *id.* 59; *Barker v. Braham*, 3 Wilson, 368; *Bates v. Pilling*, 6 B. & C. 38; *Codrington v. Lloyd*, 8 Ad. & El. 449; *Deyo v. Van Valkenburgh*, 5 Hill, 242.

But in the case before us, the writ sued out by the defendant was regular and valid. The plaintiff's exemption from imprisonment under it arises not from any irregularity or illegality in the writ, but from his personal privilege of infancy. It is incomprehensible, says Lord KENYON, in *Belk v. Broadbent*, 3 T. R. 135, "to say that a person should be considered a trespasser, who acts under the process of the court." The question before us was carefully considered in the recent case of *Marks v. Townsend*, 97 N. Y. 590. In that case, the plaintiff was arrested for debt under the "Stillwell act." He was discharged from the arrest, upon showing to the court that he had previously been arrested for the same cause and upon the same grounds. It was held, that an action for false imprisonment would not lie for the second arrest, even if the defendant maliciously caused it to be made, because it was made upon a process, regularly issued by a court, having jurisdiction of the matter. It is difficult to see how any person can be guilty of a trespass, in serving or causing to be served a valid writ or other process of a court. The plaintiff has his remedy by a right to a speedy release, upon proper application, and by the right to bring an action in the case, if the defendant has maliciously violated his privilege by the arrest. The fact that the plaintiff gave notice of his infancy to the defendant, at the time of the arrest, is immaterial. It did not make the writ an illegal process. We are of opinion, that upon the facts of this case, an action of trespass will not lie, and that the court rightly refused the rulings requested by the plaintiff.

Exceptions overruled.

BURNHAM v. BOSTON MARINE INS. CO.

June 20, 1885.

INSURANCE — MARINE POLICY — PAROL EVIDENCE TO VARY.

Statements made by an insurance agent before issuing a policy cannot be used to change the contract of insurance finally made as contained in the policy.

Under a marine policy "free from claim for particular and general average," the plaintiff must show either an actual total loss of the property insured, or a constructive total loss followed by an abandonment.

Contract upon a policy of insurance, issued by the defendant "on advances, on board the Schooner Madame Roland, free from claim for particular and (or) general average." The words "and — dollars on the outfits, catch, cargo or the freight on the cargo," printed in the policy, were stricken out. The policy in suit was shown to have been issued to the plaintiffs by George Steele, of Gloucester, Mass., whose name appears upon it, as agent. It was admitted that Steele was the local agent of the defendant at Gloucester, having authority to take risks and countersign and issue policies, which were furnished him by the defendant, signed by the president and secretary. It appeared that Steele was also president of the Gloucester Mutual Fishing Insurance Company of Gloucester. At the trial in the superior court, the plaintiffs testified that the policy in suit was issued by him under the following circumstances: The plaintiffs are owners of the fishing schooner Madame Roland, which vessel they had recently bought of said Steele, who was largely engaged in the fishing business in Gloucester. They had insured their vessel and her outfits, in the Gloucester company and they testified that they

had, as they supposed, all the insurance they could have on the vessel and on the outfits of the company. Sometime after this policy was issued, Steele came to the plaintiff's place of business in Gloucester, told them that they were not sufficiently covered on that vessel and ought to have more, in case of total loss; that he could write \$500 in Boston Marine for them; they asked him how he was going to write it, and he said: "I shall not call it outfits, I shall call it advances; and it will be all right." He then showed them a list of parties in Gloucester, for whom he had written policies in that way. After some talk they agreed that he should do it, and after a few days he sent them the policy sued on. All the evidence as to conversations between Steele and the plaintiffs was introduced against the objection of defendant.

The plaintiffs also called one Gore, who testified that the word "advances" had not a fixed and definite meaning of itself in the business of insurance, but that its meaning depended upon the circumstances under which it was used; that under the circumstances of this case the word "advances" might apply to any pecuniary interest in any thing put on board the vessel; that he had examined the list of articles, which were put on board this schooner, and that every thing on those lists might properly be insured as advances. On cross-examination he testified that "outfits" would be a better word than "advances," to describe the articles on board the schooner; that he could see no reason for striking out the printed word "outfits" in the policy and writing in "advances on board," if outfits were to be insured thereunder; that "advances" meant usually "advances to crew" or "advances on account of freight," and that it had been used in one of these meanings in the larger portion of those policies in which he had known it to be used. The defendant objected to the admission of this evidence.

The defendant requested the court to rule upon all the evidence in the case that the plaintiffs could not recover in this action. The court refused so to rule, but ruled that the plaintiffs could not recover under this policy for loss of outfits, but that they might recover under the policy the amount of advances to crew (\$60.14), and the amount furnished to captain to buy bait (\$100), and that there was evidence to justify the jury in finding a total loss. To those rulings both the plaintiffs and defendant excepted. A verdict was taken for the plaintiffs by consent for \$160.14 and interest, and the case was reported for the consideration of the supreme judicial court.

G. B. Ives & B. N. Johnson, for plaintiffs. *J. C. Dodge & Sons*, for defendant.

FIELD, J. The statement made by Steele, before the policy was issued, that he could "write \$500 more in the Boston Marine Insurance Company and could call it advances and not outfits, and that it would be all right," could not be received to change the contract actually made.

The testimony of Gore is that "advances" in policies of insurance commonly meant advances to the crew and advances on account of freight. The only portion of his testimony favorable to the claim of the plaintiffs is an expression of an opinion of what might properly be done, and not testimony of any thing that had actually been done, or any existing usage.

The advances claimed are \$60.14, which had been advanced to different members of the crew, to be repaid by them out of their shares of the catch, and \$100 which had been advanced to the captain to buy bait. Neither the captain nor the crew received wages, "but took shares of the catch instead." It is not contended that the advances to the crew were not covered by the policy, if the evidence showed a total loss. For the advances to the crew, the plaintiffs had a lien upon their share of the catch. The plaintiffs also had a lien upon the catch for any money expended for bait. If the plaintiffs delivered money to the captain to be expended for bait, and he did so expend it, it would seem that the captain became personally indebted to the plaintiffs for it, and that the plaintiffs would have no lien on the catch for the payment of this debt; and that it would not be covered by the policy. *Minturn v. Warren Ins. Co.*, 2 Allen, 86.

So far, however, as the money was expended for bait, it was an advance on account of the catch, for the payment of which the plaintiffs held a lien on the catch and was covered by the policy. There was evidence from which the jury could properly find that \$90 had been expended for bait.

The defendant denies that there was a total loss of the catch, out of which the advances were payable. The policy was "free from claim for particular and general average," and the plaintiffs must show either an actual total loss of the catch or a constructive total loss followed by an abandonment. *Heebner v. Eagle Ins. Co.*, 10 Gray, 181; *Greene v. Pacific Mut. Ins. Co.*, 9 Allen, 217.

We think there was sufficient evidence of a constructive total loss of the schooner, outfits and catch, and of an abandonment to Steele and of an acceptance of it by him. The Gloucester Mutual Fishing Insurance Company, of which Steele was president, had insured the schooner and "outfits, catch, cargo or the freight on said cargo." Steele was also "the local agent of the defendant at Gloucester, having authority to take risks and countersign and issue policies, which were furnished him by the defendant, signed by its president and secretary." The defendant's policy is "on advances on board the schooner Madame Roland." A constructive total loss of the catch would be a constructive total loss of the advances, which were a lien on the catch. At the same time that the plaintiffs delivered to Steele written notice that they abandoned the schooner Madame Roland to the Gloucester company, they also delivered to him, as agent of the defendant company, written notice that they abandoned the schooner to the defendant as insured under the policy, the number of which they gave. Plaintiffs had previously orally abandoned the vessel to Steele, who had sent a man to take charge of her.

We think it is too narrow a construction of this notice to the defendant, to hold that it was merely an abandonment of the schooner. The notice refers to the policy and reasonably gives notice that the plaintiffs abandoned whatever was on board the schooner, to which the policy attached. *Macy v. Whaling Ins. Co.*, 9 Metc. 354. If the defendant insists upon a new trial, in order to determine what part of the \$100 was actually expended for bait, the exceptions must be sustained and a new trial granted upon damages only; otherwise if the plaintiffs will remit from the verdict \$10 with interest thereon from the date of the writ, there may be Judgment on the verdict.

BRIGGS, Trustee, v. EARL.

June 22, 1885.

INSURANCE — CO-OPERATIVE LIFE — ASSIGNMENT OF POLICY.

Certificates issued by an association formed under the act, chapter 204, Laws of 1877, authorizing the formation of associations for the purpose of rendering assistance to the widows, orphans or other dependents of deceased members, are not assignable or transferable by the members of such an association to any one not embraced within one of the classes mentioned in the statute. And this is so although the beneficiary named in the certificate joins in the assignment.*

Bill in equity by the trustee of the minor children of Joseph A. Remington and Adelaide V. Remington, deceased, praying that the New England Mutual Aid Society, one of the defendants, may be restrained from paying over to Earl, another defendant, the amount due Earl upon an assignment made to him by Joseph A. Remington and Adelaide V. Remington and also the delivery to the plaintiff of a certificate in the defendant's society held by Earl. It appears that July 11, 1877, the New England Aid Society, a mutual benefit association, was incorporated for the purpose of rendering assistance to the widows, orphans or other dependents of deceased members. On April 16, 1883, the society issued to Joseph A. Remington a certificate of membership, which declared that he was a member of class A, in said society, and that it was issued for the benefit of his widow Adelaide V. Remington, unless he should at any time, or from time to time, thereafter in writing assented to by said society, substitute some other beneficiary or beneficiaries; and in that case, for the benefit only of the beneficiary or beneficiaries last substituted, before the death of Joseph A. Remington, and upon his death or upon the death of the beneficiary last therein substituted, the society agreed to pay to

* 22 Eng. Rep. 702; 33 id. 156. — Ed.

said beneficiary or beneficiaries or their legal representatives a sum not to exceed \$5,000, provided said certificate should be surrendered and proper receipts for said sum tendered to the corporation. On October 3, 1883, Joseph A. Remington, being indebted to the defendant Earl, joined with his wife Adelaide V. Remington, in a form of an assignment of said certificate, which purported to convey to Earl all their interest in said certificate, the assignment having been made as security for the debt due Earl. The certificate of membership was delivered to Earl at the same time. Joseph A. Remington died January 15, 1884. March 4, 1884, Adelaide V. Remington executed and delivered to the defendant Clinton V. S. Remington, an order or assignment, of \$1,200 on said society. March 6, 1884, Adelaide V. Remington also made an assignment of her interest in any sum due her under said certificate, or which might become due her from said society, to the complainant in trust, for the benefit of herself and her children. The case was heard by a single justice upon agreed facts and was reserved for the consideration of the full court.

E. P. Brown & T. M. Osborne, for complainant. *J. M. Morton & J. F. Jackson*, for defendants.

C. ALLEN, J. The statute of 1877 (chap. 204) authorizes the formation of associations for the purpose of rendering assistance to the widows, orphans or other dependents of deceased members by means of the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto. The fund so held is not to be liable to attachment by trustee or other process; and it is declared that the provisions of the general laws relating to life insurance companies shall not be applicable to such beneficiary corporations. The question now arises whether the contract entered into by such an association or corporation with one of its members for the benefit of beneficiaries within the classes named, is assignable during his life to a person not within either of those classes. We think it is not. If it were held otherwise, these associations would stand on substantially the same footing as life insurance companies. But such was not the intention of the legislature. The purpose for which they can be formed, is strictly limited by statute to rendering assistance to the widows and orphans of deceased members or other persons dependent upon them. It is not contemplated by the statute that the right to the assistance secured by membership shall be assignable to creditors during the member's life. The purpose of the statute would be defeated by allowing an assignment during the member's life to his creditors as collateral security. The assignment to Earl was therefore invalid.

The order of March 4, 1884, to Remington constituted a good assignment in equity to the amount of \$1,200 of the widow's interest, which had then become vested, and, having been made for a good consideration, was not revocable. Moreover, the acts of the treasurer amounted to a ratification of it. He is, therefore, entitled to the amount of his order and the plaintiff to the residue.

Decree accordingly.

HINCKLEY, Executor, v. THACHER.

June 22, 1885.

WILL — EXTRINSIC EVIDENCE TO AID CONSTRUCTION — BEQUESTS TO RELIGIOUS SOCIETIES.

The testator gave the residue of his estate "equally to the authorized agents of the home and foreign missionary societies, to aid in propagating the holy religion of Jesus Christ." There being no societies the names of which conformed accurately to the description contained in the will, and several societies of the character described having appeared as claimants to the fund, a bill in equity was brought to obtain the direction of the court for its distribution.

Held, that extrinsic evidence could be given to ascertain the intention of the testator, and that for that purpose the facts known to the testator at the time he executed the will, the names by which he was accustomed to call the missionary societies, or by which they were usually called and known in the religious society with which he worshiped, the inter-

est shown by him in any particular missionary society, and the contributions which he made for missionary purposes, were competent facts to aid in identifying the societies intended by the will.

Held, also, that such a bequest was a good, charitable bequest.*

Bill in equity by the executor of the will of Admiral Henry Knox Thatcher, late of Winchester, to obtain the direction of the court as to the disposition of the residue of his estate. The testator gave the residue of his estate "equally to the authorized agents of the home and foreign missionary societies, to aid in propagating the holy religion of Jesus Christ." The next of kin of the testator appeared and claimed that the gift was void, and the attorney-general appeared as representing public charities. The American Home Missionary Society of New York, the American Board of Commissioners for Foreign Missions, the Massachusetts Home Missionary Society, and the Missionary Society of the Methodist Episcopal Church also appeared and filed claims to the fund. The case was heard by a single justice, who decided that the testator did not intend either of the societies, or any particular society; that the gift was a valid charitable gift and ought to be applied equally to home and foreign missions, according to a scheme to be directed. From the decree which was entered the next of kin appealed so far as it declared the gift valid, and the American Board of Commissioners for Foreign Missions and the Massachusetts Home Missionary Society so far as it was against their claims.

R. R. Bishop & G. Wigglesworth, for the American Board of Commissioners for Foreign Missions, and the attorney-general. *J. N. Marshall*, for the Massachusetts Home Missionary Society. *H. Baylies*, for the Missionary Society of the Methodist Episcopal Church. *M. A. Fowler, J. L. Thorndike & F. C. Welch*, for the next of kin of the testator.

FIELD, J. Henry Knox Thatcher died April 5, 1880, leaving a will, which was executed March 18, 1870. The first clause of the last article of the will is as follows: "I also will and desire, that the residue of my property, if any, after paying my funeral expenses and just debts, as well as all before named bequests, be given equally to the authorized agents of the Home and Foreign Missionary Societies, to aid in propagating the holy religion of Jesus Christ."

In the original will, the words "Home" and the words "Foreign Missionary Societies," each begin with a capital letter. There is nothing else in the will that affords any aid in construing this clause, unless it be thought that the declaration in the first clause of the will might aid the court in determining what the testator meant by "the holy religion of Jesus Christ," if it becomes necessary to determine it.

That declaration is as follows: "Realizing the uncertainty of human life, which by the blessing of my Heavenly Father, I have been permitted to enjoy for so long a time, and acknowledging my firm belief in Him and the efficacy of the atonement of His Son, our Lord and Saviour Jesus Christ and, with the hope of the final salvation of my immortal soul through His merits, and being of sound mind and memory, I declare this instrument to be my last Will and Testament."

The two principal questions argued are: First, whether the home and foreign missionary societies intended by the testator can be identified; and second, if they can be, whether this is a valid charitable bequest.

One question of evidence has been argued, which is, whether evidence of the testator's religious opinions, at the time he executed the will, is admissible, either for the purpose of identifying the societies, or of showing what the testator meant by "The holy religion of Jesus Christ." The case is one in which there is not shown to exist any society or societies which conform accurately to the name or description contained in the will. In *Shore v. Wilson*, 9 Cl. & F. 356, it was left undetermined whether the religious opinions of Lady Hewley could be shown for the purpose of determining the meaning of the words "Godly preachers of Christ's holy Gospel," contained in her deed of 1704. A majority of the judges whose opinions were taken by the House of Lords, were of opinion, that evidence of the religious opinions of Lady Hewley could not be considered,

* 23 Eng. Rep. 517; 49 Am. Rep. 141.—Ed.

except for the purpose of showing her connection with a religious denomination, the members of which used the words in a restricted sense. The House of Lords intimate that such is their opinion. *Drummond v. Attorney-General*, 2 H. L. C. 387; *Charter v. Charter*, L. R., 7 H. L. 364.

But in carrying into effect by means of a scheme, a charitable bequest for religious purposes, when the terms of the gift are indefinite it seems the religious opinions of the donor are sometimes regarded in England. *Attorney-General v. Calvert*, 23 Beav. 248; *Attorney-General v. Glasgow College*, 2 Colyer's Ch. 665.

The precise point we find it necessary now to determine is whether such evidence can be considered for the purpose of identifying the missionary societies intended by the will. It may be conceded that the private religious opinion of the testator would not be competent evidence, but his public religious acts and association, with a particular denomination of Christians, in connection with other testimony, has often been admitted, and we are not prepared to say that there might not be cases in which such evidence, unconnected with other evidence, would be competent. If each denomination of Christians had one missionary society, bearing the name of the denomination, and a testator left a bequest to "the missionary society," without further description, his publicly professed religious belief would naturally throw some light upon the meaning. It could not well be presumed that a zealous Roman Catholic could intend, by these indefinite words, a Protestant missionary society, or that a zealous Trinitarian intended such a gift for a Unitarian society. There is, however, little or no evidence in the case of the religious opinions of Admiral Thatcher, except as they may be inferred from his acts in connection with churches and religious societies, and the usages of those churches and societies; and it is unnecessary to decide, whether his religious opinions, disconnected from the other evidence, would be competent evidence. In carrying into execution every will, extrinsic evidence is necessary to identify the legatees, but often the evidence leaves no room for doubt, as the name or description of the legatee in the will accurately conforms to the facts established by the evidence; but when the evidence raises a doubt, the question then arises, whether by competent evidence, the identity of the legatee can be ascertained with reasonable certainty. The facts known to the testator at the time he executed this will, the names by which he was accustomed to call the missionary societies, or by which they were usually called and known in the religious society with which he worshiped, the interest shown by him in any particular missionary society, and the contributions, if any, that he made for missionary purposes, are competent evidence to aid in identifying the missionary societies intended by the will. It is apparent from the evidence, that Admiral Thatcher was a constant attendant upon public religious worship; that he confined his attendance to the Protestant Trinitarian churches; that he used in the navy, as is customary, the Episcopal service; that, at times, before 1870, he showed a personal preference for the Episcopal church, but that this preference was not very strong; that he attended the Episcopal, Congregational, Methodist or Presbyterian churches, without any decided denominational basis, according to his convenience, or his approbation of the minister or the service; and that, as a fact, he more frequently attended the Congregational churches than any other.

The interest he is shown to have felt in the missionary work of the American Board, the knowledge of the relations existing between that board and the Massachusetts Home Missionary Society, the manner in which the two societies were usually spoken of in the church at Winchester, where he worshiped when he made the will, and the manner in which he spoke of them, have far more significance than the evidence of his attendance at churches. It appears abundantly by the testimony, that in 1870, when the will was executed, he knew of the American Board of Commissioners for Foreign Missions, had been acquainted with some of its officers and agents and missionaries, and was interested in the work that society was doing, and that he knew of the Massachusetts Home Missionary Society as a co-operating society, devoted wholly to home missions, while the American Board was devoted exclusively to foreign missions. It does not appear that he knew definitely, the relations existing between the Massachusetts Home Missionary Society and the American Home Missionary Society. In 1869, the American Board

began sending him the *Missionary Herald*, a monthly publication of that society. Both before and after executing this will, he is shown to have spoken approvingly of the work of the missionaries of that society. He was interested in the purchase of the "*Morning Star*," which was built by the American Board in 1870. If the bequest in the will had been solely to the Foreign Missionary Society, in view of the knowledge of the testator, at the time of the execution of the will of the American Board of Commissioners for Foreign Missions, the interest he had shown in it and the acquaintance he had had with some of its officers and missionaries, the favorable opinions he entertained of the work it was doing, the fact that in the church and religious society which he attended, it was often spoken of as The Foreign Missionary Society, and was the Foreign Missionary Society, for which contributions were annually taken up, to which he contributed, and was one of the great charities which that church and society were supporting, and the only one called by that name, and also of the fact that it is not shown that he, at that time, was interested in any other American Foreign Missionary Society, we can have no doubt that it would be a reasonable and proper inference that the testator intended by the Foreign Missionary Society, the American Board of Commissioners for Foreign Missions. *Am. Trust Society v. De Witt*, 9 Allen, 447; *Tilton v. American Bible Society*, 60 N. H. 377; *Att'y-Gen'l v. Dublin*, 88 id. 459; *Dunham v. Averill*, 45 Conn. 61; *Goodhue v. Clark*, 37 N. H. 525; *In re Fearn's Will*, 27 W. R. 393; *Howard v. Am. Peace Society*, 49 Me. 288; *Button v. Am. Tract Society*, 23 Vt. 349; *Brewster v. McCull's Devises*, 15 Conn. 275; *In re Kilvert's Trusts*, L. R., 7 Ch. 170.

But the bequest is "equally to the authorized agents of the home and foreign missionary societies, to aid in propagating the holy religion of Jesus Christ." The word "equally" shows that more than one society was meant, and that the words "the home and foreign missionary societies" were not intended as the name of one society. One contention is, that two, and only two societies were meant, one the Home Missionary Society and the other the Foreign Missionary Society. The use of the definite article and of the capital letters by the testator, perhaps slightly favors this contention. The facts favor it. If there had been more than one society known to the testator, in which he was interested, each of which was a home and foreign missionary society, the contention might well be that he intended this bequest for each of these societies, but no such facts appear. In 1866 Admiral Thatcher spoke to Mr. Phillips, of the good work which the Wesleyan Missionary Society in the Southern Pacific had done," and he was evidently familiar with the fact that the Methodist Episcopal Church had foreign missions and probably with the fact that that church had home missions. It does not appear, however that he knew that any of the Protestant Trinitarian churches of the United States carried on their missionary work by means of societies, each of which was both a home and foreign missionary society, and he did understand that the principal missionary work of the Congregational Church was divided between the American Board, which was wholly a foreign missionary society, and the Massachusetts Home Missionary Society, to which it was auxiliary, was exclusively a home missionary society. We think it is a fair inference from the language of the will, and the facts shown to have been known to the testator, when he made it, that he intended to divide the residue of his property equally between home missions and foreign missions, and that he understood that there was a home missionary society or were home missionary societies and a foreign missionary society or foreign missionary societies, to whose agents he intended this residue should be paid. As this residue then was to be divided into two equal parts, one to be devoted to home missions, and the other to foreign missions, the natural construction of the testator's words is, that he had in mind two definite societies, one a home missionary society and the other a foreign missionary society, to whose agents the residue should be paid in equal shares and the clause is to be construed as if it read: "I also will and devise that the residue of any property be given equally to the authorized agents of the Home Missionary Society and the Foreign Missionary Society to aid in propagating the holy religion of Jesus Christ."

If read in this way, we think the evidence makes it reasonably certain what societies were intended. By the Foreign Missionary Society we think, as we have

said, the evidence makes it clear, that the testator intended the American Board of Commissioners for Foreign Missions. Although the evidence does not show that the testator took a special interest in the Massachusetts Home Missionary Society, yet it was the society, which more than any other represented to him, at the time he made his will, the cause of home missions, the only home missionary society of which he is shown to have had any definite knowledge. And it was a Massachusetts society, which in the church and religious society at Winchester sustained the same relation to home missions as the American Board sustained to foreign missions, and was the society intended in the church and religious society at Winchester, when contributions for home missions were solicited, and its name answers better to the description in the will, than that of any other society, except, perhaps, that of the American Home Missionary Society, to which it is auxiliary. We think that it is reasonably certain that the Massachusetts Home Missionary Society was intended by the words of the testator in the will. There is no doubt that a bequest to the two societies "to aid in the propagation of the holy religion of Jesus Christ," is a good, charitable bequest. The decree entered must be reversed and there must be a decree that the American Board of Commissioners for foreign missions and the Massachusetts Home Missionary Society are entitled to receive the residus in equal shares.

So ordered.

NEW YORK COURT OF APPEALS.

CLUTE v. EMMERICH.*

June 9, 1885.

JUDICIAL SALE—CAVEAT EMTOR—SUBROGATION—JUDGMENT SALE—RIGHTS OF PARTIES PAYING PRIOR MORTGAGE.

The maxim of *caveat emptor* applies to judicial sales.

Plaintiffs purchased, in 1869, certain real estate sold under a judgment docketed in 1865, which was at the time incumbered by a mortgage given in 1863. Subsequent to the recovery of the judgment, the judgment debtor conveyed, and the property passed through several conveyances to the defendant, who acquired title in 1871, his grantor being Marks Cottrell. The mortgage of 1863 had been taken up and a second mortgage given in 1866 by the then owner. In 1871 Marks Cottrell mortgaged the property, and, with the proceeds, paid off the second mortgage. In an action of ejectment, *held*, that the original mortgage of 1863 had been kept alive and was still a prior lien upon the property as against the plaintiff, whose title depended upon the judgment of 1865, and that the rights of the parties should be adjusted accordingly. †

Appeal from judgment of general term, first department, affirming a judgment rendered upon a trial by the court without a jury.

T. J. Clute, for appellant. *B. Skaats*, for respondent.

FINCH, J. Very numerous answers to the careful and elaborate opinion of DANIELS, J., at the special term, and which the general term approved and adopted, have been presented for our consideration, and fortified by a copious citation of authorities. Selecting out those which seem most plausible and are confidently urged, we may confine what needs to be said to their discussion without useless repetition of the argument which has thus far prevailed.

1. The judgment rendered is criticised, as in direct violation of the recording acts. That Mrs. Clute bought the property at a sale on execution, when the prior Chamberlain mortgage was discharged of record; that she became such purchaser in good faith and for value, as the trial court expressly found; and that a practical revival of the satisfied mortgage sweeps away the protection of the record, and works gross injustice to one who has trusted to it,—is the substantial argument made. But we do not see that the recording acts affect the

* 28 Hun, 10, affirmed. See, also, 12 Hun, 504.

† As to subrogation, see 28 Eng. Rep. 212. Rights of purchaser on execution sale, *ante*, 38.

question. Whatever of good faith attended Mrs. Clute's purchase at the execution sale, she could gain by it no better or stronger right than the creditor would have got if he had been the purchaser. *Frost v. Yonkers Savings Bank*, 70 N. Y. 553; S. C., 26 Am. Rep. 637. She took only what the judgment could give, and bought at the peril of disappointment as to the existence or scope of its lien. The maxim of *caveat emptor* applied to her purchase, and she has no ground of complaint if she is given an interest in the land, precisely commensurate with the actual lien of the judgment under which she bought. The record told her that such lien was only upon Hall's equity of redemption, and was subject, when obtained, to the prior Chamberlain mortgage. The judgment creditor had no equitable right to any thing more. If more came by an enlargement of the lien, that was simply the creditor's good fortune; if it did not so come, the good fortune vanished, but no right of the creditor was invaded. Mrs. Clute's purchase, therefore, gave her, outside of her legal right, no equity to have the property freed from the incumbrance to which the judgment itself was subject. Her struggle is to retain the benefit of an accidental and unintended extension of the judgment lien, to which she was in no way equitably entitled, at the expense of others acting in ignorance and through mistake.

2. It is further contended that the judgment appealed from carries the doctrine of subrogation beyond any recognized limit; that the savings bank holding the final mortgage was a mere volunteer, advancing its money without compulsion or necessity; and that it was error to make the mortgage as the final form of a continuous debt a lien upon the premises, having priority over the sheriff's deed. Two cases are specially relied on as the basis of this contention,—*Marvin v. Vedder*, 5 Cow. 671; *Banta v. Garmo*, 1 Sandf. Ch. 883. They hold that a mere volunteer cannot be subrogated, and we have quite recently admitted the doctrine to be sound. *Acer v. Hotchkiss*, 97 N. Y. 403. But it is not the savings bank which is invoking equitable interference. It is not even a party to this action, although benefit may result to it from justice done to others. The defendant sued in ejectment and certain to lose his land, resists the claim of mesne profits and the complete recovery sought, by himself invoking the doctrine of subrogation. It is Emmerich and his grantors who have paid the interest upon the outstanding incumbrance, in ignorance that the title had been sapped, and wasting their money without return, and it is the defendant who brings his trouble into equity and seeks its aid. He is no mere volunteer. He was in possession of the land as owner, supposing his title to be perfect. He had covenanted to pay the bank mortgage and parted with his money in good faith and to protect his title. In no sense were his payments voluntary, and in every particular he stood within the rule of subrogation. But it is said that he could defend against his covenant as it respects any future liability by reason of his eviction, *Dunning v. Leavitt*, 85 N. Y. 35; S. C., 39 Am. Rep. 617; and so the amount unpaid cannot be made a lien for his benefit. Possibly he might so defend; but is he bound to set up such defense and repudiate his covenant for the pure profit and benefit of a plaintiff having no equitable right to such profit? If Emmerich can escape his liability by two modes of procedure; one of which throws the loss where it belongs, and the other lands it upon innocent parties, may he not choose the former? If he decides to abide by his covenant and not resist it, at least the plaintiff may not complain. But Emmerich by his deed obtained all the right of Marks Cottrell, and he at all events remains liable upon his bond to the bank, and himself paid off the Pearsall mortgage with the new loan, and his equity has become defendant's.

3. It is said that Marks Cottrell had actual notice of plaintiff's title before he paid off the Pearsall mortgage, and that defendant had such notice in 1874. The findings are to that effect, but they show also that each party had no such actual knowledge until after their conveyances were taken and they had become bound by their covenants to pay off the mortgage incumbrance. The contention amounts to this: that they were bound to repudiate their covenants and throw the loss upon innocent third parties for the benefit of one whose sole right was subject in equity to the payment of the debt.

4. But it is added, that Marks Cottrell, after the sheriff's deed to Mrs. Clute, had

nothing to convey and could not transfer any right or title to Denis Cottrell which might pass to the defendant; and that Marks Cottrell could not indirectly, by mortgage upon land which he did not own, cut off Mrs. Clute's title. All this assumes that her title was something more than it really was, and puts its accidental and mistaken extension in the place and stead of its real lien. Marks Cottrell was in possession when he conveyed to Denis, and his deed was at least effective to transfer that possession and whatever equitable rights he had as against the legal title obtained by plaintiff. That legal title is not here assailed or destroyed. Equity has simply taken its measure, and allowed it to prevail to its lawful extent, and, in justice to the complaining parties, compelled it to operate solely within its own proper and just boundaries.

5. It is also insisted both as to Mrs. Hyde and Marks Cottrell as well as to defendant that they had covenanted and agreed to pay off the mortgage debt, and that one cannot be subrogated to a debt for which he is primarily liable, and which it is his duty to pay. That is only another mode of saying that one cannot be subrogated who has no equity, and is quite true without affecting the case here presented. It was not their duty to pay as against the judgment creditor, and it was his duty and his debt if he became owner under the judgment. As between these grantees and the creditor, the mortgage debt was the prior lien and to be taken out of the land, leaving the judgment to take the residue; and in no just sense can it be said, as against one claiming under the judgment, that the owners of the fee were bound to pay off the incumbrance. While they had agreed to do so as to other parties, and as to them were primarily liable, they stood in no such relation to the plaintiff and owed her no such duty.

The foregoing are the principal objections taken to the conclusions of the court below. There were many others but largely dependent upon those discussed. The general principles involved in the decision have been sufficiently vindicated by the opinion of the special term, to which we have already referred.

The judgment should be affirmed, with costs.

All concur.

REHBERG v. MAYOR, ETC., OF NEW YORK.

June 9, 1885.

PRACTICE—EXCLUSION OF EVIDENCE—PROOF OF REGULATIONS—READING FROM STENOGRAPHER'S MINUTES—LIMITING COUNSEL.

In an action brought to recover damages for injuries received from the falling upon him of a pile of bricks placed in a street by a contractor engaged in taking down a building, a witness called by plaintiff testified on cross-examination that he did not consider that the brick pile was the same in its appearance as those he had seen in the streets constructed under similar circumstances. The plaintiff then asked the witness, "what was the difference that you observed between this pile and other piles of old brick?" This was objected to and excluded. *Held* not error; whether it was safe or dangerous could only be determined by proof of its own features and not by evidence showing the construction of other piles of brick, and the fact that the witness had testified on cross-examination that the brick pile in question differed in appearance from others seen in the streets by the witness, did not entitle the plaintiff to prove in what respect it differed from the other piles.

A regulation defining or limiting the extent of the obstruction of streets by building material cannot be proved by oral evidence; the ordinance itself must be produced, also the permit issued under such regulation.

It is not error for the trial court to refuse to allow counsel in cross-examining a witness to read from the alleged minutes of the stenographer taken on the former trial, the accuracy of which has not been established.

An exception is not well taken unless the attention of the court is directed to the precise point intended.

The time to be allowed counsel in summing up is a matter of discretion for the trial court, with which, unless abused, this court will not interfere.*

Geo. N. Sanders, for appellant. *D. J. Dean*, for respondent.

MILLER, J. Numerous questions were made upon the trial as to the rulings of

* 22 Eng. Rep. 741.

the judge in regard to the admission of evidence, which questions are first entitled to consideration.

The plaintiff called a policeman, who testified as to the character of the pile of brick, by the falling of which the accident in question was occasioned, and that he saw nothing particular about the pile that attracted his attention. The plaintiff then called a witness, who testified generally as to the character of the pile, and upon his cross-examination testified that he did not consider that the brick pile was the same in its appearance as those he had seen in the streets constructed under similar circumstances. The plaintiff then asked this witness, "what was the difference that you observed between this pile and other piles of old brick?" This was objected to, and the objection sustained, and the plaintiff excepted to the ruling of the judge.

No distinct offer was made to show by the witness in what respect the other brick piles were differently built, and we think that the difference between this pile and other piles of brick was entirely immaterial. The characteristics of other brick piles could not affect the question whether the pile in question was properly constructed or was unsafe and dangerous. Whether it was safe or dangerous could only be determined by proof of its own features and not by evidence showing the construction of other piles of brick. The evidence, without objection upon the cross-examination of the witness, that the brick pile in question differed in appearance from others seen in the streets by the witness, did not entitle the plaintiff to prove in what respect it differed from the other piles. Proof had already been given of the characteristics of the pile in question, and the admission of the evidence offered would open the door to an extended field of inquiry which would not affect the real question in the case as to the proper construction of the pile which was the subject of the controversy. It would tend to divert the attention of the jury from the real issue as to the negligence of the city in allowing the construction and maintenance of the pile in question.

The claim that the testimony offered was necessary to prevent the policeman's evidence from relieving him from the charge of negligence in not observing that the pile was dangerously constructed, is not well founded. Whether other piles were constructed differently from the one in question would have no direct bearing upon the issue in controversy, as to its safety, and it would be extremely remote to say that the testimony offered affected or impaired the evidence of the policeman. There was, we think, no error in the exclusion of this evidence.

The question put to the witness Blumenthal, who was superintendent of incumbrances in the department of public works in the city of New York, as to the regulation in regard to permits issued for the placing of building materials in the street, was properly excluded. The objection to the evidence was upon the ground that to prove a regulation the ordinance of the common council is the proper way to prove it.

The offer was a proposition to prove by oral evidence a regulation defining or limiting the extent of the obstruction of streets by building material. By the charter of the city the common council had authority to enact ordinances on the subject, and one of the ordinances had already been put in evidence, and hence it would follow that the oral evidence of the witness was not competent. The production of the ordinance was clearly essential in the first instance, and testimony showing that a regulation had been established by the proper authority, prohibiting the erection of a pile of bricks, such as was constructed in accordance with the ordinance on the subject, would only be competent after the production of the same. Such testimony was not excluded by the ruling in question, and the effect of the decision was only to hold that before the introduction of evidence of a regulation, under an ordinance or ordinances, the necessary preliminary proof must be given. It follows that parol proof of a uniform regulation as to the height to which brick piles could be carried, was not competent in the form in which it was offered.

We are not called upon to consider the effect of the evidence which was excluded, as such evidence, as we have seen, was incompetent and inadmissible, until the plaintiff had proved the regulation of the common council by ordinance.

Nor are we bound to consider the charge, in case such proof had been properly introduced, to which the plaintiff would have been entitled as to the negligence of the policeman in allowing an unlawful obstruction, even without notice in accordance with the opinion of this court upon the former appeal, that the city was responsible, although it had not by actual examination and inspection ascertained its dangerous character. *Rehberg v. Mayor, etc.*, 91 N. Y. 137; S. S., 43 Am. Rep. 657.

We are also unable to perceive that there is any ground for the contention that the validity of the plaintiff's exception is settled by the ruling as to the testimony given on the first trial, to which we have referred, in reference to the regulation of the common council in regard to obstructions in the street of this character, as a marked distinction exists between the decision of the court upon the first and the last trial, and the question now raised was not then presented.

It cannot, we think, be claimed that the ruling in the record before us is the same as on the former trial, and that the decision of this court, in reference to the first trial, upon the appeal therefrom, is conclusive and controlling upon the question now presented. On the first trial the plaintiff offered to prove that a regulation had been made prescribing the height to which brick might be piled in the streets, and the permission of the proper bureau, which was excluded, and it was held to be error; that it was to be assumed that regulations had been made; as plaintiff offered to prove, and that the policeman assigned to duty at the place knew of them; that while the policeman might have been justified in supposing that the contractors had a permit, he ought to have known, when the pile exceeded the height which safety permitted, they were not acting within the scope of any authority; that notice to the policeman of the unlawful character of the obstruction was notice to the city, and it is chargeable with any neglect on his part; that as to whether there was time for the city, using reasonable diligence, to have removed the obstruction after such notice and before the injury, was a question of fact for the jury. The distinct objection was not taken to the evidence that the ordinance of the common council should have been introduced, and the point here made was not presented. This makes an essential difference between the two cases, and while on the first trial the proof offered was competent when no such objection was made, there is a plain distinction between that case and the one now presented when the objection stated was made. The decision of the trial court, therefore, in no way conflicts with the decision of this court, and it cannot be said that it was erroneous.

The question put to the same witness as to whether the paper shown him was the printed form used in the department since the 1st of September, 1877, for permits for placing building material on the street was properly overruled. The only material question was, what was the form of the permit actually given in this instance? It was proved that a permit had been given, and it was not proper to prove its contents by proof of the general form of permits. This would be secondary evidence, and no foundation was laid which authorized its introduction.

No error was committed in striking out the copy permit which had been read in evidence, or in the refusal of the court to permit the written portion thereof to be put in evidence. Oral testimony had been given to show that this paper was a written copy of the permit which had been given, and it was objected to on the ground that no foundation had been laid for the introduction of secondary evidence. *Lochman & Braender*, to whom the permit had been issued, had not been subpoenaed to produce it, and *Braender* swore no search had been made for it for the purpose of producing it in court. Nor was it shown to have been a copy, for it appeared subsequently from the testimony of *Blumenthal*, that he could not testify, and did not testify that it was a copy of the original permit issued, and on this ground a motion was made to strike out the evidence. The court said it would grant the motion unless the plaintiff further established the correctness of the copy. This additional proof was not furnished and the copy permit was properly excluded.

The ruling of the court refusing to allow the plaintiff's counsel to read from what he claimed to be the stenographer's minutes on the former trial, in putting questions to a witness from the same, was not error. The witness was being cross-

examined and it was not proved that the paper, from which the counsel read, was the stenographer's minutes although asserted to be such. While it was perfectly proper to examine the witness in the ordinary way as to what he had testified to on the former trial, the mode of such examination was, to a certain extent, under the direction of the court, and it is easy to see that a question put from the alleged stenographer's minutes might not be the proper mode of examining the witness in respect to his former testimony. The objection was not to using a manuscript but to the reading from the alleged minutes, the accuracy of which had not been established, a question which might tend to affect the credibility of the witness. Nor was it to the use of any aid which counsel might deem necessary in framing his questions as he might have consulted these minutes and then put his question without reading from them as the stenographer's notes of the former trial. By pursuing this course he could have drawn out from the witness all that he desired, and if thereafter he, the witness, had been impeached, he would have had the full benefit of the examination in reference to the testimony he had given on the previous trial. The mode and extent of the examination as to the credibility of a witness must necessarily be in the discretion of the judge, and unless that discretion has been abused, it is not the subject of review. In the orderly proceedings of a court it is for the judge to say how far the counsel shall be permitted to pursue his examination in reference to matters which affect the credit of the witness as well as the manner in which the examination should be conducted, and we are unable to see that any rule was violated, under the facts presented, by the decision of the judge in this respect. The witness had testified that he did not recollect producing at the former trial of this action a notice from the defendant that it would hold him liable for any damages recovered against them in this action. Plaintiff's counsel insisted on refreshing the witness' recollection on the point. Thereupon defendant's counsel admitted that such a notice had been given. The plaintiff's counsel then commenced to read from the alleged stenographer's notes. It would seem to be unnecessary to ask the witness any further questions in reference to the matter, as the fact that such notice had been given was admitted by the defendant's counsel, and, under the circumstances, the court was justified in the exclusion of further testimony as well as in holding that reading from the alleged stenographer's minutes was improper.

Various requests to charge were made upon the trial, and some ten propositions were submitted to the court at the close of the charge, and the court refused to charge any of them, and the plaintiff's counsel excepted.

We think the exception was not well taken and that it was too general. The rule is well established that the attention of the court must be directed to the precise point intended, and that otherwise the exception is not well taken. *Schile v. Brokhaus*, 80 N. Y. 614. This was not done, and hence the plaintiff is not in a position to avail himself of the general exception made to the refusal to charge the entire series of requests. Aside from this, however, the requests were mainly covered by the charge of the court, and those which were not, were properly refused.

The exception taken to the limitation of the court in reference to the time allowed to counsel to sum up to the jury is not well taken. It was a matter of discretion with the court to determine what time should be allowed under the circumstances, and unless such discretion was abused, we are not authorized to interfere with the same. The court announced what time would be allowed and the plaintiff's counsel did not ask for any further time and did not claim that any additional time, beyond what was allowed, would be required. He merely excepted to the ruling of the court, and is not in a position to claim that the time allowed was insufficient, or that his client's rights were affected, or that the discretion of the judge was improperly exercised.

The judgment should be affirmed.

All concur.

GOULD v. CAYUGA COUNTY BANK, etc.

June 9, 1885.

FRAUD — RESCISSION — DAMAGES — COMPROMISE.

The fraud for which an action for damages will lie must be some fraud with reference to the subject-matter which the defrauded party has received by virtue of the fraudulent contract.

Plaintiff, upon a false and fraudulent statement of the facts as to the value of a disputed right of action, compromised the same. In an action to recover damages therefor,—

Held, that the measure of plaintiff's actual loss was the excess of that value upon the true state of facts as known or honestly believed over the value fixed upon a false state of facts fraudulently asserted, or in other words, the compromise should be made honest and fair.*

W. F. Cogswell, for appellant. *H. V. Howland*, for respondent.

FINCH, J. Upon the argument of this appeal the learned counsel for the appellant expressed a regret that he had been unable to impress upon the general term the precise and accurate point which he desired to make. The suggestion warns us to study the argument now made attentively, and not to miss its force and direction, and to endeavor to hold firmly for analysis and examination, the distinction sought to be drawn, however it may seem to us, somewhat subtle and narrow.

Assuming for the purposes of the discussion that a fraud existed, the argument upon both sides proceeds for a long distance upon parallel lines, and without divergence. The previous action between the parties was upon the contract by which the bank, and Beardsley as its security, agreed to return to Gould its government bonds, loaned temporarily to the corporation. Whether these bonds or their equivalents had been actually returned to Gould so as to have become his property on special deposit at the bank before the embezzlement of the cashier, and so which party had been robbed, was the precise fact in controversy. The defense was an agreement of compromise, and the reply that such agreement was void for fraud. We decided that the action was upon the original obligation, which was extinguished by the compromise agreement so long as the latter stood; that while it might have been rescinded on the ground of fraud, it could not be so rescinded without a return of the \$25,000 received upon it; and since that had not been tendered, the compromise stood and operated to extinguish the original obligation. But that one guilty of a fraud obtained complete immunity, because time or circumstance had made impossible a restoration of the parties to their original condition, seemed such a reproach to the law, that we added a statement of the settled and undoubted rule, that though one situated like the plaintiff may not be able to rescind, he still has ample remedies; "he may keep what he has received and sue to recover damages for the fraud; or he may commence an action in equity to rescind, and for equitable relief, offering in his complaint to restore in case he is not entitled to retain what he has received." 86 N. Y. 84. The language thus used accurately reproduced an early statement of the law, and a still earlier decision called out by the complaint of one unable to rescind that it was hard to lose all remedy, Leake's Dig. of Law of Cont. 397; *Clarke v. Dickson*, E. B. & E. 148, and is abundantly supported by authority in our own State. *Whitney v. Allaire*, 4 Den. 554; *Van Epps v. Harrison*, 5 Hill, 63; *Kerr on Frauds*, 330; *Krumm v. Beach*, 96 N. Y. 406.

But the correctness of the rule as thus laid down seems not to be challenged by the appellants, and needs no special defense. Their counsel grants that a substantive action for the fraud may be brought, but insists that when brought it can only be for a fraud in the subject-matter of the fraudulent contract and with damages confined to that; or, to state it negatively, that fraud in an extrinsic subject and damages which enforce and revive an extinguished obligation are not within the meaning or intent of the rule which permits an action for the deceit; and then it is further contended, that the present action is not for a fraud in the subject-matter of the compromise agreement, but for the amount of the original

* That there must be proof of actual loss, see *ante*, 142. — Ed.

contract obligation disguised as damages for a fraud. Beyond this statement of the point raised, as we understand it, we may prudently repeat it in the careful language of the learned counsel's brief. He says: "What is it that the plaintiff contracted for in the compromise agreement? It was \$25,000 which he got. He received just what he contracted for. There is no question as to any fraud in reference to the consideration which he received for his release. He does not seek by this action to have that consideration made equal to what it was represented to be, because there is no complaint but what it was thus equal. The fraud for which an action for damages will lie must be some fraud with reference to the subject-matter which the defrauded party has received by virtue of the fraudulent contract. Where there is no fraud with reference *thereto*, there can be no action." Such is the language addressed to us, and such the argument. It takes the \$25,000 received to be the subject-matter of the compromise agreement, and assumes that there was no fraud in that because it was all fully paid. Exactly at that point we take issue. The \$25,000 was in one sense the subject-matter of the new agreement, but, in the same sense, the fraud sued for, inhered in that identical subject-matter, and was, in the learned counsel's own language, "with reference *thereto*." What was the \$25,000, and how came it to be in the negotiation that defined amount, and neither less nor more? Obviously it was the agreed value of a disputed right of action, but an agreed value won out of Gould by a false and fraudulent statement of the facts upon which such value depended. If no falsehood had been told him, that value would have been greater in his judgment, and so in his demand as a term of the compromise made; and that such value was fixed at \$25,000 and no more, was the direct product and result of the fraud. If we can see that the sum received as the then fair value of the disputed claim was not such value, and would not have been so received had the truth been told as it was known or believed, but instead a larger sum would have been required as the condition of a compromise, why is not the fraud in inducing the inadequate sum to be accepted a fraud in the subject-matter of the compromise agreement? That the \$25,000 was but \$25,000 and not another and a larger sum was the very fraud point of the agreement; and so we reply to the propositions addressed to us that the fraud sued for *does* relate to the subject-matter of the compromise; that Gould did *not* "receive just what he contracted for," but contracting for the fair value of his disputed claim, was induced by fraud to accept less than that fair value, and so there *is* question as to "fraud in the consideration which he received for his release;" that he *does* "seek by this act to have that consideration made equal" to what it would have been had no falsehood been told him, and there *is* complaint that it is not so equal.

And here we may turn to the other branch of the argument, that the action is an attempt to recover under the mask of damages, the extinguished balance of the original obligation. That is not the effort, and such is not the true measure of damages. If it was, very much of the appellant's argument would be difficult to answer. There having been no rescission of the compromise agreement, that must stand, and it discharges forever the original contract, and extinguishes all right to any balance due upon it. In no form of action, while the compromise stands, can that balance be recovered. But because of that fact it does not follow that merely nominal damages resulted from the fraud. While their measure is not the extinguished balance, and cannot be without making the rule as to rescission an idle and useless formality, its measure is indemnity for the real loss sustained, which may very well prove to be less and even much less than the contract balance. Such damages will compensate the fraud as make the compromise which is to stand an honest and fair one, instead of a dishonest and fraudulent one. Damages which leave it to stand, but purge it of fraud are what should be recovered. What the plaintiff sold and the defendants bought was not a conceded, but a disputed claim, worth, therefore, ordinarily, something less than its face for purposes of sale, transfer or cancellation; how much less depending upon the continuing solvency of the debtor, and the probabilities of its successful enforcement, and that upon the underlying facts of the case; and depending also upon the probable extent and expense of the expected litigation. Upon a false statement of the facts material to the probabilities of success, and so affecting

vitality the value of the disputed claim in the compromise negotiation, the plaintiff was induced to take \$25,000 for his resisted demand. If there had been no fraud, how much more would he have got in the compromise? When we know that, we know the loss and can measure the indemnity. If no falsehood as to the facts had been told him, while defense and resistance were still threatened and contemplated, and his claim still disputed and denied, and a litigation needed to enforce his rights, how much more than the sum allowed ought he to have received and the defendants to have paid by way of compromise? For there is a compromise, and it must stand as a compromise, and the problem is only to make it an honest compromise. How much additional money will it take to do that? Or, to state it another way, going back to the negotiation, assuming that the parties meant to avoid litigation and compromise their dispute, and that nothing but facts were disclosed, how much could Gould have reasonably demanded and the defendants have reasonably allowed as a final compromise above and beyond the \$25,000 in fact allowed and received? That is the question of damages for the jury. It respects the fair value of the disputed claim as the subject of a reasonable and just compromise, or of a reasonable sale by the creditor to the debtor. It is the excess of that value upon the true state of facts as known or honestly believed over the value fixed upon a false state of facts fraudulently asserted, which constitutes the plaintiff's actual loss from the fraud. A dispute ending in a compromise implies mutual concession, and loss borne by each party, and if the compromise is honest and fair, the loss thus resulting is beyond recovery by either against the other. But that portion of the loss of one which is put upon him in excess by the fraud of the other, and is due solely to that fraud, may be recovered. It will not do to say that if no falsehood had been uttered there would have been no compromise at all, for, as we have said, there is one which must stand, and can simply be corrected and made honest. One who buys a horse under false representations may keep the animal and so affirm the sale and recover damages. He cannot say he would not have bought at all if he had known the truth, for he affirms the purchase. And so here; by not rescinding, Gould affirms the compromise, but is entitled to recover such damages as will purge it of fraud and make it an honest compromise, and that is a very different matter from an attempt to recover an extinguished contract debt. That there is difficulty in ascertaining these damages is true, and much must be left to the sound judgment and good common sense of a jury, but that often occurs in actions *ex delicto*. The result will be that the plaintiff, affirming the compromise agreement and unable to recover the contract balance, is entitled, in accordance with the general rule, to have such compromise agreement made as good for him as it reasonably and fairly would have been if only the truth had been told, instead of a falsehood asserted. When that is done, the loss due to the fraud and that only is recovered, the true value of the disputed claim, and not the false value, and so not at all the extinguished contract balance.

So far we have gone upon a concession, made solely for the purposes of the discussion that an actual fraud was committed. The appellants now deny that, and insist that no fraud was sufficiently established to justify or make necessary a submission of that question to the jury. The reasons assigned are that the representations made were not of personal knowledge but of information honestly believed and relied upon; that they were merely that the bonds had been returned to the bank and not that they had been returned to Gould, and that the latter knew the truth from the cashier before the compromise. The evidence shows that while the bonds had been purchased with a view of returning them to Gould, they never were so returned, or passed out of the custody of the cashier, and no information to the contrary appears ever to have been given to the officers of the bank. The proof, then, leaves it at least debatable whether these officers did not in substance represent that the equivalent bonds had not only been purchased with a view to their return to Gould, but had been so dealt with as to have gone into his special deposit and to have become his property, and whether they did not allege a return to Gould. As to the contrary information given by the cashier, his statement was alleged to have been false and a confident assertion made that the bank could prove it. We are satisfied upon consideration of the evidence

that the nonsuit cannot be upheld upon the ground that there is no evidence of fraud.

The order of the general term must be affirmed and judgment absolute rendered for the plaintiff, with costs.

All concur.

NATIONAL BANK OF VIRGINIA v. MILLS.

June 9, 1885.

PRACTICE — DISMISSAL OF COMPLAINT — WHEN ERROR.

Where the evidence is conflicting and susceptible of inference either way, and the witnesses are neither indifferent to the result nor consistent in their statements, it is error for the trial court to grant a motion dismissing the complaint.

Mr. Vanderpoel, for respondents. *E. P. Wilder*, for appellant.

DANFORTH J. The complaint states facts sufficient to create a duty on the part of the defendant Bracken, as attorney for the plaintiff, and the omission to perform it. It contains the elements of a bill in equity against both defendants, although upon allegations which are involved and uncertain, but it also alleges certain distinct wrongful acts and omissions on their part, and upon this appeal these last are relied upon by the appellant, who characterizes the action as one "to recover damages for the fraudulent conspiracy of the defendants, whereby plaintiff's rights and interests in a pending litigation were wrongfully settled, compounded and released" by them, and the fruits thereof "appropriated to their own use." The trial proceeded upon the same theory, and at the close of the plaintiff's case, a motion to dismiss the complaint was granted upon the grounds (1) "that there is no evidence to justify the allegations in the complaint, nor (2) proof of any conspiracy." Notwithstanding the concurrence of two courts in this decision, we are, after a careful examination of the evidence, brought to the conclusion that there should be a new trial.

It must be conceded that the testimony upon material points was conflicting. It all came indeed from the plaintiff's witnesses, and they were neither indifferent to the result nor consistent in their statement of facts and circumstances on which the right of recovery depended. The principal one (H.) gave different versions of his transactions with the defendants. Either his probity or his capacity might be called in question. His testimony was vacillating and contradictory. But he produced a paper signed by the firm of which Bracken was a member, acknowledging the receipt by them of the drafts which lay at the foundation of the proceeding in question, and testified in substance that at the same time he, as president of the plaintiff, undertook that it would "pay his fees, or see him paid," and the defendant (B.) said he "would make the best of it he could for the Bank of Virginia." This was at the outset, and there is evidence of conduct and admissions by him, which may be construed as showing that the relation then assumed continued until those proceedings were made effective as the basis of the compromise complained of. It may be as the answers allege, that the retainer was by Mills; that he was the actual, as upon the record he was the nominal party in interest; that as the bank took from him no formal assignment of the cause of action, so they trusted to his management of the matter of enforcing it, and relied upon his promise to pay to them, or apply to their benefit the fruits of recovery. So upon a fuller disclosure of the case it may appear that the relation of Mills to the plaintiff was such as to justify Bracken in submitting to his directions, and accounting with him for the money in question.

But the trial court had only the plaintiff's case. We think the credibility of its witnesses was a proper matter for the consideration of the jury, and in one view which might be taken of it, their testimony was sufficient to call for explanation. But as it is for that body rather than the court to raise presumptions, draw inferences, and compare and weigh particular testimony, and as upon a new trial the evidence may not be the same, we think it inexpedient to say more

than that in our opinion it ought to have been submitted to the jury to determine upon the right of the plaintiff to recover.

The judgment appealed from should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur.

FAIRCHILD v. LYNCH.*

June 9, 1885.

PRINCIPAL AND SURETY — SUBROGATION — FORECLOSURE — DEFICIENCY — ASSIGNMENT OF BOND — EXTINGUISHMENT.

When a surety has paid the debt, he is entitled to be subrogated to all the rights of the creditor against the principal debtor.

Plaintiff conveyed land to defendant, who covenanted in the deed to assume the payment of a mortgage thereon given by her grantor. In an action to foreclose said mortgage, plaintiff and defendant were made parties defendants, and personal judgment for deficiency against each were sought. The defendant in this action defended in the foreclosure suit, and previous to the trial she stipulated that judgment might be entered except so far as to charge her with a deficiency. Judgment of foreclosure and sale was entered accordingly and against plaintiff in this action for a deficiency, who thereafter took an assignment of the bond and mortgage. In an action on the bond,—

Held, that the transfer of the bond did not operate as an extinguishment of the personal security, and that plaintiff was entitled to recover.

Held, further, that in the foreclosure action, the rights of the parties here, as between themselves were not involved, or essential to the judgment rendered.

The rule that a judgment is conclusive not only as to the questions litigated, but those which might have been litigated, means such as were within the issues before the court, and so might have been determined.

S. F. Cowdry, for appellant. *Abram Kling*, for respondent.

FINCH, J. What consequence resulted to the plaintiff from an assignment to him of his own bond and mortgage is the first question debated in this case. When that transfer was made, he had already sold the land to the defendant not only subject to the outstanding incumbrance, but taking her personal covenant to assume and pay the mortgage debt. He has been defeated upon the ground that, while the mortgage lien might survive as a taking of the pledge for the debt, yet the transfer of his own bond to himself worked an extinguishment of the personal security, and, at the most, left in existence only a liability of the land to the extent of its value and with no remedy beyond. Ordinarily such transfer of the bond would extinguish the debt upon the principle that one cannot sue himself, and so there happens a complete suspension of all remedy, and that where he who is entitled to receive and he who ought to pay are one and the same, an extinguishment of the debt is inevitable. *Thomas v. Thompson*, 2 Johns. 471. But here the one entitled to receive was not the one who ought to pay, but, on the contrary, one who stood merely as surety for another primarily liable, and the general rule ceases to be conclusive when questions of suretyship and the equities resulting therefrom disturb its simplicity and introduce new and modifying elements. The defendant's acceptance of the deed with its assumption clause made her a covenantor as if an express agreement had been given. *Bowen v. Beck*, 94 N. Y. 89; S. C., 48 Am. Rep. 124. By force of that covenant she became the principal debtor for the amount secured by the bond and mortgage and bound to pay it in exoneration of plaintiff, the obligor in the bond, he standing merely as her surety for the debt. *Comstock v. Drohan*, 71 id. 12. If he had waited until that debt matured, and she who was principal debtor had made default, he might as surety have paid the bond, and, after exhausting the collateral, have sued her for the balance. *Mauri v. Heffernan*, 13 Johns. 58. The extinguishment of the bond by payment would have been the foundation of the recovery. But here, before default, the obligor buys and takes an assignment of his own bond. It must retain to some extent the breath of life, or its subsequent transfer was a nullity, and plaintiff's liability upon it was gone forever. The problem is not altogether a new

* See 42 N. Y. Super. 265.

one, and equity has furnished the solution. When a surety has paid the debt, it has been held that he is entitled not only to be subrogated to independent collaterals held by the creditor, but to be substituted in his place and stead to the debt and the instrument which is its evidence, and hold it, alive and enforceable, as against the principal debtor. *Goodyear v. Watson*, 14 Barb. 481. The right of a third person, not the obligor in the bond, but owning the land bound for the debt, to buy the bond and sue upon it, has been sustained by this court to its fullest extent. *Wadsworth v. Lyon*, 98 N. Y. 214; S. C., 45 Am. Rep. 190. A bond, therefore, may survive payment, which can become merely purchase-money, when it is a surety who buys. If under such circumstances payment will not kill it, still less will that constructive payment which is argued out of an assignment to the surety who is obligor. He may hold it till the principal debtor is in default, and then enforce it as against him precisely with the same effect as if he had been a co-obligor in the bond, for in equity that is what his covenant made him. The surety's payment of what, as to the creditor, is his own debt becomes a purchase as against the debtor primarily liable. The creditor could have sued Mrs. Lynch upon her covenant to pay the bond after default. The surety upon payment becomes substituted to the creditor's right and the bond survives to support it. When default occurs the surety may sue in the right of the creditor, and standing in his place and having his power, and for this purpose the bond remains a living and enforceable obligation. It is needless to consider whether it retains such vitality against the obligor as to enable him to assign and transfer it as a debt against himself, for that question in this case is determined by the judgment of foreclosure and for a deficiency which was entered with the express consent of Mrs. Lynch. The assignee set up title so derived and claimed judgment for a deficiency against Fairchild, the assignor and obligor, and Mrs. Lynch formally consented to the entry of that judgment. But the question seems to us immaterial for any present purpose. If we treat the foreclosure as operative only on the land and the right of the assignee as confined to a bare transfer of the mortgage as distinguished from any personal obligation beyond it, there still remains the decisive fact that Fairchild as surety for Mrs. Lynch paid the bond and mortgage to its holder and was entitled to both subrogation to the collateral and substitution to the debt, and when default occurred that he fairly exhausted and applied the collateral, and now, standing in the place of the creditor, may sue Mrs. Lynch for the balance due from her upon the covenant to pay the bond, and the latter survives sufficiently at least to support that action. The case in the end seems to us to differ from those in which the right of the surety has been many times sustained in but two particulars; first, that the surety paid before default; and second, that his liability and that of the principal debtor were the product of two separate instruments instead of one and the same. As to the first it is to be observed that no right of action was asserted until after default, and the purchase made might well be treated as effectual at that date as before; and as to the second, that the two instruments constituted the elements of the one contract, and read together put the covenantor in the same practical position which she would have occupied if she had signed the bond as principal debtor or, Fairchild signing it as her surety. We are thus of opinion that the general term erred in holding Fairchild's right of action to have been extinguished.

But the judgment for the defendant is sought to be sustained on another ground. In the foreclosure action, as we have said, both Fairchild and Mrs. Lynch were made parties defendant, and personal judgments against each for any ultimate deficiency were sought. Mrs. Lynch defended, denying her assumption of the debt; charging the bond and mortgage to be fraudulent; pleading her coverture; but among all her defenses, never alleging that of payment or the extinguishment of the bond. Before trial she signed a stipulation consenting that a judgment might be entered in the action for the relief demanded in the complaint except so far as it sought to make her liable for a deficiency, and judgment was accordingly entered of foreclosure and sale, and against Fairchild for a deficiency. The effect of this judgment she claims discharged her liability in two ways. She contends that the acceptance of the stipulation by the then

plaintiffs released her, and as a consequence released Fairchild, her surety, notwithstanding it conclusively established his liability; and whether he chose to avail himself of a defense personal to himself or not; and further insists that the judgment at all events conclusively determined that she was not liable for a deficiency. But it seems to us very clear that it determined nothing as between the co-defendants, Fairchild and Mrs. Lynch. Their rights as between themselves were not in issue, were not tried, were not decided, and were totally immaterial to the case before the court. It is doubtful, even, if the effect of the stipulation was not simply to withdraw from the case, the then plaintiff's right of action for a deficiency against Mrs. Lynch, and leave it open for future litigation if such should be deemed necessary. But, whether that be so or not, it certainly did not adjudicate upon any rights or equities between Mrs. Lynch and Fairchild, and left them wholly undetermined. These rights were not before the court; neither pleaded nor proved; unessential to the judgment rendered, and so not involved in it. That the court had power to have determined the ultimate rights of the parties as between themselves is true; but where such are not material to the actual issues before the court, or to the relief to be administered, they must, at least, in some manner be brought to the notice of the court, and actually determined or involved in the judgment rendered, before that judgment can operate upon them. The rule that a judgment is conclusive not only as to the questions litigated, but those which might have been litigated, means such as were within the issues before the court, and so might have been determined. Such was not the case here. Mrs. Lynch denied her personal liability to plaintiff in the foreclosure. Whether or not she was so liable to Fairchild by reason of his purchase of the bond was a question not presented, and which, as the case stood, could not have been tried. The necessary facts for such a determination were absent both from the pleadings and the proof.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

NEW YORK COURT OF APPEALS.

PANTZAR v. TILLY FOSTER MINING Co.*

June 9, 1885.

MASTER AND SERVANT—PRECAUTIONS BY MASTER—NOTICE OF DANGER.

The rule that a servant assumes the risks of service presupposes that the master has performed the duties of caution, care and vigilance; and it is those risks alone which cannot be obviated by the adoption of a reasonable measure of precaution by the master that the servant assumes.

Defendant was the owner of a coal mine conducted under the management of a superintendent.

The plaintiff, at the time of the accident, was upon a wall in the course of construction, for the purpose of furnishing a place behind which to deposit the refuse material of the mine, and, as claimed by defendant, also with a view of supporting the overhanging cliff from which the rock injuring plaintiff fell.

The evidence as to the condition of the rock at the time of the accident was conflicting; the plaintiff's evidence showed that a large crack, parallel with and about ten feet back from the upper angle of the face of the cliff, had long existed and was plainly visible; that the attention of the superintendent and foreman had been called to it, and they were warned of its dangerous character; that they had instituted an experiment to determine whether it was growing or not, and that such experiment did show that it was increasing in width, and still took no precaution to support the rock while the workmen were engaged under it.

The plaintiff's evidence also tended to show that the rock broke off at the place where the crack had been observed, and that with the fall the crack disappeared.

Held, that a verdict in favor of plaintiff would not be disturbed; it must be assumed therefrom that it was determined that the rock fell from a cause of which the defendant had notice, and that precautions which would have prevented the injury were not adopted, although they were practicable and of easy and safe application.

Appeal from judgment of general term, first department, affirming judgment for plaintiff and an order denying motion for new trial.

Luther R. Marsh, for appellant. *J. Edward Swanstrom*, for respondent.

RUGER, C. J. The general principles upon which this action depends have been so frequently discussed in recent cases that any thing more than a brief summary would be unprofitable. Thus it has been held that a master owes the duty to his servant of furnishing adequate and suitable tools and implements for his use, a safe and proper place in which to prosecute his work, and, when they are needed, the employment of skillful and competent workmen to direct his labor and assist in the performance of his duties. *Bartonskill Coal Co. v. Reid*, 8 Macq. 275; *Laning v. N. Y. C. R. R. Co.*, 49 N.Y. 522; S. C., 10 Am. Rep. 417; *Briden v. Stewart*, 2 Macq. 84; *Booth v. Boston, etc., R. Co.*, 73 N. Y. 40; S. O., 29 Am. Rep. 97. That "no duty belonging to the master to perform for the safety and protection of his servants can be delegated to any servant of any grade so as to exonerate the master from responsibility to a co-servant who has been injured by its non-performance," *Mann v. Pres., etc., D. & H. C. Co.*, 91 N. Y. 500; *Booth v. Boston, etc., R. Co.*, *supra*, and that when the general management and control of an industrial enterprise or establishment is delegated to a superintendent, with power to hire and discharge servants, to direct their labors, and obtain and employ suitable means and appliances for the conduct of the business, such superintendent stands in the place of his master, and his neglect to adopt all reasonable means and precautions to provide for the safety of the employees constitute an omission of duty on the part of the master rendering him liable for any injury occurring to the servant therefrom. *Corcoran v. Holbrook*, 59 N. Y. 517; S. C., 17 Am. Rep. 369.

The case shows that the defendant was the owner of a coal mine in Putnam county, N. Y., conducted under the management of a superintendent. He was invested by them with full power of control over the same, and ample discretion and authority in directing the work and using all suitable measures and pre-

* 16 W. Dig. 341; S. C. mem.; 23 Hun, 842, affirmed.

cautions for carrying on the business of mining, and securing the safety of the workmen employed in the prosecution of the enterprise.

The action under review was brought by a servant of the defendant to recover damages for personal injuries received by him through the fall of a mass of rock while working in a pit in which the mining operations in question were carried on. The plaintiff, at the time of the accident, was upon a wall in the course of construction, for the purpose of furnishing a place behind which to deposit the refuse material of the mine, and, as claimed by defendant, also with a view of supporting the overhanging cliff from which the rock injuring plaintiff fell. At the time of the accident this wall had been raised to the height of about sixty feet, and was still some fifty feet below the surface of the ground. While thus engaged with a number of other workmen, a large mass was detached and fell from the brow of the projecting cliff under which the work was in progress and caused the death of some and the serious injury of others, among whom was the plaintiff. The evidence as to the condition of the rock at the time of the accident was conflicting, and raised questions of fact peculiarly within the province of the jury to determine. On the part of the defendant it tended to show that the cliff was composed of gneiss, a mineral naturally marked by seams, points and joints, and fliations, and that it was in the frequent and continued habit of causing it to be examined for the purpose of discovering, if possible, appearances indicating any immediate danger, and that no such indication had been observed before the accident. On the other hand, the plaintiff's evidence showed that a large crack parallel with and about ten feet back from the upper angle of the face of the cliff had long existed and was plainly visible; that the attention of the superintendent and foreman had been called to it, and they were warned of its dangerous character; that they had instituted an experiment to determine whether it was growing or not, and that such experiment did show that it was increasing in width, and still took no precaution to support the rock while the workmen were engaged under it, although such precautions were practicable and frequently adopted in other mines. In some cases braces of timbers, extending across from one side of the pit to the rock liable to fall, were used, and in others the overhanging rock had been blasted off. It was also shown that a wall such as that in process of construction would, when completed, have furnished a support to the projecting mass. The plaintiff's evidence also tended to show that the rock broke off at the place where the crack had been observed, and that with the fall, the crack disappeared. It must, therefore, be assumed from the verdict of the jury that it was determined that the rock fell from a cause of which the defendant had notice, and that precautions which would have prevented the injury were not adopted, although they were practicable and of easy and safe application.

The evidence tended to show that the wall then in course of construction was not a safe and suitable protection for the laborers engaged in working upon it. It obviously required a long time to complete it, and its main design seemed to be to furnish a place for the deposit of refuse material. During the course of its erection, it certainly afforded no protection to those working below the cliff, and the jury was authorized to infer from the fact that it was not completed after a lapse of several years, that it was not originally designated as a means of present protection from the damages of falling rock.

The degree of vigilance and care required of a master in the adoption of means of protection toward his servants has been much discussed by elementary writers as well as in reported cases, and the conclusions reached applicable to such a case as the present are not disputed. To accept the rule extracted from *Leonard v. Collins*, 70 N. Y. 90, and adopted in the appellant's brief it is to inquire whether "the master did every thing which in the exercise of reasonable and ordinary care and prudence, he ought to have done." "Did he omit any precaution which a prudent and careful man would take or ought to have taken," it is difficult to see how the defendant can claim exemption from liability.

But one exception was taken by the defendant in the case, and that was to the denial by the court of its motion to nonsuit at the close of the plaintiff's evidence. It might very well be said that the broad question argued before us by the learned counsel for the defendant was not properly in the case as it was based to some

extent upon evidence given subsequent to the taking of the exception; but as we think the judgment must in any event be affirmed no injustice is done the plaintiff by considering all of the evidence taken on the trial, in determining the validity of this exception. The motion for a nonsuit was placed upon grounds stated concisely as follows: 1. That the accident causing plaintiff's injury was incident to the hazardous nature of his employment and from a risk assumed by him on entering upon it; 2. That it did not occur through an omission on the part of the defendant or its agents to perform any duty which it owed to the plaintiff; 3. That there being no proof of the incompetency of the superintendent when originally employed, the defendant was not liable for an accident caused through an omission of duty on his part, causing injury to a fellow servant. It may be said with reference to the last ground stated, that it is disposed of by reference to the general proposition laid down at the outset of this opinion, and the other grounds involved questions of fact upon which the evidence was quite sufficient to take the case to the jury. The motion assumes that the injury to the plaintiff occurred solely from a hazard incident to the nature of the employment, and not from a cause which could have been foreseen and guarded against by the exercise of proper care and prudence on the part of the master. This, however, was the very question which was disputed before the jury and decided by it adversely to the appellant.

The defendant's contention is based upon the evidence showing that it is the nature of gneiss rock to disintegrate and fall from time to time at unexpected intervals through the action of the elements operating upon it; but it does not follow from this fact that the master is excused from using proper precautions to protect his workmen from danger known to the master, arising from such a cause. The very fact that the material was likely to fall upon and injure the defendant's servants at unexpected times imposed upon defendant the duty of inspection and frequent and careful examinations, and upon the discovering of any indications of danger to adopt all suitable precautions to protect its servants from injury. The rule that the servant takes the risk of the service presupposes that the master has performed the duties of caution, care and vigilance which the law casts upon him. *Booth v. Boston, etc., R. Co., supra.*

It is those risks alone which cannot be obviated by the adoption of a reasonable measure of precaution by the master that the servant assumes.

It was for an omission to observe the dangerous appearances to which the evidence shows its attention had been called and its neglect to adopt suitable and proper means of protection that the defendant has been held liable by the jury. The evidence tends to show that the plaintiff was ignorant of the dangerous condition of the rock, and that his duties did not call him to any place from which it could be observed. He, therefore, had a right to rely upon the performance of the duty owing by the master of adopting proper and suitable measures of precaution to guard him against the consequences of any danger arising from the obviously unsafe condition of the rock, and is not justly censurable for an omission to discover the impending danger himself in time to avoid it. The master, however, had notice that the rock was in motion and was liable to fall at any moment, and was, therefore, chargeable with the duty, in the exercise of reasonable care and prudence, of taking immediate steps to avoid the danger, and of warning the men working under it of the hazard to which they were exposed.

We, therefore, think that there was evidence sustaining the verdict of the jury, and that the judgment should be affirmed.

Judgment affirmed.

All concur.

PEOPLE v. MARX.*

June 16, 1885.

CONSTITUTIONAL LAW — OLEOMARGARINE.

Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power and impartial tribunals to enforce them.

Section 6 of "an act to prevent deception in sales of dairy products" (Laws of 1884, chap. 202), "provides that no person shall manufacture out of any oleaginous substance or substances, or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure, unadulterated milk, or cream of the same, or shall sell, or offer for sale, the same as an article of food."

Held unconstitutional; as it absolutely prohibited the manufacture or sale of any article which could be used as a substitute for butter, however fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products against the competition of cheaper substances, capable of being applied to the same uses as articles of food. This was beyond the power of the legislature to do.†

Appeal from judgment of general term affirming conviction of defendant in New York general sessions. The opinion states the case.

F. R. Coudert & Wheeler H. Peckham, for appellants. *Samuel Hand*, for respondent.

RAPALLO, J. The defendant was convicted in the court of general sessions of the city and county of New York of a violation of the sixth section of an act entitled "An act to prevent deception in sales of dairy products" (chap. 202 of the Laws of 1884). On appeal to the general term of the supreme court, in the first department, the conviction was affirmed, and the defendant now appeals to this court from the judgment of affirmation.

The main ground of the appeal is that the section in question is unconstitutional and void.

The section provides as follows: "§ 6. No person shall manufacture out of any oleaginous substances, or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream of the same, or shall sell or offer to sell the same as an article of food. This provision shall not apply to pure skim-milk cheese produced from pure skim-milk." The rest of the section subjects to heavy punishments by fine and imprisonment "whoever violates the provisions of this section."

The indictment charged the defendant with having, on the 31st of October, 1884, at the city of New York, sold one pound of a certain article manufactured out of divers oleaginous substances and compounds thereof, other than those produced from unadulterated milk, to one J. M. as an article of food, the article so sold being designed to take the place of butter produced from pure unadulterated milk or cream. It is not charged that the article so sold was represented to be butter, or was sold as such, or that there was any intent to deceive or defraud, or that the article was in any respect unwholesome or deleterious, but simply that it was an article designed to take the place of butter made from pure milk or cream.

On the trial the prosecutor proved the sale by the defendant of the article known as oleomargarine or oleomargarine butter. That it was sold at about half the price of ordinary dairy butter. The purchaser testified that the sale was made at a kind of factory having on the outside a large sign "oleomargarine." That he knew he could not get butter there, but knew that oleomargarine was sold there. And the district attorney stated that it would not be claimed that there was any fraudulent intent on the part of the defendant, but that the whole claim on the part of the prosecution was, that the sale of oleomargarine as a substitute for dairy butter was prohibited by the statute.

On the part of the defendant, it was proved by distinguished chemists that

* S. C., 32 Alb. L. J. 6.

† *Contra, State v. Addington*, 12 Mo. App. 214; *aff'd*, 77 Mo. 110. — *Ed.*

oleomargarine was composed of the same elements as dairy butter. That the only difference between them was that it contained a smaller proportion of a fatty substance known as butterine. That this butterine exists in dairy butter only in a small proportion — from three to six per cent. That it exists in no other substance than butter made from milk, and is introduced into oleomargarine butter by adding to the oleomargarine stock some milk, cream or butter, and churning, and when this is done it has all the elements of natural butter, but there must always be a smaller percentage of butterine in the manufactured product than in butter made from milk. The only effect of the butterine is to give flavor to the butter, and has nothing to do with its wholesomeness. That the oleaginous substances in the oleomargarine are substantially identical with those produced from milk or cream. Professor Chandler testified that the only difference between the two articles was that dairy butter had more butterine. That oleomargarine contained not over one per cent of that substance, while dairy butter might contain four or five per cent, and that if four or five per cent of butterine were added to the oleomargarine, there would be no difference; it would be butter; irrespective of the sources, they would be the same substances. According to the testimony of Professor Morton, whose statement was not controverted or questioned, oleomargarine, so far from being an article devised for purposes of deception in trade, was devised in 1872 or 1873 by an eminent French scientist, who had been employed by the French government to devise a substitute for butter.

Further testimony as to the character of the article being offered, the district attorney announced that he did not propose to controvert that already given. Testimony having been given to the effect that oleomargarine butter was precisely as wholesome as dairy butter, it was, on motion of the district attorney, stricken out, and the defendant's counsel excepted. The broad ground was taken at the trial, and boldly maintained on the argument of this appeal, that the manufacture or sale of any oleaginous compound, however pure and wholesome, as an article of food, if it is designed to take the place of dairy butter, is by this act made a crime. The result of the argument is that if in the progress of science a process is discovered of preparing beef tallow, lard or any other oleaginous substance, and communicating to it a palatable flavor so as to render it serviceable as a substitute for dairy butter, and equally nutritious and valuable, and the article can be produced at a comparatively small cost, which will place it within the reach of those who cannot afford to buy dairy butter, the ban of this statute is upon it. Whoever engages in the business of manufacturing or selling the prohibited product is guilty of a crime; the industry must be suppressed; those who could make a livelihood by it are deprived of that privilege. The capital invested in the business must be sacrificed, and such of the people of the State as cannot afford to buy dairy butter must eat their bread unbuttered.

The references which have been here made to the testimony on the trial are not with the view of instituting any comparison between the relative merits of oleomargarine and dairy butter, but rather as illustrative of the character and effect of the statute whose validity is in question. The indictment upon which the defendant was convicted, does not mention oleomargarine, neither does the section (§ 6) of the statute, although the article is mentioned in other statutes which will be referred to. All the witnesses who have testified as to the qualities of oleomargarine may be in error, still that would not change a particle, the nature of the question, or the principles by which the validity of the act is to be tested. Section 6 is broad enough in its terms to embrace not only oleomargarine, but any other compound, however wholesome, valuable or cheap, which has been or may be discovered or devised for the purpose of being used as a substitute for butter. Every such product is rigidly excluded from manufacture or sale in this State.

One of the learned judges who delivered opinions at the general term endeavored to sustain the act on the ground that it was intended to prohibit the sale of any artificial compound as butter or cheese made from unadulterated milk or cream. That it was that design to deceive, which the law rendered criminal. If that were a correct interpretation of the act we should concur with the learned judge in his conclusion as to its validity, but we could not concur in his further view

that such an offense was charged in the indictment or proved upon the trial. The express concessions of the prosecuting officer are to the contrary. We do not think that section 6 is capable of the construction claimed. The prohibition is not of the manufacture or sale of an article designed as an *imitation* of dairy butter or cheese, or intended to be passed off as such, but of an article designed to *take the place* of dairy butter or cheese. The artificial product might be green, red or white, instead of yellow, and totally dissimilar in appearance to ordinary dairy butter, yet it might be designed as a substitute for butter, and if so would fall within the prohibition of the statute. *Simulation* of butter is not the act prohibited. There are other statutory provisions fully covering that subject. Chapter 215 of the Laws of 1882, entitled "An act to regulate the manufacture and sale of oleomargarine, or any form of imitation butter and lard, or any form of imitation cheese, for the prevention of fraud and the better protection of the public health," by its first section prohibits the introduction of any substance into imitation butter or cheese for the purpose of imparting thereto a color resembling that of yellow butter or cheese. The second section prohibits the sale of oleomargarine or imitation butter thus colored, and the third section prohibits the sale of any article in semblance of natural cheese, not the legitimate product of the dairy, unless plainly marked "imitation butter." Chapter 238 of the Laws of 1882 is entitled "An act for the protection of dairymen, and to prevent deception in the sales of butter and cheese," and provides (§ 1) that every person who shall manufacture for sale, or offer for sale, or export any article in semblance of butter or cheese, not the legitimate product of the dairy, must distinctly and durably stamp on the side of every cheese, and on the top and side of every tub, firkin, or package, the words "oleomargarine butter," or if containing cheese, "imitation cheese," and chapter 246 of the Laws of 1882, entitled "An act to prevent fraud in the sale of oleomargarine, butterine, suine, or other substance not butter," makes it a misdemeanor to sell, at wholesale or retail, any of the above articles, representing them to be butter. These enactments seem to cover the entire subject of fraudulent imitations of butter and of sales of other compounds as dairy products, and they are not repealed by the act of 1884, although that act contains an express repeal of nine other statutes, eight of which are directed against impure or adulterating dairy products, and one against the use of certain coloring matter in oleomargarine. The provisions of this last act are covered by one of the acts of 1882, above cited, and the provisions of the repealed acts in relation to dairy products are covered by substituted provisions in the act of 1884, but the statutes directed against fraudulent simulations of butter, and the sale of any such simulations as dairy butter are left to stand. Further statutes to the same effect were enacted in 1885. Consequently if the provisions of section 6 should be held invalid, there would still be ample protection in the statutes, against fraudulent imitations of dairy butter, or sales of such imitations as genuine.

It appears to us quite clear that the object and effect of the enactment under consideration was not to supplement the existing provisions against fraud and deception by means of imitations of dairy butter, but to take a further and bolder step, and by absolutely prohibiting the manufacture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted articles from the market, and protect those engaged in the manufacture of dairy products against the competition of cheaper substances, capable of being applied to the same uses, as articles of food.

The learned counsel for the respondent frankly meets this view, and claims in his points, as he did orally upon the argument, that even if it were certain that the sole object of the enactment was to protect the dairy industry in this State against the substitution of a cheaper article made from cheaper materials, this would not be beyond the power of the legislature. This, we think, is the real question presented in the case. Conceding that the only limits upon the legislative power of the State are those imposed by the State Constitution and that of the United States, we are called upon to determine whether or not those limits are transgressed by an enactment of this description. These limitations upon legislative power are necessarily very general in their terms, but are at the same

time very comprehensive. The Constitution of the State provides (art. 1, § 1), that no member of this State shall be disfranchised, or deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. Section 6 of article 1 provides that no person shall be deprived of life, liberty or property, without due process of law. And the fourteenth amendment to the Constitution of the United States provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than to refer to the conclusions which have been reached, bearing upon the question now under consideration. Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful and industrial pursuit, not injurious to the community, as he may see fit. *Live Stock Assn. v. Crescent City, etc.*, 1 Abb. U. S. 398; 16 Wall. 106; *Corfield v. Coryell*, 4 Wash. C. C. 380; *Matter of Jacobs*, 98 N. Y. 98. The term "liberty," as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. In the language of ANDREWS, J., in *Bertholf v. O'Reilly*, 74 N. Y. 575, the right to liberty embraces the right of man "to exercise his faculties and to follow a lawful avocation for the support of life," and as expressed by EARL, J., in *In re Jacobs*, "one may be deprived of his liberty, and his Constitutional right thereto violated, without the actual restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry, for the sole reason that it competes with another, and may reduce the price of an article of food for the human race.

Measures of this kind are dangerous even to their promoters. If the argument of the respondents in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative council, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity, under the Constitution, of such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them.

Illustrations might be indefinitely multiplied of the evils which would result from legislation which should exclude one class of citizens from industries, lawful in other respects, in order to protect another class against competition. We cannot doubt that such legislation is violative of the letter as well as of the spirit of the constitutional provisions before referred to, nor that such is the character of the enactment under which the appellant was convicted.

The judgment of the general term and the court of sessions should be reversed. All concur.

SUPREME COURT OF ERRORS OF CONNECTICUT.

COOGAN v. BARBOUR.

OFFICE AND OFFICER—APPOINTMENT—CONFLICTING CLAIMANTS—TITLE.

The charter of a city provided for the appointment of a prosecuting attorney by the common council in joint convention, but was silent as to the mode of appointment.

A motion to ballot for a prosecuting officer was carried, and on the ballot being taken, relator had a majority of all votes cast. A resolution, declaring him elected was lost, and another, declaring the ballot taken null and void, carried, as was also one declaring another person elected to fill the office.

Held, that having once exercised the power to appoint, and having no power to remove, the subsequent proceedings were irregular, null and void, and that the relator was entitled to the office.

C. E. Perkins & C. J. Cole, for appellant. *W. Hamersly & W. C. Case*, for appellee.

CARPENTER, J. The charter of the city of Hartford provides that the common council, in joint convention, shall appoint a prosecuting attorney, but gives no direction as to the mode of appointment. The convention, therefore, is at liberty to proceed as it pleases, by ballot, by resolution, by the adoption of a verbal motion, or in any other manner. In this case a member moved that the convention proceed to ballot for a prosecuting attorney and the motion prevailed. Thereupon a ballot was taken and the relator had a clear majority of all the votes cast and of the whole convention. After the result was announced another member of the convention offered a resolution declaring the relator elected. That resolution on a yea and nay vote was lost. Two resolutions were then offered; the first declaring the ballot just taken null and of none effect by reason of errors in the same, and the other declaring that Joseph L. Barbour "is hereby elected and appointed prosecuting attorney, etc." Those resolutions were passed.

The question is, which of the two candidates was appointed? The superior court held that the relator was appointed, and the defendant appealed to this court.

It will be observed that the business of the convention was limited to making appointments. For all the purposes of this case we may assume that its sole business was to appoint a prosecuting attorney, and that it had no other powers or duties. It had but one thing to do, and when that was done, its powers were exhausted. Unlike legislative bodies convened for purposes of ordinary legislation it had no power to enact and repeal, and its power to reconsider was very limited, being confined to the preliminary proceedings. The term of office is prescribed by the charter, "for the term of one year, and until his successor is chosen and qualified." The power of removal is not vested in the convention. It follows that when the appointment was once made, the title to the office vested in the appointee, and it was not in the power of the convention to take it from him.

The question then is reduced to this, was the relator appointed by the ballot? In behalf of the defendant it is contended that he was not; that the ballot should be regarded as an informal one; that the convention, as appears by its subsequent action, manifestly contemplated and intended that the passage of a resolution declaring the candidate receiving a majority of votes elected, should be the act of appointment; that until that is done, even until the convention has adjourned, the proceedings are *in fieri* and it cannot be said that an appointment has been made.

In behalf of the relator it is contended that the vote of the convention to proceed to ballot for a prosecuting attorney was equivalent to and must be regarded as a vote to elect or appoint a prosecuting attorney by ballot; that when the result was announced the appointment was complete, nothing more being required, that the relator thereby acquired a vested right to the office, and that it was not in the power of the convention, by its subsequent proceedings, to deprive him of it.

We are inclined to think that the view presented by the counsel for the relator is the better one. If the convention had adjourned immediately after the result

of the ballot was announced, we think it must be conceded that Mr. Coogan would have been legally appointed. The adjournment would have indicated that the convention regarded its duty as fully performed. But the convention proceeded to consider and vote upon resolutions declaring the respective candidates elected. This proceeding may be accounted for on one of two grounds, first, the convention may not have regarded a resolution as essential to an appointment, but simply as a more formal and orderly declaration of the result. Secondly, that the convention considered the resolution as necessary to an appointment. In the former case it is evident that the resolution would not give efficacy to the ballot nor add to its force and effect. In the latter, it is equally apparent that the views of the convention as to the necessity of a resolution would not be conclusive. So that the question remains notwithstanding the subsequent action, was the result of the ballot a legal election? If that was its effect without the subsequent action, we think it must have the same force with it.

It was doubtless competent for the convention to have determined in advance that the appointment should be made by the passage of a resolution, that the ballot should be an informal one, or, that it should be a method of selecting a candidate to be appointed by resolution. In such a case there would have been no appointment prior to the passage of the resolution. Such was not the action of the convention. The vote was, not to take an informal ballot, not to select by ballot a person to be appointed, but to ballot for a prosecuting attorney. The ballot we think was understood and intended to be an election; and an election was an appointment.

We interpret the vote to ballot, as equivalent to a vote to elect or appoint by ballot, as a vote determining the method by which the appointment should be made. After the passage of that vote an appointment by any other method would not have been in order, would not have been according to parliamentary usage. If the convention had omitted the ballot, and made the appointment by resolution without first rescinding the vote to ballot, it might perhaps have been a legal appointment, on the ground that there was an implied rescission, but it certainly would have been irregular. But that course was not taken. After voting to ballot, a ballot was actually taken which resulted in an election by a clear majority. Then, without any vote changing the method, the convention proceeded to pass a resolution which declared another man elected and appointed. In addition to the irregularity of not following the prescribed method, they departed from it after the thing to be done had been done. The convention decided to appoint and did appoint by ballot, and then appointed another man by resolution.

We have said that the appointment was made when the result of the ballot was ascertained and declared. Nothing more was required of the convention. Its will had been expressed in a parliamentary and legal method, had been duly declared, and had become a matter of record. Declaring the result by resolution was unnecessary. No certificate or commission from the convention or its officers was required by law. Mr Coogan's right to the office vested at once, and he might, without further ceremony, accept and qualify.

We do not wish to be understood as denying the power of the convention to correct errors and to nullify the effects of fraud. If there was a palpable error or fraud, or if the ballot for any cause was illegal, the convention might undoubtedly treat it as void and proceed to another election. If we were to look only to the resolutions which passed, we might assume that there was an error in the ballot and so give effect to the resolution. But the pleadings show that it was admitted that there was, in fact, no error or mistake. The mere declaration that there was an error when there was none, and the attempt to nullify the appointment on that ground, cannot be vindicated.

These views are believed to be in harmony with the best and most carefully considered cases. Appointments to office, by whomsoever made, are intrinsically executive acts. So held when the appointment was made by a court. *Taylor v. Commonwealth*, 3 J. J. Marsh. 401. When it was made by the common council of a city. *Achley's Case*, 4 Abb. Pr. 35. By an executive officer. *Marbury v. Madison*, 1 Cranch, 137.

When the appointing officer or body has not the power of removal, if the power to appoint has been once exercised it is irrevocable and the appointee will hold office during the term. *Marbury v. Madison*, *supra*; *Achley's Case*, *supra*; *Cole v. Chapman*, 44 Conn. 601; *Putnam v. Langley*, 133 Mass. 204.

An appointment is complete when the last act required of the appointing power has been performed. The signing of a commission by the president of the United States when the appointment was made by him, and the law required a commission was held, to be the last act. *Marbury v. Madison*, *supra*.

Also a writing signed by the mayor of a city making a nomination to be confirmed by the common council under the erroneous belief that such confirmation was necessary although it was not required by law. *People v. Fitzsimmons*, 68 N. Y. 514.

In the case of a judicial appointment, a declaration in open court where the law does not require the appointment to be in writing. *Hoke v. Field*, 10 Bush, 144.

In *Achley's Case*, *supra*, it was held that the appointment was made when both branches of the common council concurred in the passage of a resolution making the appointment. So also in *People v. Stowell*, 9 Abb. N. C. 456. In *Conger v. Gilmer*, 32 Cal. 75, the law required that justices of the peace appointed by the board of supervisors should receive a commission signed by the officers of the board and sealed with its seal; it was held that a commission so signed and sealed was the only evidence of an appointment. If, however, such formal act is to be performed by some other than the appointing power it constitutes no part of the appointment. *Marbury v. Madison*, *supra*; *People v. Stowell*, *supra*. Such formal acts in such cases are mere ministerial acts.

The case of *Marbury v. Madison*, *supra*, is worthy of a more extended notice. In that case nearly all important principles involved in this, were promulgated by the supreme court of the United States in an elaborate opinion by Chief Justice MARSHALL, in which the whole subject is exhaustively considered.

President Adams, under a law of congress, nominated certain persons to be justices of the peace in the District of Columbia, and the nominations were confirmed by the senate. The law required that the appointees should be commissioned by the president under the great seal of the United States. The appointment was for a term of five years. The president signed the commission and the seal, under the statute, was affixed by the secretary of state, by whom alone it could be affixed. The commission, however, was not delivered. The persons appointed applied to the supreme court for a *mandamus* to compel its delivery. On a rule to show cause, the court held that the appointment was complete, that the persons therein named were legally entitled to the office, but discharged the rule on the ground that the cause was not within the jurisdiction of the court.

The opinion shows that in some cases there is a distinction between the acts of appointing to office and commissioning the person appointed. "It follows," say the court, "from the existence of this distinction that if an appointment was to be evidenced by any public act other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the president, would either give him a right to his commission, or enable him to perform the duties without it."

Again: This is an appointment made by the president by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case, therefore the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission, still the commission is not necessarily the appointment, though conclusive evidence of it."

It was there held, that the appointment was made when the last act required of the president was performed. On this point the court says: "Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself, still it would be made when the last act to be done by the president was performed, or at furthest when the commission was complete.

"The last act to be done by the president is the signature of the commission.

He has thus acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open unequivocal act, and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

"Some points of time must be taken when the power of the executive over an officer not removable at his will must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person possessing the power has been performed."

The case then holds that affixing the seal to the commission was no part of the appointment, nor was it essential to its validity, it being a mere ministerial duty to be performed by a ministerial officer, and not by the appointing power.

"It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made."

It is there held, that the power having been exercised and the appointment made, the president could not revoke it and appoint another notwithstanding the fact that the commission had not been delivered; and for the reason that the president had not the power of removal. On this point the court says, "Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern, because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be reserved. The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases where by law the officer is not removable by him."

The case of *Conger v. Gilmer*, 32 Cal. 75, is cited and relied on by the defendant. In that case it was decided that "the appointment to office by the board of supervisors is not complete until the person appointed has received a certificate of his election under the seal of the board, signed by the proper officers of the board. An appointment made by a majority of the board may be revoked at any time before such certificate is issued and another person may be appointed. In the case of an election to office by the people the rule is different, and the issuance of a commission is a mere ministerial act."

A statute of California required that the person appointed should receive a certificate of his appointment signed by the officers of the appointing body and sealed with its seal. The court, following the case of *Marbury v. Madison*, held that the appointment was not complete until the last act required of the appointing power had been performed; and that the last act was the issuance of a certificate signed and sealed as required by law.

A United States statute made the secretary of State the custodian of the great seal and made it his duty to affix it whenever required. When, therefore, it was affixed to commissions issued by the president to complete an appointment made by him it constituted no part of the act of appointing, but was a mere ministerial act attesting the verity of the presidential signature. In *Conger v. Gilmer*, the signing and sealing of the certificate were acts to be performed by the board, the appointing power being performed by its officers and by its immediate direction and were properly held to be an essential part of the act of appointment, executive and not ministerial acts. So far, that case seems to be in harmony with the views we have expressed, and is an authority quite as much in favor of the plaintiff as of the defendant; for in this case it will be remembered that no seal, no certificate, or other act, other than that actually performed, is required from the appointing power.

In that case it will be observed that the second appointment was made some days after the first and at a subsequent meeting. The board doubtless had continuing jurisdiction over the subject-matter. But it is not contended that, when

the law requires a convention to meet on a given day and make an appointment, the convention may meet on a subsequent day and revoke an appointment made at the time required.

The case of *Baker v. Cushman*, 127 Mass. 105 — another case cited by the defense — was this: The alderman and councilmen, thirty-one in number, met in joint convention to appoint a city clerk. Baker received seventeen votes, but there were thirty-two votes cast. The convention declared the ballot void, and on a second ballot being taken, Cushman was elected. The court held that his election was legal, saying: "It was within the lawful power of the convention, at the same meeting, and before the result of the election had been declared, to treat the proceeding already had as irregular and invalid, and to vote anew."

In that case there was a reason for setting aside the ballot. It may have been tainted with fraud. If fraudulent the extent of the fraud could not be known, for several members entitled to vote may have refrained from voting, and several not entitled to vote may have voted; and possibly the fraudulent vote may have been required to make a majority. The convention had a right to insist, and it was due to the appointee, that there should be a ballot free from any suspicions of fraud. Had there been a similar fact in this case, or any reason for declaring the ballot void, it would have presented a different question. We regard that case as consistent with the position we have taken.

The case of *Miller v. Foster*, 2 Halst. (N. J.) 101, was, like this, the case of an appointment by a joint convention of two bodies. It consisted of fifty-six members, of which only fifty-five were present, and voting. On two ballots Miller had twenty-eight votes, but was not declared elected, the chair ruling that a majority of the whole number was necessary, in which ruling he was sustained by the convention. Another ballot was taken and Foster received thirty-one votes and was declared elected. The court held that Foster was legally elected. The court interrupted the counsel for the plaintiff with the announcement that their minds were made up, and then said, "that all deliberative assemblies during their session have a right to do and undo, consider and reconsider, as often as they think proper, and it is the result only which is done."

"In this case they had a right to reconsider any question which had been before them, or any vote which they had made."

We cannot regard that case as an authority controlling or materially influencing our decision for several reasons. It was hastily decided and manifestly was not well considered. It confounds legislative proceedings with executive acts and applies the rules regulating the former to the latter; while such rules are applicable only to a limited extent. It assumes that the convention had power to undo as well as to do, to remove as well as to appoint. That may have been so in that case while confessedly it is not so in this.

For these reasons a majority of the court holds that there is no error in the judgment of the superior court.

PATTERSON, Admr., v. KELLOGG.

PARTNERSHIP — ACCOUNTING — JOINDER OF PARTIES DEFENDANTS.

P. and K. were joint owners of a wood lot and mill property, and carried on the lumber business as partners. K. also held two mortgages on P.'s interest in the property. P. died, and K. thereafter sold all his interest to C., who took possession of the entire property. On an accounting before commissioners: —

Held, that K. was not bound to account for the rents and profits of the business or of the mortgaged premises after the sale to C.

Held, further, that as K. and C. had no interest in common at any time in the property, the claims, if any, against each being distinct and separate, that they could not be joined as defendants in one action.

W. F. Taylor, for appellants. *A. H. Fenn* and *D. T. Warner*, for appellees.

CARPENTER, J. Pierce, the plaintiffs' intestate, and the defendant Kellogg were the joint owners of a wood lot and a saw-mill standing thereon, and carried on the wood and lumber business as partners for more than thirty years. In 1872 the mill became old and the machinery worn, and a new mill was built with new

machinery. Kellogg advanced most of the money for that purpose, and Pierce gave him a note for his share secured by a mortgage of his interest in the real estate. In 1875 that mill burned down and another one was built in its place, Kellogg advancing the money, taking another note and mortgage from Pierce.

Pierce died August 6, 1881; Kellogg continued the business until February 8, 1882, when he sold his half of the real estate to the defendant Calhoun, and assigned to him the two notes and mortgages. August 2, 1882, this suit was brought, alleging among other things, that said notes were without consideration; that they had been paid; that Kellogg had had the management of said partnership business taking the avails thereof; that he had in his possession a large quantity of timber, lumber and other personal property belonging to the partnership; that after the death of Pierce he continued the business without the consent and against the objection of the plaintiffs; that he and Calhoun carried it on jointly after February 8, 1882, and that the defendants had refused to account for the same.

The complaint prays for an account, and a re-conveyance if said notes shall be found to have been without consideration, or to have been fully paid, and for the privilege to redeem if said notes were for a good consideration and not paid.

An accounting was had between Pierce and Kellogg before a committee, the notes were found to be for a good consideration and an unpaid balance due thereon. The court rendered a judgment on the counter-claim of the defendant Kellogg, foreclosing the equity of redemption unless the plaintiff should redeem within the time limited.

The defendant Calhoun made answer that on the 4th day of August, 1882, he re-assigned the notes and mortgages to Kellogg and delivered to him the possession of the mortgaged premises, and that now he has no interest in the causes of action mentioned in said complaint. To that answer there was a demurrer. Without any judgment on the demurrer the complaint was dismissed as to him without costs. The plaintiffs appealed.

The first question arises under the remonstrance. It is somewhat vaguely stated, and the reasons of appeal do not show clearly the question which the plaintiffs made. But, by the aid of the brief, we conclude that the question is this: that the committee should have held the defendant Kellogg responsible for the income and profits of the business, etc., after he sold to Calhoun to the date of his report and should have stated the account accordingly; and, not having done so, the court erred in accepting the report, that is to say, the court should have rejected the report. We do not think that this exception is well taken, because the report of the committee shows that after the conveyance to Calhoun he alone operated the saw-mill (not that he continued the partnership business), and that the net receipts therefrom to August 6, 1882, were \$53.80. Perhaps the plaintiffs would have been entitled to have one-half of that sum applied on the mortgage notes if they had made that claim. If so, the presumption is that the court would have applied it; but, instead of claiming that, they asked that the report be set aside or re-committed, thus involving another trial before the committee. Such a proceeding, we think, was unnecessary, as the court had before it all the material facts, and could have settled upon an equitable basis the accounts between the parties down to the commencement of the suit.

But the objection involves this further claim, that Kellogg is chargeable with the rents and income from the mortgaged premises from the commencement of the suit down to the date of the report. He is doubtless chargeable for all that he received during that time. But the claim shows that Kellogg sold his half of the joint property in February, 1882, and that since that time Calhoun has been in the possession of it. The report expressly states: "After the conveyance by said Kellogg to said Calhoun, on the 8th day of February, 1882, of his interest in said mill property and woodland, said Kellogg has had nothing to do with the property so conveyed, nor with the interest of the estate of said Pierce in the same." Nor can Kellogg be chargeable on account of the occupancy by Calhoun, because, after the reconveyance, Calhoun held possession of the saw-mill not as mortgagee, or under the mortgagee, but as tenant in common. And also for the further reason, as the report states, that "no account was rendered to your com-

mittee of the receipts and expenditures by Calhoun in running the said mill since August 6, 1882." And it does not appear that either party claimed that any such account should be taken. The committee did not err in not doing what neither party claimed that he should do.

The next question is whether the court erred in dismissing the complaint against Calhoun.

The plaintiff complains that no account was taken of the profits received either by Kellogg or Calhoun after the sale to Calhoun. We have already sufficiently considered this claim so far as it concerns Kellogg. So far as it concerns Calhoun it requires further notice.

On the face of the complaint Calhoun was properly made a defendant. He was the owner of the notes, and as such was interested in the relief sought by the plaintiffs. Moreover it is alleged that he in common with Kellogg received interest and profits from the partnership property. Immediately after the suit was brought he reassigned the notes and mortgages to Kellogg, and had no further interest in them; and the report of the committee shows that he received no part of the income in common with Kellogg, so that as the case finally stood the plaintiffs had a claim for an accounting by Kellogg, of the partnership business down to February 8, 1882, and after that date a claim against Calhoun for their share of the income from the common property. It will be noticed that the two claims are entirely separate, and could not properly be joined in one action. The plaintiffs might with the same propriety have joined the defendants in one suit on several promissory notes held against them respectively. That could not have been done under the old practice, nor will it be permitted under the Practice Act. That act (§ 12) provides that any person may be made a defendant who has or claims an interest in the controversy or any part thereof, adverse to plaintiff. In this case Calhoun had no interest in the controversy with Kellogg, nor had Kellogg any interest in the controversy with Calhoun. And so the plaintiffs practically regarded it; for they asked for no judgment on the demurrer and none was in fact rendered. It is a fair inference from the record, that they made no claim against Calhoun before the committee, and asked of the court no judgment against him on the report. Indeed, as the pleadings stood, his case was not before the committee at all. If the plaintiffs had desired to pursue their claim against him, the demurrer should have been first disposed of, and then, if the proceedings presented a proper case for a committee, the parties could have been heard before him.

There is no error in the judgment.

SEELEY v. CITY OF BRIDGEPORT.

CONSTITUTIONAL LAW — TRIAL BY JURY — EVIDENCE.

The constitutional provision that "the right of trial by jury shall remain inviolate" does not create such right, but merely secures it as it existed when the Constitution was adopted.

In an action to recover damages for injuries received by falling on a dangerous sidewalk defendant made default, plaintiff filed a motion to have the damages assessed by a jury, the court overruled the same, and assessed the damages.

Held no error; the constitutional provision did not apply.

In such an action evidence locating the line of the street each side of the place of injury was admissible on the question, where the line was at the place where the accident occurred.

D. B. Lockwood and H. S. Sanford, for plaintiff. *R. E. De Forest and C. Sherwood*, for defendants.

GRANGER, J. This is a civil action claiming damages for an injury received by the plaintiff, from a fall upon a sidewalk of the defendant city, left in a dangerous condition, through the negligence of the defendants. The defendants suffered a default and were heard in damages. Before the hearing, the plaintiff filed a motion to have the damages assessed by a jury. The judge overruled the motion and assessed the damages at \$80. The first reason assigned by the plaintiff upon his appeal is the error of the court in this ruling.

The counsel for the plaintiff claim that under the provision of the Constitution, that "the right of trial by jury shall remain inviolate," his right to a trial of his case by a jury cannot be taken away; but, as has been repeatedly held, this provision of the Constitution secures the right of trial by jury only where it existed when the Constitution was adopted. It does not create the right; it only preserves it. But it had never been the practice to have damages upon a default assessed by a jury. It had always been done by the court. This provision of the Constitution has therefore no application to the case. 2 Swift's System, 268; 1 Swift's Digest, Damages; *Cockran v. Leister*, 2 Root, 348; *Raymond v. Danbury, etc.*, R. Co., 43 Conn. 596; *Batchelder Bartholomew*, 44 id. 502; *Shephard v. New Haven, etc.*, Co., 45 id. 58.

Another error is assigned as a ground of appeal, in the ruling of the court as to the admissibility of certain evidence. It appears by the finding of the court that the defendants claimed that the place where the plaintiff slipped was outside of the limits of Main street, and on land belonging to the People's Savings Bank, and that it was open to travel, not for the purposes of a sidewalk, but for the accommodation of people going to a store in the building. This evidence was of course admissible, it being only claimed by the plaintiff that it was a part of the sidewalk, and of course that the defendants were bound to keep it in a safe condition; and it not being claimed that it was a dangerous place outside of the sidewalk, but so near as to make it the duty of the defendants to protect the public against it by a railing. *Beardsley v. City of Hartford*, 50 Conn. 529; S. C. 47 Am. Rep. 677. This point being proper to be proved, the question is, whether the evidence offered for the purpose was in its nature admissible. It appears that Main street, where the accident occurred, was originally a town highway, and that there was no survey or record fixing its limits. The question was, where was its east line? In the absence of any thing else to determine it, it would be taken to be that line up to which the public on the one side had used the way to travel over, and up to which adjoining proprietors had occupied or used the land on the other side. To show where that line was in front of the bank building, the defendants offered evidence to show where it clearly was, as marked by buildings or fences, north and south of the bank building. The plaintiff objected to this evidence unless limited to the property immediately adjacent or very near to the bank building. But the evidence was in its nature admissible, and was none the less so that it was not limited to the adjacent property. Any indications of the line remoter than the adjacent property would of course become of less importance in determining the line at the place in question, but this would be within reasonable limits, only a question of the weight of evidence, not of its admissibility. The presumption would be if the highway had been originally laid out by formal proceedings and all record of the lay out lost, that the line was a continuous one, substantially straight; and if the highway had become such by dedication and the acceptance of the public, there would be equally a presumption that the dedication had been made upon a continuous line, and the use of the public constituting an acceptance of the highway, had been along a continuous course and within continuous lines. It was, therefore, entirely proper that the east line of the street for some distance north and south of the place of the injury, if ascertainable, should be considered on determining where the line ran at the place in question.

There is no error in the judgment appealed from.

STEVENS v. BOROUGH OF DANBURY.

EMINENT DOMAIN — ABANDONMENT OF PROCEEDINGS — DAMAGES — RECOVERY.

By a resolution of the general assembly, passed in 1860 and added to in 1862, the borough of Danbury was empowered to supply itself with water by purchasing, or by taking for the purpose, any stream of water, water privileges or lands necessary or convenient for the purpose, within or without the limits of the borough, with a provision for the assessment of the value of any property taken otherwise than by purchase, and for payment to the owner of the property so taken.

Under this resolution the borough, at a legal meeting held on the 16th day of July, 1880, voted to procure a supply of water for the use of the borough "from a stream running near the residence of Samuel Gregory." On the 26th of September of that year the borough pur-

chased of Gregory certain lands through which the stream ran, and which were below certain lands and a water privilege on the same stream belonging to the plaintiffs.

The water commissioners of the borough, not being able to agree with the plaintiffs as to the compensation to be made them for the taking of their mill privilege and lands, applied to a judge of the superior court for the appointment of appraisers to assess the damages. Appraisers were appointed, a hearing was had, both parties being present, and they made their report, assessing the damages at \$3,000.

June 29, 1881, the borough, at a legal meeting, rescinded the vote of July 16, 1880, and nothing further was done with regard to the taking of the plaintiffs' land and privilege, and the \$3,000 was not paid. Notice of this action of the borough was given to the plaintiffs, and they afterward sold to other parties and conveyed by warranty two parcels of the land which the borough had proposed to take. In an action to recover the said \$3,000,—

Held, that the plaintiffs could not recover; the borough, after the assessment, had still a right to abandon the idea of taking the land, and the only security the owner of the property had, was in the necessity of the borough making payment before the land was actually taken.

L. D. Brewster & D. A. Hough, for plaintiffs. *W. Burke and G. Stoddard* with whom was *D. B. Booth*, for defendants.

GRANGER, J. By a resolution of the general assembly, passed in 1860 and added to in 1862, the borough of Danbury was empowered to supply itself with water by purchasing, or by taking for the purpose, any stream of water, water privileges or lands necessary or convenient for the purpose, within or without the limits of the borough, with a provision for the assessment of the value of any property taken otherwise than by purchase, and for payment to the owner of the property so taken.

Under this resolution the borough, at a legal meeting held on the 16th day of July, 1880, voted to procure a supply of water for the use of the borough "from a stream running near the residence of Samuel Gregory." On the 26th of September of that year the borough purchased of Gregory certain lands through which the stream ran, and which were below certain lands and a water privilege on the same stream belonging to the plaintiffs. The lands were purchased of Gregory with the intention of constructing a dam thereon across the stream, making a pond or reservoir, which would have set the water back upon and have destroyed the mill privilege of the plaintiffs.

Under the resolution before mentioned the water commissioners of the borough, not being able to agree with the plaintiffs as to the compensation to be made them for the taking of their mill privilege and lands, applied to a judge of the superior court for the appointment of appraisers to assess the damages. Appraisers were appointed and a hearing was had before them, both parties being present, and they made their report, assessing the damages at \$3,000. This report was duly recorded in the records of the superior court for Fairfield county, and the proceedings were, in all respects, according to the provisions of the resolution in such a case.

On the 29th of June, 1881, the borough, at a legal meeting, voted to rescind the vote of July 16, 1880, and nothing further was done with regard to the taking of the plaintiffs' land and privilege, and the \$3,000 assessed as damages for the taking was not paid. Notice of this action of the borough was given to the plaintiffs, and they afterward sold to other parties and conveyed by warranty two parcels of the land which the borough had proposed to take. The plaintiffs now sue the borough to recover the \$3,000 assessed in their favor.

It is found that the defendants never took actual possession of the lands in question or of the mill privilege, or in any manner occupied them, or interfered with their occupancy by the plaintiffs. Had they in theory taken possession, or by what they did become the owners of the property, so that they were bound to pay the assessed value to the plaintiffs?

The resolution of the general assembly empowers the water commissioners of the borough to "purchase and take conveyances of, in the name of the borough, all lands, property or privileges necessary or convenient for the purposes of the act, to hold in sufficient quantity the water of any stream, either within or without said borough, by the construction of dams across the same; to enter upon any lands near such proposed dams and procure earth, stones or other materials for the construction and maintenance thereof, and to make suitable waste-ways for the surplus water of such stream; to change the location of any road or

passway which may be covered by the waters of any reservoir so formed, and take land therefor; and to enter upon and make use of the ground or soil of any railroad, street, highway or private way, or public or private grounds, and lay, construct and maintain all necessary pipes and aqueducts."

Another section of the resolution provides as follows: "Said borough shall be liable to pay all the damages that shall be sustained by any person, persons or corporation by the taking of any land or estate as aforesaid, or by the construction or laying of any reservoirs, pipes, aqueducts or other works for the purposes of this act. And if at any time it shall appear that any damage has occurred, or may be likely to occur, to any person, persons or corporation, by reason of taking or using their land or estate for the purposes of this act, or in the construction of said water-works, and the said board of commissioners cannot agree with the owners of such property, as to the amount of compensation or damages to be paid to them, then such compensation or damages may be assessed by three disinterested persons under oath, to be appointed by a judge of the superior court on application of either party; notice to be given of such application as directed by such judge which said appraisers shall report their doings, embracing the amount of their assessment, to the clerk of the superior court for Fairfield county, to be by him recorded, and thereupon such assessment shall be taken and held to be a final adjustment of said compensation and damages between said parties, and payment thereof or deposit of the same with the county treasurer to the use of such owner or owners shall release said borough from liability to any further claim for compensation or damages."

There is here, it will be seen, no provision that the amount assessed shall constitute a debt which may be recovered of the borough by the owner of the property proposed to be taken; the amount is fixed by the proceedings as the sum to be paid if the land is taken, and its payment is clearly a condition precedent of the right to take it. The mere incipient or theoretical taking is really only a *proposed* taking. This is manifest from the use of the word "take" in the resolution in relation to lands taken for the laying of pipes, where the proposed taking, upon which the proceedings for the assessment are had, is a very different thing from the actual entry upon and digging up of the land for the laying of pipes.

We conclude, therefore, that the borough, after the assessment, had still the right to abandon the idea of taking the land, and the whole project if it deemed best, and that the only security that the owner of the property had, was in the necessity of the borough making payment before the land was actually taken.

There may be a hardship in compelling a land or mill-site owner to hold his property in entire uncertainty, after an assessment, whether it will be taken or not, but the inconvenience is of the same kind which attends all proceedings for the taking of land for public improvements, and which is incident to the ownership of property in a community and especially in a city. This inconvenience was shown in a marked degree in the recent case of *Curson v. City of Hartford*, 48 Conn. 68, where it was held by the court to give no right of action against the defendant city. There is generally a provision in such resolutions that the payment shall be made, if at all, within a limited time; and there ought properly to be such a provision in every case. But its absence here cannot affect the question now before us.

The plaintiffs claimed also to recover for counsel fees and other expenses incurred in the hearing before the appraisers. These very clearly say they had no right to recover in any circumstances. The borough was acting within the law in applying for an assessment of the damages, and the law under which the proceedings were had made no provision for costs on either side, while the abandonment of the taking of the property by the borough could not create an obligation to pay these costs where no legal obligation existed before. There was no negligence on the part of the borough; no misrepresentation, no action that was not in every respect according to law. There was nothing upon which to found a claim for damages for a consequential injury in any form.

The superior court is advised to render judgment for the defendants on both counts of the complaint.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

DONAHUE v. CHASE.

June 25, 1886.

MORTGAGE — MORTGAGEE IN POSSESSION — TENDER; INTEREST AFTER — REDEMPTION — ITEMS CHARGEABLE ON SETTLEMENT OF ACCOUNT.

The word "tender" as used in Public Statutes, chapter 181, section 22, in relation to the redemption of mortgaged premises, does not mean the same kind of offer as when used in reference to the payment of a mere moneyed debt, the amount of which both parties are presumed to know; and if the mortgagee refuses to accept the money except upon compliance with an illegal demand, interest should be continued, reduced, however, to the legal rate, in case the mortgage calls for more.

Payments made by the mortgagee in possession for unpaid water rents due from the mortgagor at the time he took possession, in order to prevent the supply of water from being cut off, are properly chargeable to the mortgagor on the settlement of the account.

In the absence of proof of negligence or want of due diligence on the part of the mortgagee to procure rent for a tenement he is not chargeable with the same.

Bill in equity by a mortgagor to redeem certain land in Haverhill from six successive mortgages, all now held by the defendant, the assignee of the original mortgagees, who has been in possession. The defendant denied the plaintiff's right to redeem, claiming that the fourth mortgage, given to one Edwin Bowley, had been foreclosed by a sale under the power therein contained. The plaintiff claimed that the sale was invalid and her right to redeem was sustained by the court. 130 Mass. 137. After the decision, the case was referred to a master to state the account and determine how much the plaintiff should pay. Both parties excepted to the master's report. The exceptions were heard by a single justice, who sustained certain of the exceptions taken by each party, and overruled others and re-committed the case for further findings. To the supplemental report, made by the master, the defendant excepted. The case was heard upon all exceptions to the original as well as supplemental report, and was reserved for the consideration of the full court.

The defendant excepted because the master charged the defendant as rent "paid S. D. Maynard" the sum of \$359.44, whereas rent due on the lease of the premises at the time was only \$284.44; because the master disallowed certain items of insurance premiums amounting to \$21; because the master erred in finding that the defendant ought to be charged rent of one building which he never received; because the master disallowed the sum of \$27.50 paid by the defendant for water-rates; because the master computed interest at six per cent upon the mortgage notes instead of the larger rate agreed upon in the notes.

The plaintiff excepted because of the exclusion by the master of certain evidence upon the question of rent, and the allowance of certain sums paid for insurance; because the master refused to admit the plaintiff's testimony that soon after the attempted foreclosure of the Bowley mortgage she offered to pay the defendant the amount due under the mortgage, and he refused to receive the same, denying her right to redeem, and because the master allowed the defendant interest at the rate specified in the mortgages after the same became due, and after the plaintiff offered to redeem by payment of the full amount due, the plaintiff having been prevented from making such payment by the refusal of the defendant to accept.

D. Saunders & C. G. Saunders, for plaintiff. *C. P. Thompson & G. B. Ives*, for defendant.

C. ALLEN, J. In determining whether the premiums paid for insurance are a proper subject of charge in the mortgagee's account, it is necessary to know what was the contract between the parties, if any, in relation to insurance. It is stated by the counsel for the defendant, in his brief, that three of the mortgages held by the defendant contained provisions upon the subject, but none of the mortgages are before us. As neither party has taken pains to bring before us the necessary

facts, which an inspection of the mortgages would disclose, we have no means of determining whether the master's rulings on this subject were right or wrong.

The exceptions of both parties as to the several items of insurance are, therefore, overruled.

2. Interest at the rate of six per cent per annum is the amount with which, under the facts disclosed, the mortgagor should be charged after her offer to redeem. In an action to foreclose a mortgage, the conditional judgment is for the amount due according to equity and good conscience. *Holbrook v. Bliss*, 9 Allen, 69.

In a bill to redeem the amount to be paid is to be ascertained by the same rule. *Hart v. Goldsmith*, 1 Allen, 145, 148; *Freeland v. Freeland*, 102 Mass. 475, 480.

By Pub. Stat., chap. 181, § 22, "the party entitled to redeem shall pay or tender to the mortgagee, or to the person lawfully claiming or holding under him, the whole sum then due and payable on the mortgage, and shall perform or tender performance of every other condition contained therein." By section 23, "if the mortgagee, or any person under him, has had possession of the premises, he shall account for the rents and profits." These acts of the mortgagor and mortgagee are to be concurrent. Until the mortgagee has rendered his account, the mortgagor cannot make a tender of money in the manner in which a tender is made for the mere purpose of paying a debt, the amount of which the debtor is presumed to know equally with the creditor. Whenever there are mutual and concurrent promises, or mutual and concurrent acts to be done, as for example the payment of the price of land and the delivery of the deed, the word "tender" does not mean the same kind of offer as when it is used in reference to the payment of a mere money debt. *Smith v. Lewis*, 26 Conn. 110; *Cook v. Daggett*, 2 Allen, 439; *Smith v. Boston and Maine Railroad*, 6 id. 273; *Gormley v. Kyle*, 137 Mass. 189.

In the present case the plaintiff appears to have done all that was necessary to be done by her before receiving the account of the mortgagee. By the mortgagee's announcement that he would not accept the money, except upon compliance with his illegal demand, he waived the necessity of any thing on her part.

He was not ready to accept the amount justly due to him. Full justice is done by the continuance of interest, reduced, however, to the legal rate in case the contract calls for more. In *Union Institution for Savings v. Boston*, 129 Mass. 82; 8 C., 37 Am. Rep. 305; and *Brannon v. Hursell*, 112 Mass. 63, relied on by the defendant, no question arose as to the effect of an offer to pay by the mortgagor, and the decisions that the stipulated rate of interest should continue after breach have no application to the present case.

3. The defendant, on taking possession of the premises, found unpaid water-rates, due from the plaintiff, and paid the sum due, in order, as may reasonably be inferred, to prevent the supply of water from being cut off, according to the rules of the aqueduct company. This method of supplying water to the building was, as it thus appears, in use by the plaintiff herself; and she may be supposed to have known the rules of the company. Under these circumstances the defendant might properly pay the water-rates and charge them to the plaintiff. *Saunders v. Frost*, 5 Pick. 270.

4. It appears that the plaintiff gave an order on the defendant, in favor of Maynard, for the whole amount of the defendant's indebtedness for rent to be due on a certain day, and the defendant paid Maynard \$359.44 accordingly, which was to go in reduction of the plaintiff's mortgage debt to Maynard. Now the defendant, having become the assignee of the Maynard mortgages, seeks to have this sum reduced, by alleging that he paid Maynard too much. But the master found that he should be bound by the settlement. We see no question of law involved in this exception and nothing to show that the finding was wrong.

5. The defendant properly put the plaintiff out of the rear tenement. The fact that he did so has no proper bearing on his liability to be charged for rent afterward. The master does not state that the omission to receive rent for this tenement was by the defendant's neglect, or that he did not use due diligence to secure tenants. The report seems to state all the facts on which the finding rests, and in the absence of proof of negligence, or want of due diligence on the part of the mortgagee, he is not chargeable. The account will be changed so far as is necessary in order to conform to this decision.

Decree accordingly.

BULLARD v. SMITH.

June 23, 1885.

STATUTE OF FRAUDS—STOCK JOBBING—PARTNERSHIP.

An oral agreement to share equally in the profits and losses resulting from the purchase and sale of stock already owned by one of the parties is not a contract for the sale of goods, wares and merchandise, and is not within the statute of frauds.

A contract with brokers for the purchase of stock upon margin is not void as a wager contract, or within the statutory provisions against stock jobbing.

To constitute a partnership in profits it is not essential that there should be a community of interest in the capital or stock producing the profits.

Action to recover one-half of the loss, resulting from the purchase and sale of one hundred shares of Lake Erie and Western common stock, bought by one George E. Foster, the plaintiff's intestate. At the trial in the superior court, the plaintiff offered evidence, tending to show that on the 3d day of June, 1881, Foster gave an order to Jackson & Curtis, brokers, doing business in Boston, to buy and carry for his account, one hundred shares of Lake Erie and Western common stock; that Jackson & Curtis did not personally purchase the stock, but sent an order to McGinnis Brothers & Fearing, brokers in New York, their agents; that Jackson & Curtis ordered McGinnis Brothers & Fearing to buy said stock on margin for Jackson & Curtis, and the state of their account was considered sufficient to warrant such a purchase on the credit of Jackson & Curtis; that Foster did not, at the time of giving his order or subsequently, deposit any margin or make any payment on account of said purchase, and his account with Jackson & Curtis was considered good enough to warrant such purchase for him by said brokers on margin; that McGinnis Brothers & Fearing bought said stock and received a certificate therefor, but in whose name said certificate was, or how indorsed, did not appear. The plaintiff's evidence further tended to show that said stock was carried in the manner aforesaid, from the time of its purchase down to the time when Foster died in Sept., 1882; that on Sept. 19, 1882, the plaintiff, Bullard, was appointed administrator of Foster's estate; that on Sept. 23, 1882, Bullard addressed a note to the defendant, relative to his interest in the stock; that the defendant stated that he had a half interest; that Bullard asked him to settle his share of the loss; that defendant stated that he was unable then to settle his share of the loss, and requested the plaintiff to carry it for him, which he consented to do. The stock was afterward sold. The plaintiff called the defendant as a witness, who testified that he was a friend of Foster; that Foster informed him that he had purchased one hundred shares of the said stock and told him he could have a half interest in the same; that defendant replied that he could not spare the money to put up as a margin; that Foster said that he need not put up any thing, as he would look out for him, and that the defendant accepted the offer, and that Foster never called on him for any money during his life time, although the price of the stock went down; that when he called on Bullard, he stated these facts. The plaintiff denied that the defendant had so stated to him, but contended that the defendant admitted he had a half interest for profit or loss on the stock. Upon conclusion of the plaintiff's evidence, the defendant requested the court to rule that the plaintiff had not made out a case, (1) that the contract was a gambling contract; (2) was a contract for the sale of goods, wares and merchandise, exceeding \$50 in value, without any memorandum in writing, or any delivery or acceptance, or any payment in earnest; (3) because neither Foster nor Bullard was the owner, nor assignee of said stock, nor authorized by the owner, nor assignee thereof, or his agent, to make an agreement for any sale or transfer of any interest therein. The court declined so to rule, and the defendant alleged exceptions.

The court instructed the jury that, if they found that the stock was bought on the order of Foster and was thereafter held subject to his order and control, and that, after the purchase, Foster and the defendant orally agreed to share equally in the profits and losses which might result from the purchase and sale of the stock, the plaintiff was entitled to one-half the difference between the cost of the stock and the price for which it was sold, with interest from the date of the demand of

payment. The court further instructed the jury, that the action could not be maintained unless they found that the contract between Foster and Smith was, in substance, that Foster should pay Smith one-half of the profit upon the sale of the stock, in consideration of the promise by Smith to pay Foster one-half of the loss if the stock was sold at a loss. And the court instructed the jury that such a contract was not a contract for the sale of goods, wares and merchandise, and was not within the statute of frauds. The jury found for the plaintiff in the sum of \$1,001.

P. West, for plaintiff. *W. E. L. Dillaway*, for defendant.

C. ALLEN, J. The defendant contends that, if the evidence shows any contract, it is not binding, because it was a contract, not in writing, for the sale of goods, wares and merchandise exceeding \$50 in value. The jury, however, under the instructions given to them, must have found that the contract was of a different character, and that it was in substance a contract between Foster and the defendant to share equally in the profits and losses which might result from the sale of the stock. Such finding was warranted by the evidence. The jury may have accepted the plaintiff's testimony as accurate, and on a bill of exceptions, we cannot revise their finding upon this subject. Assuming the contract to have been according to the plaintiff's testimony of the defendant's statement to him, it was not a sale of goods within the statute of frauds, or the statutory provisions against stock jobbing. *Colt v. Clapp*, 127 Mass. 476.

Nor was it shown to be a wager contract. It was a contract, by which the defendant was to share in a speculation, which had been entered into by Foster, the plaintiff's intestate. So far as appears, Foster supposed that the shares had been bought and were held for him by the holders to whom he gave the order. There is nothing to show that Foster was ever aware that the brokers had procured other brokers to purchase and carry the stock. Nor was Foster or the plaintiff, if he considered himself morally bound to fulfill his agreement with the brokers, obliged to refuse to fulfill it, upon such an objection, unless instructed by the defendant to do so. *Durant v. Burt*, 98 Mass. 161, 168.

It has often been held that no man is bound to set up the statute of frauds as a defense for the benefit, or even at the requirement of another, in a personal action against him, upon a claim, the obligation of which he recognizes, as founded in good faith and right. *Cahill v. Bigelow*, 18 Pick 369; *Ames v. Jackson*, 115 Mass. 508. To constitute a partnership in profits, it is not essential that there should be a community of interest in the capital or stock producing the profits. *Lindley on Partnership*, 20, 21; *Story on Partnership*, § 27. Such a partnership might exist, though Foster furnished all the capital and though the shares stood in his sole name.

The assumption by the defendant, in his brief, that the stock was never owned nor contemplated to be owned by Foster, or to be under his control or disposition, and that the contract was understood by the parties as merely nominal, is not supported by the facts in proof.

Exceptions overruled.

NEVADA BANK v. LUCE.

June 23, 1885.

NEGOTIABLE INSTRUMENT — DRAFT — LIABILITY OF PARTY AGREEING TO ACCEPT.

A bank discounting a draft, upon being shown the authority of the drawer to make the same, acquires no greater rights as against the party giving such authority than was actually intended to be conferred upon the drawer.

Action to recover of the defendants the amount of the following bill of exchange:

"SAN FRANCISCO, CAL., 3d of April, 1883.

"Exchange for \$2,500.

"At sight of this, first, of exchange, second, unpaid, pay to the order of The

Nevada Bank of San Francisco, twenty-five hundred dollars, value received, and charge the same to account of telegram, dated Boston, April 3, 1883.

"B. W. OWENS."

"To LUCE & MANNING, Boston, Mass.:

"Indorsed.— Pay to the order of The Traders' Nat. Bank, Boston, for collection for account of The Nevada Bank of San Francisco.

"J. S. ANGUS, *Cashier*."

The declaration contained two counts, one against the defendants, as acceptors of the bill, and the other on a promise to accept the same. At the trial in the superior court, without a jury, it appeared that in the latter part of 1882, one Owens, a wool dealer in San Francisco, consigned to the defendants, wool dealers doing business in Boston, 154 bales of wool, for sale, for his account, on commission. At the time of the consignment, the defendants advanced the sum of \$3,200 on the wool. It further appeared, that from that time forward, there was frequent correspondence between Owens and the defendants, as to the value of the wool. Owens' estimate of the value of the balance in March, 1883, being \$3,800, while the defendants' estimate was about \$3,000. Early in March Owens telegraphed the defendants several times, asking for further advances. The defendants at first refused but on March 27 telegraphed Owens as follows:

"BOSTON, *March 27, 1883.*

"B. W. OWENS, San Francisco:

"Party has not approved 15c. wool. Value lot 6 at 16, lot 8 at 18; market very dull. Draw fifteen hundred.

"LUCE & MANNING."

To which Owens sent the following reply:

"SAN FRANCISCO, *April 1, 1883.*

"LUCE & MANNING, Boston:

"Will you accept thirty days' draft, two thousand dollars? Answer.

"B. W. OWENS."

To this defendants responded as follows:

"BOSTON, *April 3, 1883.*

"B. W. OWENS, San Francisco:

"Think we can get fourteen cents for ninety-nine bales very best, market is dull and we advise selling before new clip arrives. If you decide to sell, draw twenty-five hundred dollars on demand; if not, draw not over fifteen hundred.

"LUCE & MANNING."

To which Owens replied as follows:

"SAN FRANCISCO, *April 3, 1883.*

"LUCE & MANNING, Boston:

"Sell ninety-nine bales, fourteen cents; hold lots six and eight, twenty cents.

"B. W. OWENS."

On receiving the dispatch of March 27th, Owens took it to plaintiffs' bank and obtained the discount from the bank of his draft on the defendants for \$1,500. He gave no notice to the defendants of his having drawn this draft, and the first they heard of it was on April 6, 1883, when it was presented for payment and paid.

On receiving the telegram of April 8d, Owens' clerk took it to the plaintiffs' cashier with the draft, and asked to have it discounted, saying that Owens was authorized to draw it and showed the telegram. The cashier was then shown the telegram from Owens to the defendants of April 3d as above set forth. The cashier then credited Owens' deposit account with the amount of the draft and took the same. The defendants had no notice of this draft until it was presented for acceptance on April 12, 1883, when acceptance was refused. The draft was then protested for non-payment. The evidence tended to show that the bank acted in good faith in the transaction. Owens drew out of the plaintiffs' bank his entire account except \$26.75, before the bank had notice of the dishonor of the draft of April 8d. The superior court found for the defendants and reported the case for the consideration of this court.

H. G. Parker, for plaintiff. *Hutchins & Wheeler*, for defendants.

C. ALLEN, J. So far as appears, the telegram on which the plaintiffs rely was not

sent by the defendants for the purpose of being shown to others. It was one of a series of telegrams, three of which were sent by Owens and two by the defendants. It was not a contract with the plaintiffs and was not designed to constitute a contract with anybody but Owens. The defendants cannot be held to any greater responsibility than that which they assumed to Owens. The plaintiffs, in order to recover, must show that the bill was drawn, in pursuance of the authority given by the defendants to Owens. To ascertain this the whole correspondence by telegraph is to be looked at. It is quite plain that the defendants did not intend to authorize him to draw \$2,500, in addition to \$1,500 already drawn, though unknown to them. By Owens' own estimate of the value of the wool, this would exceed the amount of money which would be coming to him. In view of the earlier telegram, the finding of the judge that the telegrams sent conferred no authority to draw more than \$2,500 in all was well warranted. The authority to Owens being limited, the plaintiffs must be held to have taken the second bill of exchange at their own risk. It is not as if he had a general letter of credit, or a promise distinctly referring to or describing or including the bill drawn or designed to be shown to and acted on by others. *Murdock v. Mills*, 11 Metc. 10; *Exchange Bank of St. Louis v. Rice*, 98 Mass. 288; *Central Savings Bank v. Richards*, 109 id. 413; *Union Bank of Canada v. Cole*, 47 L. J. (N. S.), C. F. 100, 110.

Judgment for the defendants.

CAMBRIDGE RAILROAD CO. v. CHARLES RIVER STREET RAILWAY CO

June 22, 1885.

EMINENT DOMAIN — FIXING COMPENSATION FOR PRIVILEGES BETWEEN STREET RAILWAY COMPANIES.

Under Public Statutes, chapter 113, authorizing the railroad commissioners to determine the manner and conditions under which one street railway company may use the tracks of another, and the compensation to be paid therefor, the commissioners, in fixing the compensation, may take into account the amount paid by the company to another corporation for the use of its roads and bridges as well as the actual cost of construction.

Petition to the board of railroad commissioners by the Cambridge Railway Company under chapter 113 of the Public Statutes, sections 48 to 52, asking the board to determine the compensation to be paid by the Charles River Street Railway Company for the use of a portion of the petitioner's tracks. The board, having heard the parties, made an award, which was duly returned to the supreme judicial court. The respondent corporation objected to the approval and allowance of the award for the reason that the commissioners erred, as a matter of law, in including in the cost of construction of the petitioner's road any share of the sum of \$33,000 paid by them to the Hancock Free Bridge Corporation for the right of using the roads, estates and bridges of said corporation. The cause was heard by a single justice and reported by him to the full court for the determination of the questions raised by the award and the objections thereto.

T. W. Clarke, for petitioner. *R. M. Morse, Jr.*, & *E. B. Hale*, for respondent.

MORTON, C. J. The statutes which authorize one street railway company to use the tracks of another provide that the manner and conditions of such use, and the compensation to be paid therefor, shall, if the companies cannot agree, be determined by the board of railroad commissioners. Pub. Stat., chap. 113, §§ 48 to 53.

It is left entirely to the discretion of the commissioners to decide what compensation is, under all the circumstances of the case, just and equitable between the companies. *Metropolitan R. R. Co. v. Quincy R. R. Co.*, 12 Allen, 262; *Metropolitan R. R. Co. v. Highland R. R. Co.*, 118 Mass. 290.

In the case before us the commissioners adopted, as one of the elements to be considered in determining the compensation to be paid by the defendant, the interest on the cost of constructing the petitioner's road, and included in the cost of construction the sum of \$33,000, for which the petitioner had given its bond to the Hancock Free Bridge Corporation. The act incorporating the petitioner provided that it might construct its road over the bridge of the Hancock Free

Bridge Corporation, and that it should pay such compensation as might be determined, if the parties failed to agree, by a board of commissioners, to be appointed by the supreme judicial court. Stat. 1853, chap. 383. Commissioners were appointed, and under their award the petitioner paid to the bridge corporation the said sum in six per cent bonds. The respondent contends that this was a payment in gross of the tolls, for which the petitioner was chargeable, while the bridge continued a toll bridge, and could not be regarded as a part of the cost of construction. If the statute had adopted the cost of construction as a fixed standard, to guide the judgment of the commissioners, this question might be one of some difficulty. The commissioners deemed it just and equitable that, in determining the compensation to be paid by the respondent, for the use of the petitioner's track, they should have regard to the cost of constructing the road, and should include in this cost the said sum of \$33,000. This was within the discretion intrusted to them by the statute. There is nothing to show that the mode which they adopted of estimating the compensation was unreasonable, or that they exceeded the authority and discretion given them by the statute.

Award accepted.

RAYMOND v. BUTTERWORTH.

June 22, 1885.

WRIT OF ERROR — TRUSTEE PROCESS — RELEASING DEBTOR FROM ARREST DOES NOT SATISFY JUDGMENT.

On a writ of error brought by the plaintiff in error to review the judgment of a municipal court, error in fact cannot be assigned when the matter of fact might have been put in issue and tried in the original action.

The arrest of a judgment debtor on execution and his subsequent release by order of the judgment creditor does not operate as a discharge and satisfaction of the judgment.

In a trustee process the fact that the only trustee within the jurisdiction of the court was, upon his answer and with the consent of the plaintiff, discharged, did not oust the jurisdiction of the court.

Writ of error to review a judgment rendered by the municipal court of the east Boston district. The case was heard by a single justice, and was reported by him for the consideration of the full court, upon the question whether the writ of error, brought by the plaintiff in error, should be quashed, or whether the same could be maintained.

A. B. Wentworth, for plaintiff in error. *H. Parker Fellows*, for defendant.

MORTON, C. J. This is a writ of error to review a judgment of the municipal court of East Boston. The first error assigned is that at the time of taking out the writ in that court and of the rendition of judgment, the cause of action, alleged in the declaration, did not exist, but had been satisfied. Error in fact cannot be assigned when the matter of fact might have been put in issue and tried in the original writ. Whether a right of action existed, or had been tried and satisfied was a fact which the plaintiff in error should have tried in the original suit, and his remedy, if dissatisfied with the judgment, was by appeal. *Riley v. Waugh*, 8 Cush. 220; *Joan v. Commonwealth*, 130 Mass. 162.

Besides it appears by the report before us, that there was no error in fact. The suit was upon a judgment, rendered against the plaintiff in error and one Bemis. Bemis was arrested upon the execution issued thereon, and was afterward by order of the judgment creditor released from arrest, and the plaintiff in error contends that this operated as a discharge and satisfaction of the judgment. It has long been the settled law of this Commonwealth that a judgment is not discharged by such commitment and a subsequent release from arrest, but remains in full force against the party committed and might be satisfied by a levy on his property, and *a fortiori*, it remains in force against a joint debtor. *Cheney v. Whitely*, 9 Cush. 289.

The second assignment of error is that the municipal court of East Boston had no jurisdiction of the action, but it is not clear whether it was intended as an assignment of error in law, or error in fact. If it be treated as an assignment of

error in law, it is clear that no error is shown. The record of the municipal court shows that the action was a trustee process, in which one of the trustees is described as "having his usual place of business in East Boston within the jurisdiction of said court," and that legal service was made upon the defendant. The record thus shows that the court had jurisdiction of the action. The fact that the trustee was discharged upon his answers, by consent of the plaintiff, did not oust the jurisdiction of the court, but it was authorized to proceed to judgment in the suit. Pub. Stats., chap. 183, § 9; *Lucas v. Nichols*, 5 Gray, 309.

If we treat the second assignment as an allegation of fact, that the plaintiff fraudulently and collusively invented a fictitious trustee for the purpose of giving the court apparent jurisdiction, the answer is, that this is matter of fact, which if it can be received in any way should have been cured by plea in abatement and tried in the original action. *Davis v. Marston*, 5 Mass. 199; *Dunning v. Owen*, 14 id. 157.

Judgment affirmed.

BOSTON AND LOWELL RAILROAD CORP. v. NASHUA AND LOWELL RAILROAD CORP.

June 22, 1885.

ARBITRATION—REVOCATION BEFORE FINAL AWARD—INTERLOCUTORY ANNOUNCEMENT BEFORE REVOCATION.

A submission to arbitration is a power which may be revoked, at any time before it is executed, by the publication of the award.

Where the authority of the arbitrators had been revoked by one of the parties before final award,—

Held, that an oral announcement by the arbitrators of their determination upon certain items in question before the revocation, even if intended by the arbitrators to be final upon those items, would be bad, unless the parties had agreed that they should be the subject of a separate award.

Action to recover the amount of an award of arbitrators made in favor of the plaintiff and against the defendant. The case was heard by the superior court without a jury. The court found for the defendant, and the plaintiff alleged exceptions. The facts appear in the opinion.

A. A. Strout, for plaintiff. F. A. Brooks, for defendant

FIELD, J. The parties submitted certain specified claims made by each against the other to the determination of three persons. One of the provisions of the submission was that the award of the arbitrators, or of the greater part of them, should be final. "And, if either party neglects to appear before the arbitrators after the notice of the time and place appointed for hearing the parties, the arbitrators may proceed in its absence, etc." The award was in writing, and was signed by the arbitrators August 7, 1883. Before this award was signed, the Nashua and Lowell Railroad Company delivered to the arbitrators papers, copies of which are annexed to the exceptions. The papers marked "C" and "D," as we construe them, were an unconditional revocation by the Nashua and Lowell Railroad Company of the authority of the arbitrators to proceed under the submission. The exceptions state that "there was contradictory evidence whether the statement of the arbitrators contained in the last seven lines of page one of the printed award was correct, the defendant insisting that such statement was not correct, and the plaintiff that it was correct. The other facts in the award were not in dispute." In reference to this statement, the correctness of which was in dispute, the defendant contended "that the only assent given by it was to the determination by the referees in the first instance of certain questions of law as preliminary, and that they might pass upon such legal questions and announce the result before proceeding to consider other claims embraced in the submission and before passing upon such other claims, and that defendant never assented to any partial and final award being made so as to be binding on the defendant before the revocation was notified to the referees. "The plaintiff contended that that statement was true."

It does not appear that the court found as a fact that this statement, con-

tained in the award, either was or was not a true statement. The statement is as follows: "Several of the claims made by the Nashua and Lowell Railroad Corporation against the Boston and Lowell Railroad Corporation were, by consent of both parties, submitted to referees for their award and determination, with the understanding and reservation, that the remaining claims, made by the respective parties, were to remain open either for adjustment by the parties themselves, or for future hearing and determination by the referees." The award then proceeds as follows: "The items submitted to the referees, and upon which they have been requested to pass, are those numbered 3, 4, 5 and 6 in Exhibit 1, annexed to the agreement of reference. The referees have considered these items and are of the opinion and so award and determine that the Nashua and Lowell Railroad Corporation is not entitled to recover any thing from the Boston and Lowell railroad in respect to either of said items." The hearing of any other claims was then, by agreement of the parties, postponed to June 29, 1883. Upon June 29, the parties met and the Nashua and Lowell Railroad Corporation presented a motion for a rehearing, "as to the law involved in the fifth claim, and in so much of the sixth claim as has arisen or accrued since the vote of the directors, passed June 25, 1877; and if, upon such rehearing, the views of the referees in said matters of law shall remain unchanged, then your petitioner prays that they will make, in writing, such a report of the facts found by them, and of their rulings upon the legal questions, raised by your petitioner, as will enable your petitioner to save, and not lose the benefit of the provisions, in said submission, which requires said referees to be governed by the rules of law applicable to the case." The provision in the submission, thus referred to, was that the claims were submitted to arbitrators "upon the understanding that said arbitrators shall be governed, in their determination and award, by the rules of law applicable to the case, but without prejudice from any defense based on the statute of limitations, unless such defense would be good and valid in law if pleaded" to a bill in equity, which had been brought by the Nashua and Lowell Railroad Corporation. The motion for a rehearing was overruled. And with the consent of both parties the further hearing under said submission was adjourned to August 1, 1883. Before the hearing on August 1, 1883, was begun, the papers, which we have held constitute an unconditional revocation, were delivered to the arbitrators. The arbitrators were of opinion "that they were bound to proceed with the hearing, if either party so desired and so informed the parties, and that they were ready to hear them." The Nashua and Lowell Railroad Company, by its counsel, stated that it "did not intend to appear further, and did not desire notice of any adjournments and then withdrew." The arbitrators proceeded with a hearing of claims made by the Boston and Lowell Railroad Corporation against the Nashua and Lowell Railroad Corporation and made an award in favor of the Boston and Lowell road, on which this action is brought. The court ruled as requested by the defendant, "that, whether the defendant's revocation of the submission in this case was legally justifiable or not, it operated to deprive the arbitrators of all further power of action under the same," and refused to rule as requested by the plaintiff that, "whatever it might find upon the question of fact in dispute, the plaintiff was entitled to a finding in its favor for the amount of the award and interest on the same." The court found for the defendant and the plaintiff excepted to the ruling, to the refusal to rule, and to the finding.

A submission to arbitration is a power, which may be revoked at any time, before it is executed, by the publication of the award. *Wallis v. Carpenter*, 13 Allen, 24; *Marsh v. Bulleel*, 5 B. & Ald. 507; *Mills v. Bailey*, 2 Hurl. & Colt. 36.

It does not appear that this was a separate award, actually reduced to writing and signed by the arbitrators. The unavoidable inference is that the conclusion was announced to the parties as the determination of the arbitrators upon these items, and that the meeting of the arbitrators was adjourned for the purpose of subsequently hearing and determining the other claims of the parties, unless meanwhile the parties settled them.

If we assume that the oral announcement of the arbitrators of their determination upon these items was intended to be their final award on these items

the award would be bad, unless the parties had agreed that those items should be the subject of a separate award, because this award did not decide all the substantial matters submitted and presented. *Randall v. Randall*, 7 East, 81; *In re Robinson v. Railston*, 1 B. & Ad. 728; *Stone v. Phillips*, 4 Bing. N. C. 37; *Bhear v. Harradine*, 7 Ex. 269.

It has been found, as a fact, that the parties agreed that those items should be the subject of a separate award. But, if it be assumed that the statement in the award is true, we are of the opinion that the award itself does not show that the announcement of the determination of the arbitrators upon the items mentioned was intended by them as the making and publication of an award. The award, as it was finally made and published, is one and entire. The power of the arbitrators over all the matters submitted, if there had been no revocation, would have continued, until the award was finally made and published. Before this was done, it was competent for them to have changed their minds upon these items, to have reheard the parties and revised their decision. The announcement was interlocutory and not final. It is, therefore, unnecessary to consider whether any partial award, made and published under a submission such as this is, would preclude a party from revoking the authority of the arbitrators to proceed under the submission to consider the remainder of the matters submitted.

Exceptions overruled.

SUPREME JUDICIAL COURT OF MAINE.

AYER v. BROWN and Trustee.

March 18, 1885.

TRUSTEE PROCESS — WAGES OF SEAMAN.

The wages of a seaman engaged in coasting trade are not exempt from trustee process while in the hands of his attorney, a proctor in the admiralty court, by whom it has been collected.

C. P. Mattocks and *W. K. Neal*, for plaintiff. *H. D. Hadlock*, for trustee.

EMERY, J. The trustee claims that a seaman's wages though earned in the coasting trade, are not attachable by trustee process, and cites the opinion of Judge **BENEDICT**, in *McCarty v. Steamer New Bedford*, 4 Fed. Rep. The contrary has been expressly held in Massachusetts. *Eddy v. O'Hara*, 132 Mass. 56; *White v. Dunn*, 184 id. 271.

The reasons given by Judge **BENEDICT**, however, do not apply here. In this case the owners had paid the wages to the seaman's own attorney, who was impliedly authorized by the seaman to receive it. There was no longer any claim against the vessel, nor the owners, nor the master. The money was not paid into court. The attorney did not hold it as an officer of the court, but as the agent of his client. His being a proctor in an admiralty court imposed on him certain duties to that court, but did not free him from any obligations to his client, or his client's creditors. The defendant had in effect collected his wages, and intrusted and deposited the money with his attorney. We think it was then liable to attachment. *Staples v. Staples*, 4 Me. 532.

Exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

DANFORTH v. STRATTON.

March 18, 1885.

TRESPASS — WRIT OF POSSESSION — OFFICER — LEASE.

Trespass cannot be maintained against an officer, charged with the duty of serving a writ of possession, for removing from the premises the person and goods of one in possession as *cestui que trust* of him who was the nominal tenant and against whom the writ of possession issued.

A judgment for possession against a tenant is a judgment against one in possession under such tenant.

Chas. P. Stetson and H. L. Mitchell, for plaintiff. *Barker, Vose & Barker and A. G. Wakefield*, for defendant.

DANFORTH, J. Motion for a new trial. The action is against the sheriff for the alleged wrong-doing of his deputy in the service of a writ of possession issued in an action of forcible entry and detainer. The judgment was obtained and the writ issued against James N. Cushing. The plaintiff's goods were removed from the premises described in the writ, and this is the act complained of in the present suit.

That the premises had for some time been occupied by the plaintiff and one Ruel J. Cushing, each occupying a specific portion agreed upon between them, is not in dispute. The plaintiff claims to have been a tenant at will under Hollis Bowman, the owner. This is denied on the part of the defendant, who contends that Cushing was tenant of the whole premises and that the plaintiff was tenant under him. After this occupation had continued for about two months Bowman gave a written lease to James N. Cushing for two months, and at or within seven days after its expiration, commenced the action in which the writ in question was issued. The plaintiff had continued to occupy until his goods were removed at the time of the service of this writ.

Hence the nature of the plaintiff's occupation became a material question which was submitted to the jury. If he was a tenant under Bowman it is evident that his goods were wrongfully removed, for such tenancy had never been terminated as the statute requires, and the jury must have so found.

It is unquestionable that no man can become the tenant of another without his consent. In this case the decided preponderance of evidence shows that Bowman never did consent to the plaintiff's becoming his tenant, that he never received or recognized him as such before the written lease, and after that he could not. What then were the plaintiff's rights in the premises? In a former action in which this plaintiff was defendant and James N. Cushing was plaintiff, it was decided by the court that the written lease was held by Cushing in trust for this plaintiff, and upon that ground he succeeded in that action. *Cushing v. Danforth*, 76 Me. 114. If the question were now open, the testimony in this case would lead to the same conclusion. Thus the right and only right which the plaintiff had in the premises was through and under James N. Cushing, as *cestui que trust*. He had no direct claim as tenant, upon Bowman, and Bowman none upon him. He was not responsible under the lease to deliver up the premises to the lessor at its expiration, but at that time all his rights under it would cease, and if he remained, it would be only as a tenant at sufferance. Hence a judgment against Cushing would be a judgment against him, and the writ of possession would authorize the officer not only to remove Cushing but all others whose rights there were dependent upon him or were in without right. As Cushing was the contracting party and his lease and its expiration laid the foundation of the process, the action was properly begun against him alone. *Howe v. Butterfield*, 4 Cush. 302.

But this defendant justifies further. In his brief statement he says: "That all and every act his said deputy did in the premises, he did under and by virtue of his said precept, and also as the servant and agent of Hollis Bowman."

As already seen, after the expiration of the lease, the plaintiff, as against Bowman, had no rights whatever in the premises. His tenancy, whatever it was, had ceased, and it was competent for Bowman, by himself or servant, to remove him and his goods with or without process, if done in a peaceable and orderly manner,

after due notice. The testimony shows that whatever was done in this respect was done under the direction and by the order of Bowman, and that the plaintiff had due notice. If it was not done peaceably and orderly, of which there is no proof, Bowman or the servant might be liable, but not this defendant as sheriff, as the writ was not served by him but by a deputy. *Stearns v. Sampson*, 59 Me. 568.

Motion sustained.

PETERS, C. J., VIRGIN, FOSTER and HASKELL, JJ., concurred; EMERY, J., concurred in the result.

STRICKLAND v. HOLMES.

March 18, 1885.

GUARDIAN'S BOND—LIABILITY OF HEIRS OF DECEASED SURETY.

Where a surety on a guardian's bond has deceased, his heirs are not liable under R. S., chap. 87, § 16, jointly with the principal on the bond.

C. B. Roberts, for plaintiff. Powers & Powers, for defendants.

DANFORTH, J. The bond in suit in this case was given by the defendant Holmes, as principal and guardian of Emma H. Pierce, a minor, and was signed by Nathan Perry as surety. There has been a breach and the amount of damages has been fixed by a decree of the judge of probate. Holmes interposes no defense.

It appears that Perry, the surety, died and his estate was administered upon more than two years before this right of action accrued. As there can be no remedy against his administratrix, the plaintiff has joined the other defendants in the suit as heirs of the surety, claiming the right to do so under the provisions of Revised Statutes, chapter 87, section 16, which reads as follows: "When such claim has not been filed in the probate office within said two years, the claimant may have a remedy against the heirs or devisees of the estate within one year after it becomes due, and not against the executor or administrator."

The context shows that the extent of the liability of each heir or devisee is measured by the amount of assets individually received from the estate. Hence there should be an allegation in the declaration, not only that assets were received but of the amount. There are no such allegations in this writ. It is, therefore, defective in that respect. But if there were no other difficulties in the way, this might, perhaps, be removed as to all but one by an amendment, for the agreed facts show that the heirs collectively have received their distributive share, which share is sufficient to pay the plaintiff's claim. The facts, however, show that one defendant, Ann H. Perry, is the widow of Nathan and, therefore, not an heir. Nor can she be a devisee, for no will appears to have been made. As to her the action must fail.

The serious question in this case is, can this action be maintained against the heirs jointly with the principal in the bond? Certainly, the liability is not a joint one. The bond is a contract, and the rights and liabilities of the parties to it must depend upon its terms and conditions alone. The liability of the heirs rests upon the statutes. In a suit against them the bond and proceedings in the probate court become material and must be a part of the declaration as showing the amount of the plaintiff's claim. But that is not sufficient to maintain the suit against the heirs. There must be to do that, the necessary allegations to bring the case within the statute, for that determines their liability. Hence, if both are combined in one suit there must be two counts in the writ of different import, one applicable to one set of defendants and another to a different set, or there must be allegations in one count which are not applicable to all the defendants alike, which could not be the case if the claim were joint. It may admit of a grave doubt whether the claim against the heirs as among themselves, depending as it does upon the different amount of assets which each may receive, is not rather several than joint. *Sampson v. Sampson*, 63 Me. 335. But, however this may be, they cannot be liable jointly with the signer of the contract; they do not become parties to it. Their liabilities are created solely by statute.

Another consideration, tending to the same result, is found in the fact that, under the statute, "the claimant may have a remedy against the heirs." This is an independent and additional remedy to that authorized upon the bond. While the plaintiff must pursue the legal course to fix the amount of his claim under the bond, when that is done the statute gives him this remedy, which, without it, would not exist. This remedy is not in the control of the probate judge. He may give or withhold his consent to a prosecution on the bond, and having given it no costs can be recovered by the defendant if they prevail. But this remedy is to be pursued at the option of the claimant and at his risk. It must, therefore, be by such a process as will give the defendants a right to costs if they prevail. No exception to the general rule, in this respect, is made by the statute.

Judgment against the defendant, Holmes, for \$302.43 and interest from the date of the decree of the probate court, September 1, 1881, and in favor of the other defendants.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

KENNEY v. WENTWORTH.

March 18, 1885

LIFE LEASE — TWO LESSEES.

A lease to two "for and during their natural life" continues during the life of each

J. W. Donnigan, for plaintiff. *Jasper Hutchings*, for defendant.

DANFORTH, J. The single question involved in this case is the duration of the right of possession of the plaintiff to the premises in question. The lease in language too clear to admit of doubt, gives it to her "for and during said term." The "said term" is defined but once in the lease and then in a previous sentence as being "for and during their natural life." The lessees are two. The pronoun is in the plural and must include both of them. The noun "life" is in the singular and refers to the life of the one as much as to the other, and must, therefore, be taken separately rather than jointly. If the lease is to terminate upon the death of one only, the full meaning of the language has not been exhausted. There is still one life included in the word "their" which has not ceased, and it must, therefore, follow that the lease has not terminated.

There is no intimation in this or any other part of the lease that it was to be terminated as to one before the other. It provides for one single term whole and undivided. It cannot cease as to one, until it does as to both, and cannot as to both, until the whole life included in the plural pronoun has ceased.

If there were any doubt about this interpretation from the language used, it would be removed when we consider the circumstances under which the lease was made and especially the object to be accomplished by it. The plaintiff was the original owner of the land and under some contract obligation to support her co-lessee. In consideration of the conveyance, the defendant agreed to support both lessees not during the life of one but that of both, and the object of the lease clearly is to secure the performance of that obligation. But if it ceases at the death of one, it fails to perform the purpose for which it was given, and instead becoming an instrument of injustice if not of fraud.

Exceptions overruled.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

RUMILL v. ROBBINS.

March 18, 1885.

EASEMENT — WAYS FROM NECESSITY — LOCATION OF.

The parties may make and change the location of ways arising from necessity. Such location may be inferred from the acts of the parties.*

* See 71 N. Y. 194; *Moak's Underhill on Torts*, 499.— Ed.

George P. Dutton, for plaintiff. *Wiswell & King*, for defendant.

EMERY, J. The only right of way claimed is that arising from necessity. In such cases the owner of the servient estate has the first right to locate the way, and if he refuse to do so upon request, the owner of the dominant estate may locate the way. The location by either must be reasonable. Wash. on Easements, 167. The parties may agree to a location, and can change any location by mutual agreement; such agreement need not be in writing, but can be inferred from the words or conduct of the parties. *Smith v. Lee*, 14 Gray, 480. However the way may be located the right remains one of necessity only.

In this case at least two roads had been used indifferently for many years by the occupants of the defendant's lot. It does not appear that the defendant requested the plaintiff to locate the way to be used, or that the plaintiff did locate it. For four years after his purchase of the land from the plaintiff, the defendant used the road in dispute without objection. Whether he used this road exclusively does not appear. He was then forbidden by the plaintiff to use it. The objection was to the use of that particular road. No objection was made to the use of the other road which was equally convenient for the defendant.

In 1879 the defendant and nine others applied to the municipal officers to lay out a way over this other road. The municipal officers met at the dwelling-house of the plaintiff on the servient estate, after due notice of their intention to meet there, and laid out a way over the old road, as prayed for. The plaintiff waived damages for crossing his land, and the town accepted the way. The defendant now claims that the way was not legally laid out. We think that is immaterial. If it be a statute way, the right of way by necessity is thereby ended. Wash. on Easements, 165. If it be not a statute way, no one but the plaintiff could prevent the use of it, and we think he would be estopped. The conduct of both parties shows a mutual designation of this as the route the defendant was thereafter to take over the plaintiff's land. The defendant procured it to be defined. The plaintiff had forbidden the use of the other road. He knew of the defendant's proceedings for the location of another way. He assented to it by waiving damages. He expected this way to be thereafter used. He brings this suit for the using the other road. He cannot now question the defendant's right to this road, if there be any necessity for a way. No one has questioned it, so far as appears, and although not formally opened, it is a traveled road, safe and convenient. The defendant should now be confined to it.

Defendant defaulted for \$1 damages.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

SUPREME COURT OF VERMONT.

LANGDON v. BAXTER NAT. BANK.

January, 1885.

NEGOTIABLE INSTRUMENT — GUARDIAN — PLEADING — BONA FIDE PURCHASER.

A bank took from a guardian as a pledge to secure his own note, two negotiable bonds owned by the ward, on which was an indorsement, seen by the cashier at the time of the negotiation and which disclosed the fact that the ownership was in the ward. In an action of replevin to recover the bonds, —

Held, that defendant was not entitled to the protection of a *bona fide* purchaser, and that the settlement of the guardian's account did not affect the title to the bonds.

Replevin for two District of Columbia bonds of \$1,000 each. Plea, general issue. The plaintiff had judgment below. The opinion states the facts.

W. C. Dunton & Edward Dana, for defendant. *Prout & Walker* and *Beeman & Platt*, for plaintiff.

POWERS, J. The settlement of the guardian's account in the probate court was no adjudication upon the title to these bonds. No order or decree respecting the

bonds was there made; and in fact the existence of such bonds was not disclosed to that court.

Our statute relating to the action of replevin is broad. It gives the action to any person entitled to the possession of goods unlawfully detained by another. R. L., § 1230.

Guardians, trustees, and other persons, acting in a representative capacity, are not excluded in terms, and should not be by implication. There is a strong reason why a recovery of goods *in specie* by them is essential to the protection of those for whom they act as in the case of a true owner. The statute is a decisive answer to the objection made to the form of action. The case calls for no action looking to the enforcement of a trust. The plaintiff is seeking to recover the possession of his ward's estate. His commission as guardian, entitles him to assert this legal right. Hence he has no occasion to resort to a court of equity.

A *bona fide* purchaser for value of these bonds would take a perfect title to them. This is the rule in all the courts in this country, Federal and State. It is said that the rule in Vermont opens a wider door for inquiry in cases of this kind than is found in other States and in the Federal courts; but it is doubtful, whether, upon a careful reading of the cases, any real difference in the rule itself, or in its application will be found. In all, the holder of negotiable paper purchased under due must be a *bona fide* holder; and whether he bears that character in the transactions is a question always open to inquiry. This is as far as the Vermont cases have gone; and in other jurisdictions cases have taken the same trend. In all jurisdictions *bona fides* is the basis of protection.

The offer to sell these bonds to the cashier was itself — nothing else appearing — a representation that J. H. Langdon was the owner. But something else did appear touching his title. The bonds carried an indorsement upon them tending to show title in W. C. Langdon, which indorsement was seen by the cashier and inquired about in his negotiation with J. H. Notice of a fact, fatal if true, to the title of J. H. came to the knowledge of the purchaser before he brought the bonds. In legal significance, it stood as if W. C. Langdon had told the cashier that he was the owner. If W. C. had personally given him such notice, and he had bought, he would assume the hazard of a disputed ownership. He could not claim the protection of an innocent purchaser. The notice he had from the indorsement upon the bonds, put him upon inquiry. The title of J. H. was evidenced by his possession and by his declarations. The title of W. C. was evidenced by the memorandum on one, and the assignment upon the other. The title of W. C. might be genuine, even if J. H. had possession. If a stranger had stood as J. H. did, having the bonds in his possession, and declaring his ownership, it probably would not be held anywhere, that the protection accorded to innocent purchasers could be invoked to defeat the rights of the true owner, when evidence of his ownership was carried upon the paper itself.

When a purchaser is put upon inquiry, his inquiry must be made in a direction likely to lead to knowledge of the facts. If a thief should offer paper for sale which disclosed grounds for inquiry to a purchaser, inquiry of the thief alone would not satisfy the rule. No more can the rule be thus satisfied because the seller is an honest man. Here the direction the inquiry should take, was plainly indicated by the paper offered for sale; an inquiry followed up in that direction would have resulted in knowledge that W. C. Langdon was the true owner.

Judgment affirmed.

[On question of *bona fides*, see 45 Am. Rep. 134, 21 W. Dig. 27. — Ed.]

RICE v. RUDD.

HOMESTEAD — R. L., § 1894 — WIDOW.

To constitute a homestead within the protection of the exemption law, there must be a dwelling-house upon the land owned by the housekeeper, or one in process of erection, and actually used or set apart and kept for a home and an abiding place for the family.*

*See *Cole v. Laconia Savings Bank*, 59 N. H. 53, 321; *Lowell v. Shannon*, 60 Iowa, 713. — Ed.

Defendant's husband living with her in her house, and owning land contiguous thereto, mortgaged the same, she not joining in the deed. His land, he used in connection with his wife's house and land, as a home for the family, and the only building thereon was a barn. In an action to foreclose two mortgages,—

Held, that the husband never had a homestead in his land, consequently the widow could hold none.

Petition to foreclose two mortgages. Heard on pleadings and agreed statement. Foreclosure of both decreed. The opinion states the facts.

J. C. Baker and *C. L. Howe*, for defendant. *W. C. Dunton* and *Edward Dana*, for orators.

WALKER, J. The petition in this case was brought to foreclose two mortgages upon the premises described in the petition. No defense is made to the first mortgage, which was executed by Ann Holton to H. C. Hubbard, March 28, 1866, before Eli A. Rudd purchased the premises, and which was upon the premises at the time of his purchase.

The only question raised upon the agreed statement of facts submitted is, whether the defendant, Amanda Rudd, who is the widow of Eli A. Rudd, is entitled as such widow to have a homestead set out to her in the premises described in the petition, as against the mortgage of the same premises executed by Eli A. Rudd in his life-time on the 20th day of November, 1871, to George Capron, of whose will the petitioner is the executor.

At the time of the execution of said mortgage the said Amanda was the lawful wife of said Eli, and did not sign or in any manner consent to the making of said mortgage; and they then resided in a house situated upon the land of said Amanda, in Middletown, consisting of about twenty acres of land with a house and barn thereon, and of the value of more than \$500. Sometime prior to the date of said mortgage to Capron, Eli A. Rudd purchased the land described in said mortgage, which is situated directly across the highway from the house and lot of Mrs. Rudd, where Mr. and Mrs. Rudd then resided; and the land so purchased was kept and used, and intended to be used by him, when he purchased the same, in connection with Mrs. Rudd's said house and lot, as a home for the family. When Mr. Rudd purchased his said lot of land there was no dwelling-house or other building upon it, nor when he mortgaged the same to Capron as aforesaid. In the spring of 1871 Mr. Rudd commenced preparations for the erection of a barn on his lot, and intended to take down an old barn on Mrs. Rudd's land, and use it with other material in the erection of the barn on his lot. In June, 1871, he dug and walled up a cellar on his lot directly opposite Mrs. Rudd's house, for the purpose of setting his barn thereon. He also drew and piled on his lot several thousand feet of lumber, to be used in the construction of said barn; and said cellar and lumber were upon the premises at the time said mortgage was executed.

In the spring of 1872, after the execution of the mortgage, Rudd took down the barn upon his wife's land, and with the material from that and the lumber that was on this lot at the time of the execution of the mortgage, built on his lot the barn which he had before intended to erect. This barn and Mr. Rudd's lot have ever since been used in connection with Mrs. Rudd's house and lot on the opposite side of the highway, as part of the home place where the family lived. The domestic animals, hay and produce of said two pieces of land have been kept in this barn since its construction in 1872; and there has been no other barn upon the lots. Mr. Rudd continued to use and occupy said barn and lot in connection with his wife's house and lot until his death in 1882; and since his death his said widow has used said two pieces of land and said house and barn in the same way. At the time said mortgage was given, and from then to his death, Mr. Rudd did not own or have any interest in any land, excepting his said lot and barn, and his interest in his wife's land.

The homestead right is a right to be set out of the estate of the husband or head of the family, and is an exemption of so much of his estate as is included within it, not exceeding the value of \$500, for the benefit of the widow and minor children. But the widow and minor children do not succeed to such a homestead right in the estate of the deceased housekeeper unless such homestead right had

become attached to and created in the real estate of the housekeeper in his lifetime. If the housekeeper had no homestead right in his real estate that was exempt from attachment and levy of execution for his debts, then on his death no homestead right would vest in his widow and minor children. And in this case Rudd's widow has no homestead right in the premises described in the petition as against the Capron mortgage thereon, executed November 20, 1871, unless at that time Rudd had a homestead right, which had become so attached to the premises in question that he could not convey the same in mortgage by his separate deed. If Rudd had a homestead right in the premises at that time, which was exempt from attachment or levy of execution on his debts, then the said mortgage was inoperative and void as against the widow's homestead right. If he did not have a homestead exempt in the premises at that time, then no homestead right vested in his widow on his decease, and the petitioner is entitled to have the Capron mortgage foreclosed against the said Amanda.

Did Eli A. Rudd have a homestead in the premises described, at the time of the execution of said mortgage, which, on his death, vested in his said widow, Amanda?

The answer to this question depends upon the requirements of the statute exempting a homestead and the application of the same to the agreed statement of facts.

The statute, defining a homestead at the time of the execution of the mortgage to Capron by Rudd, was the same as now, and is as follows:

"The homestead of a housekeeper or head of a family, consisting of a dwelling-house, outbuildings, and the land used in connection therewith, not exceeding \$500 in value, and used or kept by such housekeeper or head of a family as a homestead, shall, together with the rents, issues, profits, and products thereof, be exempt from attachment and execution, except as hereinafter provided."

This statute definition necessarily implies a house owned and used or kept by the housekeeper as a dwelling place or home for himself and family with a prescribed quantity of land on which the house is situated. It requires that the home, the abode, the castle, the residence of the family of the housekeeper, shall be upon the housekeeper's land, or upon land in which he has some legal or equitable interest or ownership.

The words of the statute, "consisting of a dwelling-house, outbuildings, and the land used in connection therewith, not exceeding \$500 in value," make the dwelling-house the first essential of a homestead. When that exists, the right attaches and draws to it outbuildings and land on which the buildings stand, and which is used in connection therewith, sufficient to make the \$500 value. Without the dwelling-house, there is no homestead right established or created in the land to which the exemption can apply. A homestead is the place of the house or home -- that part of a man's landed property which includes his dwelling-house, and is about or contiguous to it. It is the place where he surrounds himself with the insignia of home, and enjoys by right of ownership its immunities, privileges, and privacies. In *Mills v. Estate of Grant*, 36 Vt. 269, it was held, that "the object of the exemption is to create a charge upon specific premises, consisting of a house and land, for the support and maintenance of the wife and family of the housekeeper, not subject to be defeated by his separate conveyance or by attachment or levy of execution on his debts." To constitute a homestead within the protection of the exemption law, there must be a dwelling-house upon the land owned by the housekeeper, or one in process of erection, and actually used or set apart and kept for a home and an abiding place for the family.

There was no dwelling-house on Rudd's land mortgaged to Capron as aforesaid; and he had no intention of erecting one thereon, or of making his actual home and abode upon it. He did not keep it for that purpose. He intended, at the time of making the mortgage, only to erect a barn upon the land to be used by him for the better enjoyment and improvement of his land and his wife's land; and after the execution of the mortgage he carried out his intention. The abode and home of himself and family was never upon this land, and it was not kept for that purpose.

The fact that Mr. Rudd's lot was contiguous to Mrs. Rudd's land, upon which the

family resided, and was used with it as a part of the homestead place of the family, does not bring Rudd's land within the exemption of the statute. It was a separate parcel from Mrs. Rudd's. There was no tenancy in common in the ownership of the lots. The ownership of each was distinct from the other. The occupation of both lots by Rudd under such distinct and separate titles of ownership constituted a homestead only of that parcel upon which the dwelling-house occupied as the home of the family stood; and the exemption applies only to the house and land connected with it in the same title of ownership.

Rudd and his wife elected to make the wife's dwelling-house their home, and made it by their use of it as such their homestead. While they thus occupied it with no intention of abandoning it as a home, and neither having any other house, Rudd did not have a homestead in his own land, on which there was no dwelling-house, and on which he did not reside, and did not intend to. Rudd had no homestead in his land at the time he executed the mortgage to Capron, nor at the time of his decease, which vested in his widow. It was not necessary that Rudd's wife should sign and acknowledge the mortgage in order to make it operative upon all his title and interest in the premises prescribed; and hence the defendant, Amanda Rudd, the widow of Rudd, has no homestead right in the premises described in the petition as against the mortgage executed by said Rudd to George Capron.

The decree of the court of chancery, foreclosing both mortgages as prayed for in the petition, is affirmed, and cause remanded with mandate according to the above order.

BRODEK & Co. v. HIRSCHFIELD.

PLEADING — AMENDMENT.

A declaration, containing only the common *indebitatus* counts, counting upon a sale to the defendant, cannot be amended by adding counts upon a contract of guaranty.

Assumpit. Plea, general issue. Judgment for the plaintiff. The opinion states the point.

J. C. Baker & C. L. Howe, for defendant. *F. G. Swinington*, for plaintiff.

ROYCE, Ch. J. The first exception taken was to the ruling of the court below allowing the amended counts, which are made a part of the exceptions, to be filed.

The original declaration contained the common *indebitatus* counts; and the only claim made by the plaintiffs was for goods sold. To warrant a recovery under that declaration, it was incumbent upon the plaintiffs to show that the goods were sold to the defendant. *Curtis v. Smith*, 48 Vt. 116. They could not recover upon proof that the defendant guaranteed the payment for the goods. The new counts which the plaintiffs were permitted to file, declared upon a contract by which the defendant, for a consideration named, guaranteed the payment of a bill of goods, which is the same bill of goods sought to be recovered for, and described in said contract as having been sold to M. G. Hirschfield.

The original declaration counted upon a sale made to the defendant; the amended counts, upon a contract of guaranty. Were the amended counts for the same cause of action as that originally declared upon? It is evident to us that they were not. Under the original declaration a recovery might be had upon proof of a sale; under the new counts a recovery could only be had upon proof of the execution of the contract of guaranty; and then not because of a sale of the goods to the defendant, but by virtue of the contract executed by him.

The court has always been liberal in the matter of allowing amendments; but since the case of *Carpenter v. Gookin*, 2 Vt. 495, has refused to allow amendments to be made which changed the cause of action, or new counts to be filed which stated a new cause of action; and the purpose and intention of the plaintiff in instituting the suit have never been allowed to control or influence the court in allowing or refusing amendments. *Dewey v. Nicholas*, 44 Vt. 24.

It was error to allow the new counts to be filed, and to admit evidence to show a cause of action under them. Reference is made to all the evidence that was put in on the trial which is applicable to the new counts. The plaintiffs evidently

acted upon the belief that a recovery might be had upon the new counts, and so may have omitted to put in evidence to prove the original declaration. The judgment is reversed, and if the plaintiffs desire the cause will be remanded.

HEWETT v. HATCH.

REPLEVIN — VOLUNTARY ORGANIZATION — TENANTS IN COMMON.

A band formed by voluntary association, divided into two factions. Each organized a new band, and acted under new by-laws, the plaintiffs retaining the name of the old band, and defendant's faction assuming a new name.

Held, that the old organization was abandoned, and that the plaintiffs had no authority to act as its trustees; that they could not maintain replevin against the defendants to recover the common property, as the parties are tenants in common.

Replevin for a quantity of sheet music. Plea, not guilty. Verdict ordered for the defendant.

The exception stated: "The plaintiffs, as trustees, had the authority given them by the constitution and by-laws; and the defendant was the leader and musical director of the band, with the rights and authority given him under said constitution and by-laws."

Redington & Butler, for plaintiffs. *J. C. Baker & C. L. Howe*, for defendant.

ROWELL, J. The old Rutland Cornet Band was an organization by voluntary association, and when, in October, 1882, it divided into two factions, one faction, to which the defendant belonged with outside parties, forming a new organization under the name of Hatch's Military Band, and the other faction, to which the plaintiffs belonged with other outside parties, forming another organization under the old name of the Rutland Cornet Band, both of the new organizations adopting new constitutions and by-laws, and neither of them any longer acting under the constitution and by-laws of the old band. That organization was thereby abandoned and disorganized and thenceforth ceased to exist, and whatever authority these plaintiffs had, as trustees thereof, ceased with it, as it could not continue beyond the life of the body that conferred it. It is like the death of a natural person, which revokes all authority given to his agent which is not coupled with an interest. The same is true of the death or dissolution of a corporation. *Angell & Ames Corp.*, § 289. And the reason is, that there is no master to serve.

Nor did the new cornet band succeed to the property of the old band, any more than a new partnership, composed partly of some of the members of an old partnership and partly of new members, would succeed to the property of the old firm. No right of succession exists in such cases and cannot, from the very nature of the thing, and in this case less than a majority of the old band are members of the new cornet band.

Hence, it follows that, at the time of the commencement of this suit, the plaintiffs, who never had manual possession of the property in question, had no greater right in the common property than their former associates had, but all were tenants in common thereof, and one tenant in common cannot maintain replevin against his co-tenant for the possession of the common property, because one has as much right to its possession as the other, unless there be some agreement as to the contrary.

Judgment affirmed.

WING v. PEABODY.

ATTACHMENT — CHANGE OF POSSESSION — FRAUD — BAILEE.

Plaintiffs sold on credit and delivered certain goods to B. who soon after sold his business and lease of his store to G., excepting the goods bought of plaintiffs, although they were to remain in the store and under the control of B. Plaintiffs thereafter repurchased the goods and made arrangements with G. to keep them in his store, who sold the same without plaintiffs' knowledge, representing to the purchaser that B. was the owner. The goods, while in the purchaser's possession, were attached by a creditor of B.

Held, that there was a sufficient change of possession; that G. held the goods as plaintiffs' agent and that the title of plaintiffs was not changed by the erroneous statements made to or by the purchaser from G.

Trespass with a count in trover. Plea, general issue, with notice of justification under process. Judgment for the plaintiffs. The exceptions stated: "The chests of tea had all been opened and more or less tea sold out of each chest, under an arrangement between John Gosselin and Alphonso Bashaw when, or soon after, Alphonso sold out to Gosselin, that Gosselin might sell from the chests as he had occasion and account to Alphonso therefor." The other facts are stated in the opinion.

Redington & Butler, for defendant. *E. D. Merrill*, for plaintiffs.

WALKER, J. The defendant attempts to justify under process, the taking of the four chests of tea and one barrel of molasses, declared for in the plaintiffs' declaration as the property of one Alphonso Bashaw, and the question is, were the goods subject to attachment for said Bashaw's debt?

Bashaw bought the four chests of tea and barrel of molasses with other goods of the plaintiffs in April, 1883, on credit, and took them to a grocery store occupied by him in Rutland, and broke packages and sold some therefrom. In August he sold out his grocery business, stock of goods and lease of the store, with the exception of the four chests of tea and barrel of molasses to one Gosselin. Gosselin took possession of the store and goods bought, with the agreement that the goods claimed for in this suit should remain where they were in said store until they were otherwise disposed of by Bashaw, he having free access to and control of them at all times. After this sale and arrangement the plaintiffs repurchased the goods for a price agreed upon, which was the purchase-price, and when the amount remaining in the packages was ascertained, the value was to be credited toward what Bashaw was owing the plaintiffs on account. The plaintiffs, at the time they repurchased the goods by their agent, Egery, notified Gosselin that they had purchased the goods, and that Bashaw, as a favor to them, would pack and reship them to their store in Albany, and requested Gosselin to keep the goods for them; and Gosselin assented to it, and told Egery, the plaintiffs' agent, that the goods could remain there in the store as plaintiffs' goods. This repurchase, notice, and assent to keep them put an end to the previous arrangement made between Gosselin and Bashaw, as to Bashaw's control of the goods. Gosselin then became the agent of the plaintiffs to keep the goods, and then ceased to be the agent of Bashaw in that respect. After the plaintiffs repurchased the goods, Bashaw had no possession of them, and no control over them in the store, and, thereafter, had no beneficial use of the property, and no actual possession of it.

This was a sufficient change of possession to protect the goods from attachment for the debts of Bashaw. *Barney v. Brown*, 2 Vt. 374; *Spaulding v. Austin*, 2 Vt. 555.

The goods thus remained in the possession of Gosselin for the plaintiffs till October, when he sold out his stock of goods and lease of the store to Palmer, and falsely informed him that the goods in question were Bashaw's; and that Bashaw was to have free access to and control of them. The plaintiffs did not know of this sale to Palmer and change till after the goods were attached. Palmer took possession of the store and goods bought, together with the plaintiffs' goods, understanding that they belonged to Bashaw, and held the actual possession of the goods till they were attached. During this time Bashaw had not claimed or exercised any act of ownership over the goods, nor had any control or actual possession of them. As a favor to the plaintiffs he had packed the tea for reshipment to Albany. Bashaw, and Egery, the plaintiffs' agent, had tried to sell the goods for the plaintiffs to other parties in Rutland; but the goods remained all the time in the store where plaintiffs left them, which, at the time of the attachment, was in the possession of Palmer.

Did this possession of Palmer, with his erroneous information as to the ownership of the goods and attending circumstances, defeat the protection which the goods were under from attachment for the debts of Bashaw while in the possession of Gosselin for the plaintiffs? We think not. A delivery once perfected cannot be defeated by erroneous information as to the ownership of the goods, moving from a stranger to the title, though he be honestly in possession of the same, especially, so long as the vendor, upon whose debt the goods are attached,

has not, since his sale thereof, had the actual possession nor any beneficial use of them, nor exercised any acts of ownership over them.

Palmer was not the agent or servant of Bashaw. He was a stranger to the title, who had honestly come into the possession of the property under his purchase of the lease of the store with the erroneous notice that the property was Bashaw's. But that erroneous information would not make the property subject to attachment for the debts of Bashaw. The notice did not move from the plaintiffs nor Bashaw, and they were not responsible for it. Palmer's possession made him the bailee of it for the true owner; and Bashaw's creditors, while the property remained in the actual possession of Palmer, had no greater right to it for their debts than while it was in the possession of Gosselin. The legal status of the property remained the same. A person's ownership of and rights in and to property are not changed by the erroneous statements made in relation to its ownership by a person, who accidentally comes into the possession thereof, without the knowledge of the true owner. Palmer sustained no such relation to the property as would make his statements to the officer in respect to the ownership of it prejudicial to the plaintiffs' right therein. Palmer's information was at most hearsay; it moved neither from the plaintiffs nor Bashaw. He did not receive the property from the plaintiffs nor Bashaw. He professed to have no knowledge as to how the property came into the hands of Gosselin. He undertook to tell the officer simply what he understood Gosselin to say, and that information was false.

The officer was not justified in seizing the property on the information he received from Palmer.

Judgment affirmed.

RUTLAND MARBLE COMPANY v. BLISS.

STATUTE OF LIMITATIONS—ABSENCE FROM THE STATE.

A temporary absence does not arrest the running of the statute, so long as a residence is retained in this State.

Defendant, having a residence here, and leaving his family here, went into New York, and was absent several years for business purposes, without intending to acquire a new residence or to abandon the old one. He was frequently here with his family, and his presence could have been easily ascertained.

Held, that the running of the statute was not arrested.*

Assumpsit. Picas, general issue and statute of limitations. Heard by the court on the report of referees. Judgment *pro forma* for the plaintiff.

E. J. Ormsbee & J. C. Baker, for defendant. *Lawrence & Meldon*, for plaintiff.

ROYCE, C. J. The demands that are described in the referee's report were all due and payable in April, 1874. At that time the defendant resided and was doing business in Boston. He failed in business in 1875. In July of that year, he, with his family, consisting of his wife and one child, came to Brandon to reside. In the winter of 1876-7, he was engaged in the marble business in Middlebury; and that fact was known to the superintendent of the plaintiff company. His residence thus commenced in Brandon has been ever since continued, unless his absences, and those of his family from the State, as shown by the report, have interrupted it.

In February, 1877, the defendant went to New York to look for business, leaving his wife in Brandon. She was with him in New York a small portion of the time after that; and while there they boarded, except in the winter of 1880-81, when they kept house. They had no home in New York, and always intended to keep their residence in Brandon. The defendant was frequently in Brandon with his family, and under such circumstances that his presence there could have been easily ascertained. His stay in New York was for business purposes, and was not intended to be permanent; for it is found that he had no definite intention of making New York a place of residence for his family, but regarded Brandon as their home, and expected his wife to return there, as she did from time to time, after being with him in New York.

* 7 Wait's A. & D. 273; 3 Am. Rep. 727; 59 N. H. 131.—Ed.

In order to arrest the running of the statute, it must appear that the defendant was absent from and resided out of the State. It is not sufficient to show absence; but he must have had a residence in some other State. If he has a residence in this State, so that process can be served upon him in the manner provided by law, the running of the statute is not arrested by his absence from the State. A mere temporary residence in another State does not constitute the party a resident of that State within the meaning of the statute, so long as he keeps a residence in this State.

Upon the facts found, the right to collect the demands in suit was barred by the statute of limitations, and the *pro forma* judgment of the county court is reversed, and judgment rendered for the defendant.

ROWELL v. HORTON.

TAXATION — COMMITTEE OF SCHOOL DISTRICT — ASSESSMENT — WARRANT — R. L., §§ 2698, 8058 — REPLEVIN — COLLECTOR.

1. A school district voted to have two terms of school, and "to use the public money, and raise the balance on the grand list, for the support of said schools." After using the public money to defray the expenses of the first term, it was necessary to raise only \$41.85; but before the second term commenced the committee assessed a tax amounting to \$158.14; and also another tax, after the close of the second term, which was \$32.14 in excess of the expenses of that term.

Held, that the tax was illegal, in that, while a slight excess over the amount voted would not vitiate the tax, here the excess was unreasonable; and, under the vote, that the public money could be used only toward defraying the expenses of the school.

2. It is necessary that a collector of town taxes should have a legal warrant to collect unpaid highway taxes delivered to him by the selectmen under R. L., § 8053.

Replevin for a wagon. Plea, not guilty. Judgment for the plaintiff. The opinion states the facts.

W. C. Dunton & Edward Dana, for defendant. *J. C. Baker & C. L. Howe*, for plaintiff.

ROWELL, J. On March 29, 1881, the school district voted to have two terms of school of fourteen weeks each, to commence on the first Monday of May and the first Monday of December respectively, and "to use the public money, and raise the balance on the grand list, for the support of said schools."

We construe this vote to mean that the public money should be used toward defraying the expenses of the schools, and that the balance only of such expenses should be defrayed by money raised by taxation.

The statute provides that the prudential committee shall, as soon after the vote of the district for that purpose as the circumstances of the case may require, assess a tax *for the amount voted to be raised, etc.* R. L., § 631. It is true that the assessment of a slight excess over the amount voted to be raised, added to cover possible contingencies in collecting, has been held not to vitiate the tax; and this, because courts will not take notice of small things in these matters, but are disposed to uphold taxes when the excess is comparatively insignificant. Such was the case of *Chandler v. Bradish*, 23 Vt. 416. But from the very reason of the thing, you cannot go beyond this without throwing down the safeguard that the statute has erected. The vote of the district is the only authority for assessing the tax at all; and when the prudential committee goes beyond the vote, it goes beyond its jurisdiction, and its acts are void.

Nor are the contingencies referred to above such as is claimed were attempted to be provided for in this case. The committee had no right to anticipate that plaintiff and Harrison would not pay their taxes, and therefore assess enough more to cover that contingency; for the case finds that they were both good, and that a legal tax could be collected of them at any time.

But it is said that the first tax, which was assessed on October 1, 1881, is not void, because it did not, as it turned out, exceed the expenses of both terms of school. But this tax was assessed before the winter term commenced, and before its cost was known, and not at all for the purpose of defraying the expenses of that term or any part thereof, but for the express purpose of defraying the expenses

of the summer term, as is shown by the certificate of the committee appended thereto. Besides, it is said in *Chandler v. Bradish*, under a similar vote, that the assessment must be made after the amount to be raised is known, and when the money is required.

When the first tax was assessed, it was necessary to raise \$41.85 only, as the public money would defray the expenses of the summer school into that amount. But the amount of that tax was \$153.14, which was \$111.29 in excess of what was required — an excess entirely unwarrantable.

The other tax, assessed March 4, 1882, was \$32.14 in excess of the expenses of the winter school; and if we add to this the excess of the first tax, we have a total excess of \$143.43, which is more than eighty-eight per cent of the entire sum to be provided for by taxation.

Taking the statutes for the collection of taxes altogether, it is considered that section 3053 was not intended to dispense with a warrant for the collection of highway taxes by the collector of town taxes. Section 2693 expressly requires the selectmen to annex to town and highway tax-bills, warrants for their collection. The state treasurer and county treasurers are severally required to issue warrants for the collection of State taxes and county taxes, § 368. Warrants are also required for the collection of school-district taxes and village taxes. And in the case of the town-school tax — generally called the State-school tax — although the statute does not expressly provide for a warrant, yet, in *Wilson v. Seavey*, 38 Vt. 221, it was held that one was necessary; and the court said that it was unreasonable to suppose that the legislature intended to dispense with a warrant in the single case of the State-school tax and require one in all other cases. When a delinquent is committed to jail, the statute provides generally that the collector shall leave with the jailer a copy of his warrant, with his doings certified thereon. Without this, the jailer would have no evidence of his authority to receive and imprison the delinquent. Thus it appears to be the settled general policy of the State to require warrants for the collection of taxes, and no exception to that policy should be allowed unless by clear statutory intentment, seeing that every reason is in favor of the policy and none against it.

But it is contended that if a warrant was necessary in this behalf, a sufficient one was annexed to the tax-bill of 1881. But not so. The warrant referred to was ambulatory, having been made by means of alterations to serve as a warrant to several successive tax-bills, and in its progress, at the time in question, it had passed the tax-bill of 1881, and been annexed to the tax-bill of 1882. But it is argued that the attempt to make the warrant apply to the tax-bill of 1882 was abortive, for that the certificate of the selectmen attached to it still showed that the tax to be collected was assessed on the list of 1881. The certificate is as follows:—

“Highway Tax-Bill for District No. 3 in Chittenden.

“The within is a rate-bill of a highway tax of twenty-five cents on the dollar of the grand list of District No. 3 in Chittenden for A. D. 1881, made and assessed by us this 21st day of May, 1882, and voted by said town March, 1882.”

This certificate was signed by the selectmen of 1882, two of whom were also selectmen in 1881, and the date of the warrant was changed to May 20, 1882. The case finds that it was the design of the selectmen to make the warrant apply to the tax-bill of 1882; but whether they failed in that or not, we think it clear that they succeeded in making it inapplicable to the tax-bill of 1881, and that the defendant cannot justify under it.

These holdings being decisive against the defendant, it is unnecessary to consider any other question raised in the case.

Judgment affirmed.

MCGINNIS v. COOK.

STATUTE OF FRAUDS — PAROL CONTRACT — SALE OF LAND — R. L., § 981.

The plaintiff's house being mortgaged, he entered into a parol contract with the defendant to purchase the mortgage, sell the house, and after satisfying the mortgage debt, costs, etc., to pay the balance to the plaintiff. The defendant purchased as agreed, foreclosed, and sold the house, the plaintiff in reliance on the contract allowing the equity of redemption to expire.

Held, that the plaintiff was entitled to recover; the contract was not within the statute of frauds, in that it was not for the sale of lands or an interest in or concerning them, and could be completely performed within one year; and parol evidence was admissible to prove the contract.*

Assumpsit. Plea, general issue. Judgment for the plaintiff. The opinion states the facts.

Redington & Butler, for defendant. *P. R. Kendall* and *Lawrence & Meldon*, for plaintiff.

WALKER, J. The plaintiff is not seeking by this action to enforce a contract for the sale of land or an interest in or concerning land. The action is brought to recover the balance which the plaintiff claims is due to him from defendant for the sale of his house and lot under the defendant's agreement to take up the Verder mortgage resting thereon, sell the land, and to pay to the plaintiff the balance above the mortgage debt, and other moneys paid to and for the plaintiff by the defendant.

The defendant by this parol contract did not undertake to purchase the plaintiff's premises. He simply contracted to buy the Verder mortgage and hold it for the plaintiff, make a sale of the land, and to account to the plaintiff for any balance there might be left after paying the mortgage indebtedness and other indebtedness to the defendant, and expenses and costs.

Immediately after the making of this agreement, the defendant bought the Verder mortgage, and the plaintiff at the defendant's request executed another mortgage to the defendant of the same premises; and a while after, the defendant foreclosed the mortgages, and the plaintiff allowed the equity of redemption to expire, without redemption, in reliance upon the defendant's said agreement, which the plaintiff's testimony tended to show, the defendant renewed several times, both before and after the foreclosure.

The plaintiff thus suffered the title to become absolute in the defendant for the purpose of the sale and accounting under the agreement. The title thus acquired by the defendant was equivalent to a deed of the premises to the defendant *in trust* for the purpose of said sale and accounting. The plaintiff fulfilled on his part; and the defendant having acquired title as aforesaid sold the premises and realized more than was required for the payment of the mortgage indebtedness, other claims and costs and expenses, as to which there was no dispute; and the balance thus remaining in his hands, he owed the plaintiff; and he is liable for the same in this action under said agreement; and the parol evidence, offered as to the agreement of the parties and their proceedings under it, was properly received in evidence by the county court. It was not an agreement which the statute requires to be in writing.

Again, if this agreement be regarded as a contract for the sale of land, which the statute requires to be in writing, the doctrine of the statute of frauds does not apply; for, as before stated, this is not an action to enforce the contract, but an action to recover the balance of money remaining in the hands of the defendant, arising from the sale of the house and lot by the defendant, which he agreed by the contract to pay over to the plaintiff.

Such a case is not within the statute of frauds.

This contract was fulfilled on the part of the plaintiff by his allowing the equity of redemption under the decree of foreclosure to expire without redemption; and the title thus became absolute in the defendant, which was, under the circumstances, in effect, giving a deed of the premises to the defendant.

*Performance within one year, see 10 Eng. Rep. 468; 43 Am. Rep. 42; 60 Md. 343; 80 Kans. 510.—Ed.

The defendant took possession of the land, sold and conveyed it to a third party, received the pay therefor, deprived the plaintiff of all beneficial use or enjoyment thereof, paid the mortgage debt, costs and expenses to be paid out of the purchase-money, and withheld and neglected to pay over to the plaintiff the balance left in his hands above such disbursements.

The claim now is to recover the balance so withheld and due the plaintiff, arising out of the sale under this contract. To establish the plaintiff's right to recover such balance the parol contract between the parties is admissible in evidence, and it is as valid and binding as if it had been reduced to writing. *Bowen v. Bell*, 20 Johns. 338; S. C., 6 N. Y. Com. Law Rep. (Lawy. Ed.) 1037, notes; *Hodges v. Greene*, 28 Vt. 358.

It is claimed, also, that this parol agreement was a contract not to be performed within a year, and for that reason was within the statute of frauds. This point is not a tenable one. The contract was one capable of being completely performed within one year. It was not by its terms *not* to be performed within one year. The contract was to buy the Verder mortgage and hold it for the plaintiff, sell the house and lot for the benefit of the plaintiff, and account for the balance. All this might have been done within one year. No time was fixed in which it was to be done. It was an executory contract, upon the performance of which the defendant might have immediately entered.

Nor does it make it any less a contract which might have been performed within one year, because the defendant, instead of taking a deed from the plaintiff, resorted to a foreclosure of the mortgages. He was not by the terms of the agreement required to foreclose the mortgages. But assuming that he was, that does not bring it within the statute of frauds. The mortgages might have been foreclosed and the time of redemption on motion have been fixed by the court of chancery at a period of time within and much less than a year, and the title have become absolute in the defendant under the decree, premises sold, debts and expenses paid, and the balance have been paid over to the plaintiff within a year from the time of making the agreement.

It is also claimed that the parol evidence offered by the plaintiff tended to vary the decree of foreclosure, and was objectionable for that reason. This claim has no foundation. There was no attempt to vary the decree. The decree was conclusive, and the plaintiff's right to recover rested on its conclusiveness. The party to whom the defendant sold the premises rested upon this decree as a link in his chain of title. Neither the plaintiff nor defendant could safely question the conclusiveness of the decree; and the parol evidence was not offered or used for such purpose.

The defendant's objections to the charge of the court were as to the instructions given to the jury bearing upon this parol agreement as to the sale of the house and lot, and as to the effect of the same. We find no error in the charge in respect thereto, the evidence having been properly received by the court.

Judgment affirmed.

HUGHES v. VAIL.

TAXATION—QUARRY LEASED—R. L., § 348.

A slate quarry, leased for the purpose of manufacturing roofing slate, should be set in the list of lessor; and if set in the list of the lessee, a tax assessed thereon is invalid.

Real estate, within the meaning of the tax law, is land with its fixtures and accessories, --land, measurable and capable of description by metes and bounds.

Trespass. Plea, general issue and notice of justification under a tax warrant. Judgment for defendant.

Barrett & Barrett and Betts, for plaintiff. *Fayette Potter*, for defendant.

WALKER, J. The defendant, to justify the distraint and sale of the property for the recovery of which this suit is brought, as collector of taxes for the town of Pawlet, must show that he had legal authority to make the distraint and sale, and that the tax, which he is ordered to collect, is a legal tax.

The first essential of a legal tax is that it be assessed upon a legal list; if the

list fails all the proceedings in the collection of the tax are invalid and void. In this case the main question is, whether the plaintiff's list, as set in the quadrennial grand list of the town of Pawlet for the year 1882, is a legal list.

The State and county taxes for the payment of which the defendant as collector distrained and sold the property, which this suit is brought to recover for, were assessed upon this list.

The listers in making the quadrennial appraisal for the town of Pawlet set in the list to the plaintiff a "quarry" at \$10,000, as real estate. The interest which they thus set in the list to the plaintiff as a quarry is created and conferred by a written instrument between Alexander Clayton of the one part, and Evans & Lloyd of the other part, dated July 10, 1872; and by assignment of that instrument the plaintiff is now the assignee and owner of whatever interest was given thereby to Evans & Lloyd.

Real estate must be set in the list to the *last owner thereof* on the first day of April preceding the making of the list. The plaintiff was the last owner on the first day of April of the interest conferred by said written instrument; and if that interest is real estate within the spirit and meaning of the general listing law, it was properly set to him as the owner thereof. If it is not, then the listers had no authority to set it in the plaintiff's list. The four acres of land mentioned in said instrument are a part of said Clayton's farm, situated in said Pawlet, and of which he has been the owner and occupant since 1857, and which was set in the list to him in 1882, the same it had been for many years before without any reduction of the acreage on account of the plaintiff's interest in said four acres.

The said written instrument was executed with the formalities of a deed, and gave unto Evans & Lloyd and their assigns the right and privilege to enter into and upon about four acres of Clayton's farm, on the lot described, and to open and test the slate rocks or quarries within said four acres, and to make roofing slate within and from the same, if suitable material for the purpose should be found, and to continue so long as suitable material may be there found for the purpose.

And said Evans & Lloyd hired and took the rights and privileges for the period mentioned, and agreed to go on and test the slate rocks, and if suitable material was found, to manufacture roofing slate therefrom until the rock is exhausted; and to return every quarter, from the time they began to work, to Clayton, a true account of all slate manufactured during each preceding quarter, and of all stone got out for other uses, and of all stone sold by them; and to pay as rent for the rights and privileges granted the sum of twenty-five cents for each square of roofing slate manufactured and sold, and five per cent of the value of other stone. Clayton reserved a lien on all slate and stone as security for the payment of the rent; and he also reserved the free and full use for farming purposes of all of said four acres which were not needed for working the ledges and manufacturing roofing slate; and it was also agreed therein that if the party of the second part failed to perform, then all rights and privileges granted were to be forfeited, and the instrument to cease to be binding at the election of Clayton. The plaintiff now stands in the place of Evans & Lloyd.

It is apparent from this instrument that Clayton retained the control and dominion of the land for all purposes except as required for the slate business; he parted with no title to the slate, as it lies in the rock constituting a part of the land. No title passes until the slate has been transformed into personal property, and payment made as stipulated; the ownership of the land remains in Clayton. The party of the second part *took and hired* certain rights and privileges only, which he may abandon at any time, and when so abandoned Clayton cannot compel him to go on. His remedy is an action for damages for a breach of contract, or his option to terminate it.

The elementary writers upon the subject of taxation say, in substance, that real estate assessable for taxes means land with its fixtures and inherent and existing accessories. It consists of territory measurable as land, and capable of description by metes and bounds, and of buildings. An interest in lands to be assessable for taxes as real estate, must be susceptible of such territorial location and de-

scription, or to be capable of being dealt with in municipal and business matters as land. It must be such an interest in land as can be conveyed and transferred only by deed executed and recorded according to the requirements of the statute for the conveyance of real estate; for otherwise a collector of taxes could not enforce the collection of the taxes assessed thereon upon the property or interest itself. It must be of such a character that a collector's tax deed thereof would give good title to it. The inventory required by law to be filled out by the tax payer in this State contemplates territory, and not an unascertained interest in land; it calls for the number of acres; the grand list book also calls for the number of acres; and section 348, Revised Laws, requires that the list when completed shall contain the *quantity* of real estate *owned* by each taxable person.

These requirements would seem to exclude all such contract interest in land as is conferred by said written instrument from taxation as real estate. Quarries are taxable, it is true, to the owner of the real estate in which the quarries exist; but, under the statute, they must be set in the list, with the real estate of which they constitute a part, and not to the person who has nothing more than a chattel interest therein, or a right under a mutual contract, like the one in question, to manufacture stone therefrom upon the payment of rent. Such a right does not make the person the owner of the quarries, in fact, nor within the meaning of the statute for listing purposes.

The plaintiff does not own the four acres of land on which the slate rock or quarry is situated. His interest therein cannot be described as real estate by metes and bounds. It is not measurable as land, and hence it is not such an interest in land as is taxable as real estate within the meaning and spirit of the statute for taxation of real estate; and the listers had no jurisdiction of it as such.

As was stated in the argument, this case stands upon substantially the same ground as *Clove Spring Iron Works v. Cone*, 56 Vt. 603, and is not distinguishable from it. In that case, the contract relied upon as a basis of listing the interest conferred as real estate, gave the party the right to go upon the land of another and cut and remove the wood and timber growing thereon for a term of years. In this case, it gives the right to go upon the land of another to open and test slate rock, and get out and manufacture roofing slate. In one case the right is to take what grows upon the surface; in the other, what lies upon and below. In that case the land was assessed to the owner, and the growing timber to the party who had the right to cut it. In this case the *land* is assessed to the owner, and the right to get out and manufacture slate, under the name of "quarry," to the party having the right. Both cases rest upon the same principle.

Listers have not the right, under the statute, to set the *land* in the list to one, and what grows upon the surface or lies beneath and constitutes a part of the land, to another; especially, under such an agreement as is shown in this case.

As the plaintiff had no interest in the real estate described in the contract shown that could be appraised and set in the list to him as real estate, it was error in the listers to so put it in the list; and the assessment of taxes upon it was void; and the defendant's attempted justification under the warrants in his hands for the collection of the taxes in question assessed upon that list, fails.

As this conclusion is decisive of the case, it is not necessary to pass upon the other questions presented by the exceptions.

Judgment reversed and judgment for the plaintiff for the sum agreed.

KENNEDY v. MORGAN.

NEGLIGENCE — PLEADING — DECLARATION.

In an action to recover for injuries received by the plaintiff's son, claimed to have been caused by the defendant's negligence, while lawfully engaged in tearing down and removing the brick walls of a school-house, in that the walls fell through a want of sufficient bracing, the declaration is bad on demurrer, unless such *facts* are alleged, that the court can see the relation of the parties and the duty which the defendant owed to the boy. A mere allegation of duty is insufficient; but the *facts* from which the duty springs must be alleged.*

* *Moak's Van Santv. Pl.* 219 *et seq.* — *En.*

Case for negligence. Demurrer to the declaration sustained.

Redington & Butler, for plaintiff. *Baker & Howe*, for defendants.

POWERS, J. Negligence is a shortage of legal duty.

All facts essential to the creation of the duty must be alleged in a declaration charging negligence upon such facts. If the facts stated in the declaration do not raise the duty, the duty cannot be established by proof of other facts not stated. *Allegation* as well as proof is the foundation of a right of recovery. If the pleader merely alleges the *duty* in his declaration, he states a conclusion of law; whereas the elementary rule is that the *facts* from which the duty springs must be spread upon the record so that the court can see that the duty is made out.

No intendments are made in favor of a declaration challenged by a demurrer.

The defendant was engaged in a lawful work. No relation, obligation or duty to the plaintiff's son is alleged; nor does it appear that he had any knowledge of the son's presence in the vicinity of his work.

Nothing actionable then is disclosed in the declaration. 2 Addison on Torts, 1147; Gould's Pl., chap. 3, § 7; *Fay v. Kent*, 55 Vt. 557.

There was no error in the judgment below; but the same is *pro forma* reversed and repleader awarded.

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POWERS v. POWERS' ESTATE.

PROBATE *Howe* — ADMINISTRATOR — COMMISSIONERS — SUITS DISCONTINUED — WAIVER — R. L., §§ 2118, 2180, 2148, 2154.

When the probate court grants letters of administration, it should at the same time appoint commissioners to adjudicate upon the claims against the estate; and it is under the same duty to creditors as to the estate to appoint the commissioners.

And it is also the duty of the court to appoint the commissioners on the petition of a creditor whose suit had been heard by referees, and a report filed before the death of the intestate, but had been recommitted for further hearing.

Such creditor waived none of his rights, although he took part in the proceedings, after first objecting to the jurisdiction of the referees.

Section 2148, R. L., and following sections, by which an administrator may enter and prosecute or defend certain suits, are rendered wholly inoperative by section 2154, R. L., when commissioners are appointed.

Appeal from the order of the probate court denying the petition of the plaintiff, praying for the appointment of commissioners upon the estate of J. C. Powers, deceased. Appeal dismissed.

Barrett & Barrett and *Ormsbee & Briggs*, for plaintiff. *W. H. Smith*, for defendant.

POWERS, J. At the hearing before the referees, February 27, 1883, the plaintiff objected to further proceedings before the referees on account of the death of the defendant; but his objection was ignored, and the hearing proceeded. It is not to be said that the plaintiff waived any rights to apply to the probate court for the appointment of commissioners by the continued proceedings before the referees, as the latter proceedings went on in spite of his protests. He did not voluntarily submit to the further jurisdiction of the county court; but on the same day presented his petition to the probate court, praying for the appointment of commissioners.

This petition was ultimately denied by the probate court; and the question presented for determination is, whether the plaintiff as matter of law had the right to call for the appointment of commissioners.

In the Probate Act of 1797, which was in force many years, it was provided that executors and administrators might, under an order of the probate court, by public notice, require creditors of the estate they represented to exhibit to them their claims within a limited time, failing which, such claims should be forever barred. It was further provided that if the administrator supposed the estate to be insolvent, he should represent its conditions and circumstances to the probate court, and thereupon the court should appoint commissioners to adjust the claims of creditors. The act further provided that attachments of property should be dissolved in pending suits only when commissioners were so appointed, and that

no action should be maintained against the administrator without his consent. Under this act it manifestly rested with the administrator whether to apply for commissioners or not. From an inspection of the claims exhibited to him, he could well judge whether the assets were ample for their liquidation, or whether he was called upon to represent the estate as insolvent, and so compel creditors to accept a *pro rata* dividend upon the allowance of commissioners.

But now, and for many years past, all estates are settled as insolvent estates, without any formal representation of insolvency by the administrator; and no reason exists for giving the option of calling for commissioners to the administrator alone. The language of our present statute is peremptory: "Where letters testamentary or of administration are granted, the court shall appoint two or more persons to be commissioners, etc." R. L., § 2115.

In all cases, save two exceptional ones, not material here to be noticed, the statute has provided a special tribunal which can adjudicate upon the claims of creditors at less expense and with greater expedition than the ordinary common-law tribunals.

By section 2130, R. L., all pending suits at the time commissioners are appointed shall be discontinued.

After such appointment no action can be continued against the estate except for the recovery of real estate. *Warner v. Crane*, 16 Vt. 82.

Our probate code has grown up into a system by itself, the leading idea of which is to confer upon the probate court exclusive jurisdiction in the settlement of estates. A board of commissioners to adjust the claims of creditors, in offsets thereto is one of the instrumentalities provided to accomplish this idea. Creditors have the same interest in the appointment of this board as the estate has, and the probate court owes the same duty to one as to the other.

In view of the general policy of the probate law, as well as the peremptory language of the section quoted above, we hold that creditors have the right to call for commissioners if the court neglects its duty to appoint.

The petitioner confessedly had a debt of near \$300, and claimed a much larger one. The validity of his debt was not for the court to determine, as this would practically usurp the jurisdiction of the commissioners.

Section 2143 and following sections of Revised Laws were first found in the Judiciary Act of 1797, and seem originally to have been enacted rather to define the power of the court than to affect the settlement of estates. The language of these sections may seem to work an inconsistency in the probate system; but their force is wholly restrained by section 2154, which makes them inoperative when commissioners are appointed.

The judgment of the county court is reversed and judgment rendered that the prayer of the petition be granted, and ordered that this judgment be certified to the probate court.

GRISWOLD v. BARKER.

MORTGAGE — BAIL FORFEITED — CHANCER.

The mortgage was executed to secure the petitioner for becoming bail by way of recognizance for the mortgagor's son, who had been indicted. On failure of the son to appear at court, the bond was forfeited, judgment rendered thereon without *scire facies* proceedings, an execution issued, and the amount was paid by the petitioner.

Held, on a proceeding to foreclose the mortgage, that it is immaterial whether the judgment for the penalty and the execution were void, as that objection is merely technical, and the petitioner's liability would continue; nor was the petitioner bound to delay payment that a motion to chancer might be interposed.

Foreclosure of mortgage. Heard on the pleadings and a special master's report. Bill dismissed.

It appeared that Alonzo W. Barker, a son of the defendant, was arrested by virtue of a warrant issued by the county court upon an indictment found against him for the illegal sale of liquor; that the petitioner, March 18, 1880, became bail for said Alonzo; that the mortgage was executed August 24, 1880; that the mortgage contained this: "Now if said Jane Barker shall indemnify and save

and keep said Griswold free and clear of and from all loss, cost, trouble, or expense, on account of his becoming bail as aforesaid, then this obligation to be null and void," etc. It furthered appeared:

"It was understood that said Alonzo W. Barker was not to appear in accordance with said recognizance, and he did not appear. At the March term of said court, 1880, the bond was called and forfeited, and judgment rendered thereon for the penalty named in the bond. Execution on said judgment was issued on the 16th day of August, 1880, against said Alonzo W. Barker and said Griswold.

"The above-mentioned proceedings were all as shown by the docket entries in said cause.

"The sheriff who had the execution for collection, pressed said Griswold for the payment of it, and insisted that, if said Alonzo W. Barker did not pay it, said Griswold must. Said Griswold, after the execution was in the hands of the sheriff, had several interviews in relation thereto with said Alonzo W. Barker, who told him that his counsel said that nothing could be done about the matter until the recognizance should be sued on *scire facias*.

"It was claimed by said counsel that said judgment and execution were void, and that *scire facias* upon the recognizance was the proper method of enforcing the forfeiture thereof; and said Griswold was seasonably notified by them of that claim, and that he must not pay the execution.

"Said Alonzo W. Barker not having taken care of said execution, said Griswold paid it on the 13th day of October, 1880."

John Howe and P. R. Kendall, for orator. *Bromley & Clark and H. H. Harman*, for defendant.

ROWELL, J. The judgment of forfeiture fixed the petitioner's liability to such an extent that he had a right to pay without waiting to be forced, if no sufficient reason existed as between him and the defendant why he should not, and none appears. Conceding that the judgment for the penalty and the execution issued thereon were void, as contended, that objection was merely technical, as the petitioner's liability continued notwithstanding, and proper proceedings could have been instituted at any time to enforce it.

Nor was the petitioner bound to delay payment that a motion to chancer might be interposed. There had been ample opportunity for such a motion, but it had not been made; nor does it appear that there was any ground for making it, and probably there was none. The case then is this: The petitioner was under obligation on his recognizance, without defense on the merits or ground for a motion to chancer, and so he paid as well he might.

If authority is needed, we have it in *Curtis v. Banker*, 136 Mass. 355, which was thus: Defendant gave plaintiffs a bond of indemnity for becoming sureties on the official bond of Holman, a paymaster in the army. Holman defaulted, and the government sued his bond without first demanding of him or the plaintiffs payment of the deficit. Plaintiffs knew of no defense, and were advised that there was none, and so, after vainly endeavoring to obtain relief through the court of claims, they suffered a default and paid the judgment, and brought this suit on defendant's bond of indemnity. Defendant objected that under their bond to the government there could have been no legal default nor legal compulsion on plaintiffs to pay, until demand on them or Holman, and that by consenting to a default they had waived a legal defense. But the court said, that if the defense suggested might have been made, it was entirely technical in its character, as it would have operated only to defeat the suit as then brought, and been no bar to a suit brought after proper demand, and that whatever might have been the case had there been a good defense on the merits, plaintiffs' failure to interpose a purely technical defense, although known to them, would not prevent their recovery, for it could not be ruled as matter of law that they were bound to make such defense.

Decree reversed, decree for the petitioner, and cause remanded, with mandate.

SHERMAN v. WINDSOR MANUFACTURING CO.

MANDATE — AMENDMENT — PLEADING — STATUTE OF LIMITATIONS — R. L., § 775.

When, after several delays caused by the defendant, the supreme court affirms the decree below overruling a demurrer to the bill, and remands the case with a mandate, the mandate is obligatory on the court of chancery; and it has no power to allow the defendant to withdraw the demurrer and plead the statute of limitations; and especially is this so, as the same question could have been raised by the demurrer, and also as the defendant had moved in the supreme court for leave to withdraw the demurrer and to answer, and the case was left "with the court," for counsel to furnish briefs within a time certain, and defendant failing to furnish a brief, the decree below was affirmed; the circumstances being the same as when the motion was first made.

Bill in chancery. Heard on motion of the defendant. Motion denied. The opinion states the facts.

William Batchelder, for defendants. *Prout & Walker*, for orators.

ROWELL, J. The original bill in this case was brought to the September term, 1880, of the court of chancery, to which a general demurrer was filed, which was overruled *pro forma* at the September term, 1883, and a decree passed for the orators according to the prayer of the bill, from which the defendant appealed.

At the January term, 1884, of the supreme court, the defendant moved for leave to withdraw its demurrer and answer over, "and raise the same questions by answer that could be raised by demurrer." The cause was left "with the court," for counsel to furnish briefs within a time certain, which not being done on the part of the defendant, said motion was overruled, the decree affirmed, and the cause remanded, with mandate.

At the March term, 1884, of the court of chancery, a decree for the orators was entered pursuant to mandate, and the cause referred to a master to take the account; after which, but at the same term, the defendant moved that the decree be reversed and set aside, with leave to answer or plead, and showed by affidavit that it desired to set up the "statute of limitations as a defense." The court found that the condition and circumstances then were the same as when said motion was made in the supreme court, no new facts having intervened, and denied the motion, on the ground that the mandate of the supreme court was obligatory upon it; and the defendant appealed.

It is obvious that the defendant is now asking for an opportunity to renew a question that was really raised by its demurrer, and might have been litigated under it had the defendant so elected, but which in effect was decided against it by the supreme court when it affirmed the decree of the court of chancery; for it is now well settled that lapse of time as a bar to a suit in equity may be availed of by demurrer when the objection appears on the face of the bill, as whatever objection of that kind there is does in this case. Nor is this motion different in legal effect from the one made and denied in the supreme court.

In this state of the case, the mandate of the supreme court was obligatory on the court of chancery, and it was its duty to proceed to carry it into effect as it did. R. L., § 775. Nor does an appeal lie in such a case.

Appeal dismissed, with costs.

RUSZITS v. HILLIARD.

INSOLVENCY — NON-RESIDENT CREDITOR — PRACTICE — PENDING SUIT CONTINUED — R. L., § 1797.

A non-resident creditor can sustain an action against a party adjudged an insolvent debtor, while his estate is being settled by an assignee, if such creditor has not participated in the proceedings, and has not submitted to the jurisdiction of the insolvency court.

But the statute — R. L., § 1797 — whereby a pending suit shall be stayed on the application of the debtor, until the question of discharge has been determined, is binding upon non-resident as well as resident creditors. But a formal application in the nature of a motion for continuance must be made to the court; and a plea in bar merely setting up the insolvency proceedings will not be treated as such motion.

Assumpsit. Pleas, general issue and two special pleas in bar. Heard on de-

murrer to the plaintiff's replication to the special pleas. Judgment that the replication was sufficient.

Redington & Butler, for defendant. *F. G. Swinington*, for plaintiff.

ROYCE, C. J. The pleas in bar allege, that before the commencement of this suit the defendant had been adjudged and declared an insolvent debtor, under R. L., chap. 98; that an assignee had been appointed and the estate duly assigned under the provisions of that chapter; that the assignee had proceeded to settle the estate, and that said insolvency proceedings were still pending and the question of the discharge of the debtor not yet determined; and conclude by praying judgment if the plaintiff ought to have judgment or execution for his said damages on or against the person or estate of the defendant.

The replication alleges, that the plaintiff ought not to be barred, because at the time of the making of the promises and undertakings by the defendant in the declaration mentioned, the plaintiff was, and ever since has been, a resident of the State of New York, and has not proved his claim against the estate of the defendant, or participated in any manner in said insolvency proceedings, or submitted himself to the jurisdiction of said court of insolvency in said proceedings.

The demurrer to the replication admits the facts as alleged in it. The replication is such an one as a non-resident creditor might make to a plea of discharge by the court of insolvency, and, upon the authority of *Bedell & Warden v. Scruton*, 54 Vt. 493, and *McDougall v. Page*, 55 id. 187, would be a full answer to such a plea. It is established by those cases that the rights of such a creditor are not affected by such a discharge, the obligation of the debtor remains as before the discharge. The pleas are in bar; and the legal effect of a judgment sustaining them would be to conclude the plaintiff from any further prosecution of the claims described in the declaration. There are no such allegations in the pleas as will bar the plaintiff from the further prosecution of his suit, and that renders them bad as pleas in bar. The defect is a substantial one, and the demurrer to the replication reaches back to it.

Our attention has been called to the act passed in 1880, and which is section 1797, R. L., which prescribes that no creditor whose debt is provable shall, unless the amount due is in dispute, be allowed, after the filing of a petition in insolvency, to prosecute to final judgment a suit at law or in equity, against the insolvent debtor, unless there is unreasonable delay in obtaining the discharge, and that any such suit shall, on application of the debtor, be stayed to await the determination of the court of insolvency upon the question of discharge. That act, it will be noticed, is made applicable to all creditors whose debts are *provable*. It is a law affecting the remedy, and is binding upon non-resident as well as resident creditors.

It is not alleged when the promises and undertakings of the defendant were made. If made after the passage of the act of 1880, they were undoubtedly within and subject to the provisions of that act; if made before, the legislature had the right to prescribe such rules as to the manner of their enforcement in the courts of the State as would not impair the obligation of the contract, or virtually deprive the plaintiff of a remedy. It is evident that the statute did not contemplate that such a suit should be discontinued, or that the plaintiff should be barred from prosecuting it; it is to be *stayed* for the period designated, upon application made as provided by the act. The application must be made to the court before which the suit is pending, and is in the nature of a motion for a continuance, for the reasons specified in the act. Such an application, or motion, would present an issuable fact for the determination of the court; and if the facts are found that entitle the debtor to a stay of the proceedings, it is made the duty of the court to continue the cause.

As pleas in bar are not proper pleadings to present such an issue, and cannot be treated as an equivalent for an application or motion of the character indicated, the judgment of the county court adjudging the replication sufficient is affirmed, and the cause remanded.

STAFFORD v. ADAIR.

MORTGAGE—REAL ESTATE, WHAT IS—BUILDING ERECTED BY TENANT ON LESSOR'S LAND—ASSIGNEE—FORECLOSURE—PARTY—INSOLVENCY.

A building, erected by a tenant at will, on land owned by a railroad company, under a parol arrangement by which the tenant could remove the building at any time within thirty days after notice of termination of the lease had been given by the company, is *real estate*; and a mortgage, executed in accordance with the statute regulating the mortgaging of realty, is valid; and the building will not pass to the mortgagor's assignee in insolvency as personalty.

But personal property, as a horse, wagon, etc., also included in said mortgage, will pass to such assignee; and this, on the ground that the instrument was a mortgage of real, but not personal, estate.

In a proceeding to foreclose such mortgage, the assignee is a necessary party defendant.

Bill to foreclose a mortgage. Heard on demurrer to the bill. Demurrer sustained. The bill alleged, that the mortgage was "prepared upon an ordinary real estate form of deed."

Prout & Walker, for orator. *J. C. Baker* and *C. L. Howe*, for defendant.

ROYCE, C. J. This was a bill brought to foreclose a mortgage executed by the defendant Adair to the orator, on the 27th of September, 1880, to secure the payment of a note of that date for the sum of \$500 and interest. The property described in the mortgage consisted of a certain shop, situated just north of the depot in Wallingford village of the Bennington and Rutland railroad, and being the same shop in which the mortgagor manufactured monuments, tombstones and like marble work; also all the tools and machinery for said business, work on hand, stock in trade, and all marble on hand, or to be on hand; and the horse, wagon, and harness that he then worked and used.

It is alleged in the bill, that Adair was, upon his petition, in February, 1884, adjudged an insolvent by the court of insolvency, and that the defendant, Frank W. Johnson, was elected his assignee, and is acting as such; and has taken possession of the property described in said mortgage, and claims that it belongs to the insolvent's estate. The case was heard upon a demurrer to the bill, filed by Johnson as such assignee.

The shop was erected upon the land of the Bennington and Rutland Railway Company under a parol arrangement, that if at any time in the future they should wish to resume possession of the lot, they might give Adair thirty days' notice, within which time he should be at liberty to move off the structure, if he desired.

The estate which Adair acquired in the land upon which the shop was erected under the arrangement made with the railway company was that of tenant at will. Such a tenancy is created where lands or tenements are let by one to another to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. *Coke on Littleton*, § 63; 2 *Bl. Com.* 146; 4 *Kent's Com.* 382; 1 *Hill. Real Prop.* 382.

The lessor is generally denominated as the landlord, and the lessee as the tenant. Such a lessee has the exclusive right to the possession of the leased premises during his tenancy, and may maintain an action for any disturbance of his possession. He has the right to the use and occupation of the premises during the pleasure of the lessor. He has an interest in the premises to that extent. His estate comes within the definition of the words *land*, *lands* and *real estate* by section 9, chapter 1, R. L., and which requires that they shall be treated as real estate.

The interest that he had might be conveyed by mortgage. The shop was a fixture, and the legal title to it was conveyed by the mortgage.

The mortgage of a building erected on leased land under an agreement that the lessee might remove it, or the lessor should pay for it at its appraised value, has been held to be a mortgage of realty, falling within the designation of a chattel real at common law. *Griffin v. Marine Co. of Chicago*, 52 Ill. 130.

The legal title to the shop having become vested in the orator by virtue of the mortgage, his title would not be affected by the subsequent insolvency of the mortgagor. All the interest that the mortgagor had in the premises after the execution of the mortgage, or that his estate now has, is an equity of redemption

It is well settled, that the assignee of an insolvent debtor under a general assignment for the benefit of creditors takes the property of the debtor subject to all equitable liens. 1 Jones on Mort. 204; *Mitford v. Mitford*, 9 Ves. 100; *Ex parte Herbert*, 13 id. 188.

All the property in the shop that passed to the assignee under the assignment was the debtor's equity of redemption. The lien given by the mortgage as security for the debt described in it remained after the insolvency of the mortgagor, as before. And his right to the security is superior to the right claimed by the assignee.

The personal property described in the mortgage was not so conveyed or treated by the parties as to be secure against a *bona fide* sale by the mortgagor, or attachment or levy of execution by his creditors. It was subject to attachment and levy at the time the debtor was adjudged an insolvent and the assignee was appointed, and under the insolvent law passed to the assignee. All the right and title of the assignee to it is not dependent upon the fact as to whether the debtor was adjudged an insolvent upon his petition or the petition of his creditors. In either case the creditors are entitled to the same benefit from his estate.

A question is made by the demurrer as to the propriety of making the assignee a party defendant. Under the insolvent law the property in the equity of redemption passed to the assignee by the assignment. The right to redeem is vested in him; hence he is a necessary party in any proceeding instituted to foreclose that right. 2 Jones on Mort. 1488.

The *pro forma* decree of the court of chancery, sustaining the demurrer and dismissing the bill, is reversed, and cause remanded, with mandate that a decree of foreclosure be entered for the orator for the shop described in the bill.

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TOWN OF ST. ALBANS v. THE NATIONAL CAR CO.* VILLAGE OF ST. ALBANS v. SAME.

TAXATION — NON-RESIDENT STOCKHOLDERS, WHERE MAY BE LISTED — CONSTITUTIONAL LAW — MANDAMUS — JUDGE.

Under our statute — R. L., § 283 — the stock of non-resident stockholders of a corporation located in this State may be legally set in the list of the town in which the corporation has its principal place of business; and the corporation compelled by *mandamus* to pay the taxes assessed upon such stock.†

A statute authorizing such taxation, and allowing the corporation to deduct the taxes thus paid from the dividends due to such stockholders is constitutional.

When a charter is taken subject to future legislation, it may be modified not only by special amendments, but also by a general law.

After the parties had formally agreed in their statement that the "list was duly made out, verified, and returned according to law," if notice of assessment were necessary, the court would hold that it was given.

A judge of the supreme court can legally make an order for the return of a petition for writ of *mandamus* and for filing an answer thereto, although the proceeding was in favor of a town to compel a corporation to pay a tax, in which town the judge was a tax payer,—as it was a ministerial, not a judicial, act.

Petition for a writ of *mandamus*.

Stephen E. Royce, for town of St. Albans. *Wilson & Hall*, for village of St. Albans. *Noble & Smith* and *E. J. Phelps*, for respondent.

TAFT, J. The action of judge ROYCE in making an order for the return of the petition, and the filing of an answer, was not an adjudication of matters in his own cause. It was of the nature of a ministerial act, in which no right of the judge was passed upon.

* Heard at the general term, 1888.

† R. L., § 283. "Shares of stock in banks, steamboat and transportation companies, trust companies, moneyed or other corporations, whether named in this section or not—except railroad corporations—shall be set in the list like other personal estate to the owner thereof, in the town where he resides, if he resides in the State, otherwise in the town where the corporation or company issuing such stock has its principal place of business."

§ 284. "Taxes assessed on such stock of non residents shall be paid by the corporation or company, and it shall hold such stock and the dividends thereon as security for such payment, and may deduct the amount from any dividends payable to such shareholders."

The National Car Company was incorporated by the legislature of this State in 1868. The charter was granted subject to the control of future legislation, as the public good might require. In the year 1880 the legislature passed an act (No. 83, acts of that year) making the stock in corporations liable to taxation, the stock of non-residents to be set in the list in the town where the corporation had its principal place of business. The office of the car company has always been in St. Albans, in this State, and the taxes in question are those assessed upon the stock of non-residents on the list of 1882. The first question that arises is in reference to the validity of the act of 1880, as to the taxation of stock held by non-residents. Can such stock be legally taxed in this State? Are the taxes sought to be collected valid? The power of taxation by a State extends to persons, property and business within its jurisdiction. Personal property follows the person of its owner, and has its *situs* at his domicile; but such as is visible, movable, tangible, may for the purposes of taxation be separated from him, and he may be taxed on its account at the place where it is actually located. Debts can be taxed only in those places where the creditors reside. They have no *situs*, but follow that of the owner. These are familiar adjudged principles. The shares of stock, upon which the taxes in question were assessed, were personal property. See charter, § 4; R. L., § 3258. Admitting the general doctrine that in the absence of all provisions to the contrary, the stockholders in a corporation can be taxed upon their stock at the place where they reside, we think it is equally true that the nature of stock is such that it may be taxed elsewhere. If shares of stock represent nothing but that which is intangible, it could with better reason be claimed that it must always follow the domicile of the owner, and could not be taxed elsewhere; but it represents the property of the corporation, that in which the capital stock is invested. The owner of stock is not merely the owner of a right to dividends, but he is the owner of a proportionate share of the property of the corporation; and we think that for this reason it has well been held that the law which creates the shares "may separate them from the person of their owner, for the purposes of taxation, and give them a *situs* of their own." *Tappan v. Merchants' National Bank*, 19 Wall. 490. Judge COOLEY, in his valuable work on Taxation, page 274, in stating the general rule that "the individual corporators, if taxed on their shares of stock, are to be taxed where they respectively reside," adds this important qualification, "though they may be, and sometimes are, taxed at the place where the corporate business is carried on."

But we think there is a still stronger reason why the taxation in question was valid. The corporate home of the company is in this State; the corporation is expressly subject to the exclusive legislative authority of the State; its dwelling is here, although it may do business elsewhere; and its members, when they enter into the relation of stockholders, do so subject to such changes in the law relating to the corporation as the supreme legislative authority deems it proper to make. The remarks of WAITE, Ch. J., in the opinion delivered in the case of *Canada Southern Railway v. Gebhard*, 109 U. S. 527, seems to us to enunciate the correct principle, and to be decisive of the question under consideration: "Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country, *Paul v. Virginia*, 8 Wall. 168, but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes." This principle is as applicable to the duties and liabilities of the individual stockholder, powers and obligations of the corporation itself. There is no just reason why it should not be so held. The stockholders apply to the legislative authority, for certain privileges of an extensive and valuable char-

acter; the corporation becomes a creature of the State, and the stockholders take their organization with all the liabilities and duties imposed upon them by the law of the land, with the implied right on the part of the State to modify such liabilities and duties in respect to taxation as the established policy of the State authorizes. It was conceded in argument that if the statute relating to the taxation of the shares had been inserted in the charter, that taxation under it would be legal. The charter would have been taken by the stockholders subject to such provision. But the stockholders took the charter subject to the right of the legislature to modify or repeal its provisions. Such modification may be made by general law, applicable to all similar corporations as well as by special amendments to each charter. Taking the charter subject to the power of future legislation, the stockholders took it subject to the law in contention as absolutely as if it had been included in the charter originally. The corporation also received its existence subject to modification by future legislation, though under the form of a general law. We see no valid reason why we should hold, without such a provision in the charter originally, that upon the acceptance of it, the stockholders or corporation should be exempt from the duties relating to taxation which are intended to apply to all alike. The taxation, therefore, in the manner shown, was legal.

From the principles stated, it logically follows that the provision of the statute requiring the corporation to pay the taxes is not in violation of the Constitution of the United States. The rights, powers, and duties of the corporation, and its individual stockholders, are governed and controlled by the general laws of the land; and if they desire to retain their corporate rights they must submit to such reasonable and valid regulations as the government deems it proper to establish.

The shares of bank stock owned by non-residents have been taxed in substantially the same manner in this State since 1849. See No. 18 of the acts of that year.

Another objection made by the brief for the company is, that no notice of the assessment was given the stockholders. We do not consider this question, as it does not, in our opinion, arise. It is agreed that the "list was duly made out, verified, and returned according to law." It could not have been so duly made out, verified, and returned, if the lists omitted any necessary step in the assessment. If notice was necessary we must hold that it was given.

Shall the writ of *mandamus* issue? The right of the petitioner to the taxes in question is clearly established; it is clear and plain. The writ should not be granted if the petitioner has an adequate remedy at law. Taxes are not debts in the ordinary sense of that term: *Cooley on Tax*, 13; and cannot be recovered in an ordinary action at law. *Webster v. Seymour*, 8 Vt. 135; *Shaw v. Peckett*, 26 id. 482; *Johnson v. Howard*, 41 id. 122; *Daniels v. Nelson*, id. 161. The trustee process may be maintained in some cases, but the collector must find some one owing the person assessed before he can by that process collect the tax. It is said that an action at law can be maintained against the corporation. How? The tax is not strictly against the corporation, but against the non-resident stockholders. The statute simply makes it the duty of the corporation having control of the property of the non-resident stockholders to pay their taxes therefrom. It is at least doubtful if any such action could be maintained against the corporation. But admitting such an action could be sustained, this brings us to the question whether in the collection of taxes by a municipal corporation, an action, either at law or in equity, is an adequate remedy.

The non-payment of taxes may seriously embarrass all the operations of the government; and if the State were forced to resort to actions at law for their collection, the expenses of litigation might exceed the receipts of the treasury. So serious did this matter become in one of our sister States, that the legislative power interfered and provided that no judicial interference should be had in any levy or distress for taxes; and the court held the provision a valid one. The court say: "How could a government calculate with any certainty upon the revenues, if the collection of the taxes was subject to be arrested in every instance in which a tax payer or tax collector could make out *prima facie* a technical case for arresting such collection? Far better is it to let the individual pay to the

government what it demands of him, at the time of the demand, as he will be certain of getting it back with interest, after more or less delay, if it was not due." *Eoe v. State*, 21 Ga. 50; *Cody v. Lennard*, 45 id. 85; *Seafeld v. Perkerson*, 46 id. 850. And see *Pullen v. Kinsinger*, U. S. C. C., Ohio S. D.; 9 Am. Law Reg. (N. S.) 557. Judge FIELD says in *Hagar v. Reclamation Districts*, 111 U. S. 701. "The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice." More summary methods are required for the enforcement of taxes. The agreed statement of facts shows that a large amount of the stock upon which the taxes in question were assessed was sold after the date of the list and before the taxes were payable, so that there is no adequate remedy for their collection, the party assessed being without the State and having no property within it; and the only remedy suggested in those cases where there has been no transfer seems to be an action at law against the corporation.

Had the petitioners in this case invoked the aid of a court of equity, a more serious question would be presented than the one raised by the bill of interpleader, brought by the respondent. What we have already said as to the delay attendant upon legal proceedings for the collection of taxes is directly applicable. Were it not, there are grave objections to the position taken by the respondents. Are they not interested in the litigation? And has the court of chancery power or process to bring the non-resident stockholders before it? But it is not necessary to discuss these questions; for upon the ground stated such proceedings furnish no adequate remedy for the collection of taxes.

We hold there is no such adequate remedy as to bar the issue of a writ of *mandamus*.

It is, therefore, adjudged that a writ of *mandamus* issue in accordance with the prayer of the petition, the payment of the sum named therein and costs to be made within fifteen days from the issuing of the writ.

STATE v. PETERS.

CRIMINAL LAW — INDICTMENT — PERJURY — PLEADING — LISTERS — R. L., §§ 8, 2658.

TOWNS are required by statute to elect annually three, four, or five listers, who constitute a board, a majority of which is essential to legal action; one acting alone has no jurisdiction; his acts would be void; hence, an indictment, charging a lister with perjury in that he had violated his official oath, is defective without allegation of the election of the requisite number of listers, and that they *qualified and acted as such*.

Indictment charging the respondent with perjury for violating the official oath as lister. Heard on demurrer to the indictment. Demurrer overruled.

A. M. Dickey and John H. Watson, for respondent. J. K. Durling, State's attorney, and Phineas Chamberlin, for State.

TAFT, J. This case was heard upon demurrer to an indictment charging the respondent with having violated the oath taken by him as lister for the town of Bradford, in the year 1881. It is alleged in the indictment that the respondent, Dudley K. Andross, and Preston S. Chamberlin were duly elected listers at the annual March meeting in that year. It is not alleged that either Andross or Chamberlin ever qualified or acted as such. It is claimed that the want of such allegation renders the indictment defective. Section 2658, R. L., provides that towns shall choose annually three, four, or five listers, and the number so chosen have joint authority to proceed in the discharge of their duties by preparing the annual lists. The concurrence of a majority of the board is sufficient — R. L., § 8 — and is required in all cases. The listers act as a board; and in order to give them jurisdiction of the matters before them, it is essential that the requisite number should be chosen and qualified. If a town chooses but one lister, it is evident that he alone has no authority to act in, or jurisdiction of, the matters which should properly come before the board. And until the legal number of listers is duly chosen and qualified, one member cannot commit the crime of perjury by violating the oath required to be taken. His acts would be

null and void in every respect. We are not called upon to decide what the effect of electing only a major part of the board would be, as there is no allegation that any one, save the respondent, ever qualified or acted as lister. It is an essential requisite in every indictment, that all matters material to constitute the particular crime charged should be positively and distinctly alleged. In *State v. Fox*, 15 Vt. 22, the respondent was indicted under a statute imposing a penalty upon each person of a company of players who should exhibit tragedies, etc. There was no allegation that Fox was one of a company; and the court said that no single individual unconnected with others could commit the offense, and adjudged the indictment insufficient. The election, qualification, and action of a board of listers—an essential ingredient constituting the offense—not being alleged, the indictment is defective. The judgment of the county court is reversed, the demurrer sustained, the indictment adjudged insufficient, and the respondent discharged.

HARTLAND *v.* HACKETT.*

DELINQUENT TAX COLLECTOR—EXTENT—ACTION ON BOND—ELECTION OF REMEDIES FOR THE SAME WRONG.

The two remedies afforded a town against a delinquent tax collector are elective, and not concurrent; thus, the plaintiff procured a justice of the peace to issue an extent against the defendant collector, caused him to be imprisoned, and now holds his body on the extent.

Held, that an action could not be sustained on the collector's bond; that a prosecution of one remedy was a bar to the other.

And this is so, although the defendant is out on bail, and this action was commenced before the extent proceedings. There was a waiver of the previous suit.

It is presumed that the regular process of the law for the enforcement of a judgment is effectual to that end.

Whether the plaintiff under the pleadings is able to contend that the imprisonment was not a satisfaction of the judgment, as the plea alleges that it was, and the point was raised by demurrer, not decided.

Debt on a constable's bond. Pleas, general issue, special pleas in bar. Heard on demurrer to defendant Hackett's fourth special plea, May term, 1883, Windsor county, ROWELL, J., presiding. Demurrer sustained.

The defendants—the sureties—filed four special pleas, and said Hackett four. The plaintiff joined issue on the first three, and replied specially to the fourth plea of sureties. There was a trial, December term, 1882, on the pleadings other than the demurrer, by the court, TAFT, J., presiding. Judgment of the plaintiff. It was conceded, that Hackett was confined in jail over two years on the extent, when he procured bail, and that he was out on bail at the time of trial.

French & Southgate and *Gilbert A. Davis*, for defendant. *Norman Paul*, for plaintiff.

ROYCE, C. J. In the fourth plea of the defendant Hackett, it is alleged, in substance, that on the 3d day of August, 1880, the treasurer of the plaintiff town made his written complaint to T. B. Winn, a justice of the peace within and for the county of Windsor, setting forth that the tax-bill of the town of Hartland for the year 1877 was duly delivered to the defendant Hackett as collector of said town; that said Hackett had failed to perform according to law the trust committed to him of collecting and paying over to said town the amount of said tax-bill, and that there was a large amount of the same then due and unpaid to said town, with other proper allegations, and praying that an extent might be issued against the defendant for such arrearages, according to law; that upon this complaint, on due proceedings and hearing, the justice adjudged that there was due to the town from said Hackett the sum of \$2,598.25, and thereupon issued an extent against him on the 14th day of August, 1880, for said sum, with interest and costs, upon which, on the same day, the body of the said Hackett was committed, and is still in custody. The plea further alleges that the present suit is brought to recover "said amount so found and adjudged to be due from this

defendant to said town by said justice of the peace, and for no other or greater sum." To this plea a general demurrer was filed, which the court below sustained, and the defendant excepted. The question is thus presented, whether the facts set forth in said plea constitute a bar to this suit.

It is admitted that the judgment of the justice, if *satisfied*, would be a bar to this suit; but the plaintiff contends that the imprisonment of the defendant Hackett by virtue of the extent is no satisfaction of the debt or judgment, and, consequently, no bar to a suit upon his official bond. Before reaching the consideration of this question, another is encountered, which seems to have escaped the attention of counsel upon both sides, notwithstanding their careful examination of the case, as shown by the learned briefs submitted.

Upon the accruing of the cause of action it was competent for the plaintiff to proceed either by complaint to a justice under the statute provisions, as was done, or by suit upon the bond, which is here sought to be enforced. These remedies must be regarded as elective — not concurrent. The liability in the first case is a several one; and its terms, conditions, and extent are determined by the terms of the statute by which it is imposed; in the second case, the liability is joint, and dependent as to terms, conditions, and extent upon the language of the bond by a breach of the conditions of which it is fixed. It might be that the measure of the liability in the two cases would be materially different. As is said by Chancellor KENT in *Ins. Co. v. Lawrence*, 14 Johns. 55: "The principle of law is that if a man has an election to do or demand one of two things, and he determines his election, it shall be determined forever." And in that case, which was a bill in equity to set aside a contract upon which the plaintiff had obtained a verdict and judgment, the learned chancellor said: "They have no right to try the experiment how much they could recover at law under the contract, before they elected to waive it, and then retaining their verdict and entering judgment at law, apply to the court to set aside the contract. This proceeding would be giving the plaintiffs a double advantage, and is unreasonable and inadmissible." Authorities are numerous to the point that when a person has two or more remedies for the same wrong, his election and actual prosecution of one is a bar to the others. *Sanger v. Wood*, 8 Johns. Ch. 416; *Goss v. Mather*, 46 N. Y. 689; *Degrave v. Elmore*, 50 id. 3; *Kimball v. Cunningham*, 4 Mass. 502; *Hooker v. Hubbard*, 97 id. 177; *Connihan v. Thompson*, 111 id. 272; and *Sloan v. Holcomb*, 29 Mich. 161, apply this principle to the case of fraudulent sale, where the party may affirm the sale and sue for damages, or rescind it and recover back the consideration, and hold that an election by suit is final. So where the vendor may retake or replevy the goods, or sue for the price. *Morris v. Rexford*, 18 N. Y. 552; *Bank v. Beale*, 34 id. 475; *Sherman v. McKeon*, 38 id. 275. It has been held that charging a debtor in execution after commission of bankrupt issued is an election to take the remedy at law which is conclusive; *Ex parte Cator*, 3 Brown Ch. 216; and *Ex parte Warder*, id. 191; and Lord Chancellor REDESDALE, in the case of *Bond v. Hopkins*, 1 Sch. & Lef. 413, says, on p. 441, that in the case of a bill waiving a forfeiture, and on that ground seeking relief in a court of equity, though plaintiff fail in obtaining that relief, he shall be restrained from insisting on the forfeiture at law.

In the case at bar, the plaintiff has proceeded against the collector by complaint to a justice, has in that proceeding obtained a judgment fixing the amount due, has taken out an extent, which is much the nature of an execution, and so far as the questions here involved are concerned, may be treated as the same in legal effect, and on that extent holds the body of the defendant. It is unnecessary to consider whether his discharge by consent of the plaintiff would be a satisfaction of the debt and judgment, or whether his discharge by operation of law would not be such a satisfaction; because he has not been discharged in either manner. The situation is this: The plaintiff had obtained a judgment for the identical sum here sought to be recovered, and holds the body of the defendant in execution on that judgment. The judgment and the imprisonment have been held valid by this court in *In re Hackett*, 53 Vt. 354. The plaintiff is, therefore, still actively proceeding in the enforcement of the remedy chosen. We do not come to the point, in support of which authorities are cited, that having the body of a debtor once in execution is in law a satisfaction of the debt; that question would

arise if the debtor were *out of custody* and the debt still in *fact* unsatisfied. But as is said by Chief Justice MARSHALL in *U. S. v. Stansbury*, 1 Pet. 574, the body, if not satisfaction in reality, "is held as the surest means of coercing satisfaction;" and "the law will not permit a man to proceed at the same time against the person and estate of his debtor." So whether the imprisonment of Hackett on the extent by the plaintiff be, or not, a satisfaction of the debt in law, it is at least the active means provided by the law for enforcing an *actual* as well as a legal satisfaction of it. The presumption, until the contrary appears, is that the regular process of the law for the enforcement of a judgment is effectual to that end, and in the existing state of affairs, as shown by the pleading, it is difficult to see how we would be justified in assuming that this imprisonment, referred to by Chief Justice MARSHALL, as "the surest means of coercing satisfaction," will not in fact result in the actual satisfaction by *payment* of the judgment. Should such a result ensue, and the present case be allowed to go on to final judgment in favor of the plaintiff, it would not only be permitting the plaintiff to proceed at the same time against the body and property of the defendant Hackett, but the plaintiff would have two judgments against the same defendant for the same cause of action.

A case directly in point was decided by this court in 1880, in Franklin county, but is not reported, having fallen to the late Chief Justice PIERPOINT—the case of *Evarts v. Town of St. Albans*. The plaintiff in that case had sued one Burgess, a constable, in an action of trespass for damages on account of an illegal sale of the plaintiff's property on execution. In that suit the plaintiff recovered judgment, and held the body of the defendant in execution. The case is reported in 48 Vt. 205. While Burgess was still in custody, though admitted to the liberties, and the judgment otherwise wholly unsatisfied, his execution creditor brought suit against the town, founded upon his official neglect or default, under section 30 of chapter 15 of the Gen. Stat.; and it was held that the suit could not be maintained. The decision was upon the ground that the plaintiff having *elected* to enforce his right in another way, namely, by action of trespass against the constable, his election was final, and a bar to any other suit founded upon the same cause of action; at all events, while he was still in the active enforcement of the judgment obtained in that suit, and holding the body of the defendant in execution thereunder. That authority is in one respect at least even stronger than is required in the case at bar, because a judgment in favor of Evarts against the town would not have involved a "proceeding at the same time against the person and estate" of Burgess.

The fact that the present suit was commenced before the complaint to the justice is not material. The election to pursue that complaint to final judgment and execution must be held to operate as a waiver of a suit previously commenced as well as of other remedies not in suit. In *Washburn v. Ins. Co.*, 114 Mass. 175, where the holder of a policy of insurance brought a bill to reform it by striking out a certain warranty, and afterward brought suit on the policy alleging compliance with the warranty in which there was judgment against him, it was held, that by prosecuting to judgment the action at law the plaintiff had conclusively elected to affirm the policy as it was, and could not thereafter seek to reform it.

It may be remarked that the pleadings in this case are in a somewhat anomalous condition. The fourth plea alleges that "said town of Hartland has taken and imprisoned, and still holds, the body of this defendant, as aforesaid, in *full payment and satisfaction* of the sums aforesaid, and in full satisfaction of the amount sought to be recovered by said town in and by this suit." This is a direct allegation of fact; and by the demurrer the plaintiff must be regarded as admitting it to be true. It might be questionable, therefore, whether the plaintiff is in a situation to contend that the imprisonment of the defendant is not a satisfaction of the claim sought to be enforced in this suit; but as that point was not insisted upon in argument, we have not considered it in disposing of the case.

This view renders unnecessary any consideration of the other questions presented by the exceptions; and the result is, that the judgment of the county court is reversed, and judgment that the defendants recover their costs.

MATTER OF HARDIGAN.

HABEAS CORPUS — INTOXICATED PERSON, ARREST OF — ILLEGAL IMPRISONMENT — R. L., §§ 1863-4 — JUSTICE OF PEACE.

The relator was arrested by an officer charging him with being intoxicated, and brought before a justice of the peace to disclose the person of whom he obtained his liquor. He disclosed that he was not intoxicated, that he had not drank any intoxicating liquor on the day of his arrest, and offered other testimony than his own to prove that fact; but the justice refused to hear it, and committed him to jail until he would disclose.

Held, that the imprisonment was illegal, and that the relator was entitled to be discharged on *habeas corpus*.

The justice should have first determined whether the relator was in such a state of intoxication as to disturb the public peace; the officer's return was not conclusive of that fact, and the relator had a right to meet it with contradictory proof, which it was the duty of the justice to hear.

In a *habeas corpus* hearing the rights of the relator are not dependent upon the officer's return; but under the statute — R. L., § 1863 — he may deny the return, and allege other material facts; thus, the return showed that the justice found that the relator "had been intoxicated, and had disturbed the public peace," but the supreme court find from facts alleged in the relator's complaint that he was not intoxicated.

Habeas corpus. The writ was signed by ROWELL, J. By consent of counsel the case was continued into the supreme court.

It was alleged in the complaint, that the petitioner, at Montpelier, on the 30th day of May, 1884, was arrested by one Ordway, claiming to be a police officer, and was placed by said officer in the county jail, and there remained until the morning of the next day, when he was taken from jail and brought before a justice of the peace; that said Ordway then and there represented to said justice that he found the petitioner on said 30th day of May in such a state of intoxication as to disturb the public peace and tranquillity, and that he apprehended the petitioner when so intoxicated; that the justice ordered the petitioner to disclose, etc.; that he did disclose, as stated in the opinion; and that thereupon the justice ordered him to be committed to jail, and he was accordingly committed by a sheriff; wherefore he prayed for a writ of *habeas corpus*.

The writ was directed to the jailer of Washington county. The following is a part of the *mittimus* on which the petitioner was committed:

"WHEREAS, E. A. Ordway, police officer of the village of Montpelier, on the 31st day of May, 1884, at Montpelier, in said county, brought before me, O. D. Clark, a justice of the peace within and for said county of Washington, John Hardigan, charging him, the said Hardigan, with having been found intoxicated and disturbing the public peace or tranquillity of the village of Montpelier, aforesaid, on the 30th day of May, 1884, and the fact being found by me that the said John Hardigan had been intoxicated, and had disturbed the public peace and tranquillity, he was by me ordered to disclose, under oath, the place where, etc."

G. W. Wing, for relator. S. C. Shurtleff, for State.

ROYCE, C. J. The right of a justice of the peace to compel a person to disclose the place where, and the person of whom, he has obtained the intoxicating liquor is conferred by R. L., § 8816, and the right is limited to the class of persons specified in section 8814. They are there described as persons found in such a state of intoxication as to disturb the public or domestic peace and tranquillity. So that, to authorize a justice to demand that such a disclosure be made, and order a party to be committed to jail if he refuses to make one, the justice must first find that he was found in such a state of intoxication. Unless that fact is found the justice has no right to make any inquiry upon the subject; his authority is limited to the inquiry as to the place where and the person of whom the liquor so producing intoxication was obtained.

The complaint upon which this writ was awarded was verified by the oath of the relator; and in it he alleges that when he was required by the justice to disclose, after having been duly sworn, he did disclose that he was not intoxicated and had not drunk any intoxicating liquor on the day of his arrest; and that he offered to show to said court by other testimony than his own that he was not so intoxicated at the time of his arrest; which testimony the said justice refused and neglected to hear. It was competent for the State to dispute these allega-

tions under section 1363, but it has elected to submit the case upon the record alone; hence, all that is stated in the record must be considered as true.

It being admitted that the relator swore, before his commitment, that he was not intoxicated at the time of his arrest, and the justice having refused to hear the other testimony offered by him to prove the fact, was his subsequent imprisonment under the *mittimus*, which is a part of the record, legal?

We are aware that the general rule is that upon the hearing of a *habeas corpus* the court will not review the rulings or findings of the court under whose authority the alleged imprisonment is justified; and that the rights of the relator are dependent upon the return of the officer and the copies which are made a part thereof; but that such return is not conclusive is evident. Section 1363 provides, that the prisoner may deny any of the facts set forth in the return, and may allege other material facts; and the court or judge may in a summary manner examine into the cause of the imprisonment or restraint, and hear the evidence of any person interested; and by section 1364 the court or judge is required, if no legal cause is shown for the imprisonment or restraint, to discharge the prisoner therefrom.

The only evidence before us upon which a finding as to the legality of the relator's imprisonment can be predicated is the complaint sworn to by him, the copies of record, and the return of the officer. The testimony offered by the relator before the justice was not of an uncertain character, nor offered as tending to show a fact, but to prove that he was not in fact intoxicated at the time of his arrest. When testimony is offered to prove a fact, and is for any reason excluded, in deciding the question of its admissibility the fact that it was offered to prove is considered as having been proved. The fact, then, that the testimony was offered to prove, must be treated as having been proved; so the relator was ordered to be committed to jail, when in fact he was not intoxicated at the time of his arrest. It was an abuse of authority by the justice; and it requires no argument to convince that such an imprisonment was illegal.

Can the relator be relieved from such imprisonment upon a writ of *habeas corpus*? The only doubt that can be entertained upon the question results from the generality of the language used by courts in the promulgation of the rule above referred to. That the rule is not to be regarded as one of universal application is evident from the fact that by R. L., § 1363, the relator is allowed to allege other material facts, and that the court may hear the evidence produced by any person interested. What fact could be more material than that the justice ordering the imprisonment did not have any jurisdiction to make such an order? What evidence extrinsic of the record may be used upon the hearing of a writ of *habeas corpus* has always been a doubtful question. We are not aware that any rule upon the subject, of universal application, has been formulated. The authorities are conflicting. Considering the nature of the writ, and the purposes that it is designed to accomplish, the rules of evidence to be observed cannot be arbitrarily prescribed, but must necessarily be varied to meet the exigencies of individual cases. In *Matter of Powers*, 25 Vt. 261, the principal question considered was as to the constitutionality of what is now R. L., § 3816. It appeared in that case that the relator was very thoroughly intoxicated at the time of his arrest; and that, upon his examination in regard to the person of whom he obtained the liquor by which he became intoxicated, and the manner of his obtaining it, his answers were not satisfactory to the justice; and he was committed upon a *mittimus* commanding his detention until he should make a disclosure. It does not appear that any evidence was offered before the justice tending to show that he was not so intoxicated; and in the supreme court evidence was received bearing upon the question of his intoxication; so the record and return were not treated as conclusive in that case. In *Tracy, ex parte*, 25 Vt. 93, REDFIELD, C. J., says that it may still be regarded as unsettled how far it is competent for this court to revise the proceedings of an inferior court upon *habeas corpus*.

Treating the return of the officer upon the question of the relator's intoxication as *prima facie* evidence of the fact, it was the right of the relator to meet that evidence by contradictory proof; and it was the duty of the justice to hear such proof when offered. It is no answer to say that the justice might have come to the same

conclusion if he had heard it; it was his duty to hear it before coming to any conclusion.

In *Hathaway v. Holmes*, 1 Vt. 405, in the opinion delivered by Judge PRENTISS, it is said that where a party is in execution by the judgment of another court having *competent jurisdiction*, the court will not examine into the merits of the judgment nor discharge him, if the execution is regular, unless some matter is presented extrinsic of the judgment which entitles him to be discharged. From what is there said, the fair inference is that the jurisdictional question is open to inquiry.

The chief excellence of this writ consists in the easy, prompt and efficient remedy afforded by it for all unlawful imprisonment. To deny the relator relief under it in this case would defeat the purpose for which it was designed, and circumscribe the benefits secured by it to those who are deprived of their personal liberty within such narrow limits as to deprive it of the principal value we have been educated to ascribe to it.

It is adjudged that the relator is illegally imprisoned, and it is ordered that he be discharged.

TAYLOR v. ST. JOHNSBURY RAILROAD COMPANY.

ARBITRATION — SUBMISSION — AWARD — RATIFICATION — WAIVER — PLEADING — ASSUMPSIT.

The plaintiff and the defendant railroad agreed to and did submit in writing to two arbitrators "to appraise the damages" which should be caused by the defendant's taking of the plaintiff's land for railroad purposes. The arbitrators awarded that the plaintiff should deed; that the defendant should pay \$100; that it should build and maintain a certain cattle-pass; that it should keep up the fences while the road was being built; and that it should not injure a spring of water near the railroad line. The declaration averred that the plaintiff had performed his part of the award by deeding, etc.; that defendant had occupied his land since the award was made, and had only paid the \$100; that it neglected to build the cattle-pass and keep up the fence; that it had injured the spring by filling around it; and set forth the injuries.

Held, on demurrer to the declaration, that the defendant had waived the right to claim that the arbitrators did not follow the submission, as it had gained all it sought by the submission, and holds it by virtue of the award; that if the arbitrators exceeded their authority, the defendant ratified their action by accepting the deed, etc.

Assumpsit will lie upon the award.

It is no objection that successive actions may arise. The right of action is complete so far as damages have already happened.

Assumpsit upon an award. Heard on demurrer to the declaration. Demurrer *pro forma* sustained.

The declaration set out the submission as follows:

"Know all men by these presents, that we, the St. Johnsbury and Lake Champlain Railroad Company and Arthur Taylor, hereby enter into bonds in the penal sum of \$500 to abide the decision of Samuel Ford and Ezra A. Parks, to appraise the damages on said Taylor, where the survey of the railroad has been made; and if the said Ford and Parks cannot agree, they are to call in another man. The said Taylor binds himself to give a good and sufficient deed as said arbitrators shall award, and the said railroad company to pay the sum awarded.

"The said Ford and Parks are to be called out as soon as convenient, and the said Taylor and railroad company bind themselves in the penal sum of \$500 to each other to carry out the award of said arbitrators."

And the award as follows:

"In accordance with the above agreement we, Samuel Ford and Ezra A. Parks, the arbitrators named therein, do hereby award that said Taylor shall execute a good and sufficient deed of a strip of land, four (4) rods wide, through his land for the purpose of a railroad; that is to say, two (2) rods each side of the center line of railroad leading from North Concord to Victory, as now surveyed and located, and that said railroad company shall pay said Taylor \$100; and shall build and maintain a good and sufficient cattle-pass for his cattle to pass from one side of the railroad to the other; and shall keep up the fences while said railroad is being built, so that his cattle or other property shall not be injured; and shall not injure or interfere with the spring on his land near said railroad line."

Bates & May, for plaintiff. *Poland*, for defendant.

POWERS, J. We attach little importance to the question, whether in strictness the award of the arbitrators followed the submission made by the parties. The defendant has taken, and is now enjoying, the fruits of the award which it insists is void. If the defendant had vacated the land and the plaintiff was in possession, this objection to the award would stand in a more favorable light. But having gained all the advantage which is sought by the submission, and holding it under and by virtue of the award, the defendant has waived all objections to the award on this score. Cald. on Arb. 374; *Kennard v. Harris*, 2 B. & C. 801; *Culver v. Ashley*, 19 Pick. 300. "If in making up their award, arbitrators exceed their authority, the party against whom this excess operates will ratify the entire action of the arbitrators by accepting from the other party performance of the acts nominated in the award to be done by such other party." Morse on Arb. 530.

The declaration avers, that the award was duly published, and in consideration of the promise of the defendant to perform and abide the award, the plaintiff executed his deed of the land, and the defendant paid him the \$100 awarded to him, and agreed to comply with the other terms and conditions of said award to be by it performed.

By these acts the parties are now precluded from disputing the force of the award, and stand in court precisely as they would if the award in strictest sense had followed the submission.

We think the action of *assumpsit* will lie upon this award. *Culver v. Ashley*, *supra*; *Pierce on Railroads*, 424, 425; 23 Me. 259; 62 id. 49; Cald. on Arb. 388; Morse on Arb. 573. The parties mutually promised on good consideration to perform the award. The award is properly made covering various duties to be by the parties respectively performed. Practically, these mutual duties are imposed by the contract of the parties. They agree to do all things that the arbitrators may prescribe. The duty to convey the land, pay the money, build the cattle-pass, preserve the spring, and keep up the fences, is a duty that the parties have agreed to perform, inasmuch as they have promised to perform the award. And after award made the defendant promises to perform it as made.

It is no objection that successive actions may arise. Installments of annual interest on an entire contract are recoverable in *assumpsit*; and many other instances might be cited. If duties are successively violated, successive actions may be brought. So far as damages have already happened to the plaintiff, his right of action is complete.

The *pro forma* judgment of the county court is reversed, and judgment that the demurrer be overruled, and the declaration adjudged sufficient. Case remanded with leave to defendant to plead on usual terms.

HOLMES v. CADEN AND CARROLL, Administrators, etc.

STATUTE OF FRAUDS—SPECIFIC PERFORMANCE—ASSIGNEE—ADMINISTRATOR—SURVIVING PARTNER—INSOLVENT LAW—NOTICE—PUT ON INQUIRY.

The oratrix entered into a parol contract for the conveyance of a house. She paid for it and occupied the tenement in the upper story, without rent, for more than four years; and also agreed with the original owners to collect the rent for her of the lower tenement. The contract was made with one of two partners, one of whom is now dead, and the other insolvent; but the contract was made known to the other partner, who did not object to it. A bill having been brought against the assignee and administrator,—

Held, that the case was not within the statute of frauds; that the oratrix was entitled to a decree for the conveyance of the premises, and an accounting for the rent.

The house did not pass to the assignee; it was not attachable by the creditors of the original owners, they holding the title in trust for the oratrix; and the fact that she was in possession was notice to the creditors, and put them on inquiry as to her rights.

Bill in chancery. Heard on bill, answer, and testimony. Bill *pro forma* dismissed without hearing.

It appeared that John and Thomas Caden were partners; that Thomas had deceased, and that John Caden and Carbury Carroll were the administrators of his estate; that John Caden was insolvent, and that H. O. Edson was assignee of the estate of said John, and of the firm of J. & T. Caden. The prayer of the bill was, that John Caden, surviving partner, and John Caden and said Carroll,

administrators of Thomas Caden's estate, convey to the oratrix the house in contention, and for an accounting. By agreement said Edson was made a party defendant.

J. C. Baker, for orators. *Reddington & Butler*, for defendants.

Ross, J. The testimony establishes that J. & T. Caden agreed to give to the oratrix, Mary, the premises in contention in payment for her services for them for ten or eleven years; and that in part fulfillment of the contract they allowed her to take possession of the tenement in the upper story of the house, which she has occupied four or five years, without rent, and agreed to collect the rent for her of the lower tenement and account to her therefor. Although the immediate contract was made between the oratrix and Thomas Caden, it was made known by Thomas to his partner, John Caden, who did not object to the same; that, in fact, the contract was made in accordance with an earlier understanding to the same effect between John and the oratrix.

Hence, there is a parol contract for the conveyance of the premises to the oratrix, full payment therefor by her, and possession thereof by her, as owner, for more than four years. These facts take the case out of the operation of the statute of frauds, and entitle the oratrix to a decree for the conveyance of the premises and an accounting, in accordance with the prayer of the bill against John & Thomas Caden. *Pike v. Morey*, 32 Vt. 37; *Stark v. Wilder*, 36 id. 752; *Griffith v. Abbott*, 56 id. 356.

But John Caden is now represented by an assignee in insolvency, and Thomas Caden's estate by an administrator. It is contended that John Caden took the premises on the death of Thomas as surviving partner — the premises being partnership property — and that his assignee in insolvency therefore, takes the whole interest. This is doubtless true. The assignee claims that, under the insolvent law of this State, he has the rights of an attaching creditor, and contends that, although the payment of contract price, and possession by the oratrix take the case out of the operation of the statute of frauds against John & Thomas Caden, a creditor could attach and hold it against the oratrix, and therefore he is entitled to hold it as assignee in insolvency of John Caden. It has been held at the present term in *Collender Co. v. Marshall*, 57 Vt. , that an assignee in insolvency, under the present State insolvent laws, takes all the property of the insolvent which an attaching creditor has the right to attach and appropriate in satisfaction of his debt. But the possession of the premises by the oratrix long before, and at the time of the insolvency, was notice to his creditors and assignee of all the rights the oratrix, to which she was entitled by virtue of the contract, payment of the contract price, and possession. These facts, in regard to which a creditor was put upon inquiry by her possession, and which he would have learned by inquiry, rendered the premises as invulnerable to attachment and appropriation by such creditor, as they were, by John & Thomas Caden, or by a purchaser from them. After payment of the price and possession, John & Thomas Caden held the title to the premises, not as of their property, but in trust for the oratrix.

An attaching creditor of real estate, with notice actual or constructive of the true state of the debtor's title, stands in no better position than a purchaser with the same notice. *Perrin v. Reed*, 35 Vt. 2; *Hackett v. Collender*, 32 id. 97; *Hart v. Farmers and Mechanics' Bank*, 33 id. 252.

A purchaser, with notice, can acquire no better title than his grantor has. Hence the oratrix has the same right to a decree against the assignee in insolvency which she had against John Caden as surviving partner of John & Thomas Caden.

The *pro forma* decree of the court of chancery is reversed and the cause remanded, with a mandate to enter a decree for the orators in accordance with the prayer of the bill.

[Possession as notice, see 45 Am. Rep. 188.—Ed.]

LENEHAN v. SPAULDING.

INTESTACY — DISTRIBUTION — HEIR ABSENT FIFTEEN YEARS — ALIEN — PROBATE COURT — NOTICE — R. L., § 2245.

The intestate died in 1871, unmarried and without issue, but leaving, as it was supposed, as her heirs, only two brothers, but, in fact, also an absent sister, the female plaintiff. The defendants purchased the interest of one brother in 1874; and the probate court in 1877 distributed the estate, one-half to one brother, and the other half to the defendants, the assignees of the other brother, in accordance with a statute passed in 1876 — R. L., § 2245 — which provided that the share of an heir, absent and unheard of for fifteen years, could be distributed to the other heirs, and if the absent person proved to be alive an action was given to recover his share of *any one receiving the same under order of the court*.

Held, that the defendants are liable, and that the plaintiff could sustain an action against them to compel payment for her share; and that they are jointly liable, having taken the title jointly.

The fact that the intestate was an alien cannot avail as a defense.

The amount to be recovered is not the value of the share at the time of distribution, with interest; but the share is chargeable with expenditures necessary for the preservation of the property, and with loss caused by depreciation without the fault of the distributee. The heir should be credited with rents and profits, if any were or might have been received.

The notice given by the probate court, before the order of the distribution, was sufficient; and the finding of the court as to the absence of the heir, etc., is conclusive.

Assumpsit. Heard on a referee's report. Judgment *pro forma* for the plaintiff.

E. P. Hard, for defendants. *Edson, Cross & Start*, for plaintiffs.

ROYCE, C. J. This action was brought under No. 82 of the Laws of 1876, now section 2245 of the R. L., to recover compensation for the share which the female plaintiff was entitled to in the intestate estate of Catherine Driscoll, and which was distributed to the defendants by an order of the probate court on the 17th day of February, 1877.

Before the passage of that law there was no statute remedy for an heir of an intestate estate who had been left out in the distribution of the estate to recover his share, or compensation therefor. That law provides, that where a person entitled to a distributive share of such an estate is absent and unheard of for fifteen years, five of which are after the death of the intestate, the probate court may order such share to be distributed among his lineal heirs, if he have any; otherwise among the heirs of such deceased person. It is claimed by the defendants that the requirements of the law were not so observed by the probate court as to justify the making of such an order.

The law required that before any such order was made the court should cause notice to be given as notice is given on the settlement of an administrator's account, and such other notice, by publication or otherwise, as the court might deem proper. The notice required before the settlement of an administrator's account is to be given personally to such persons as the probate court should judge to be interested, or by publication under the direction of the court of the time and place of allowing the same. R. L., § 2106. The record of the probate court shows that personal notice was ordered to be given to the heirs of Catherine Driscoll, if living within this State, of the time and place when and where the application for distribution would be heard, and that such notice was given, and that public notice was given by publication in the *St. Albans Messenger*. The notice thus shown to have been given was legally sufficient.

It was necessary that the court should find that the absent heir had been absent and unheard of for fifteen years, five of which were after the death of the intestate. That fact, and that notice had been given, it appears was found by the probate court.

It is claimed that these findings, and the recitals that appear in the record, are not conclusive. Probate courts in this State are courts of record; and judgments rendered by them upon matters within their jurisdiction to determine, unappealed from, are conclusive. To give the court jurisdiction over the absent heir's share in the estate, it was necessary, after proper notice given, that the fact of the absence of the heir for the time specified should be found by the court; so that the court in making such finding was discharging a duty imposed by the

law, and its finding must be held to be conclusive. The court, then, having acquired jurisdiction over said share, the order made divested the heir of all legal claim to the estate, and vested the same in the defendants. *Grice v. Randall*, 23 Vt. 239; *Stone v. Peasley's Estate*, 28 id. 716.

The defendants having elected to have the share of the heir distributed to them jointly, having taken the title jointly, cannot now excuse themselves from joint liability.

It is also claimed that the defendants, having acquired their interest in the estate of Catherine Driscoll by purchase, before the passage of the law of 1876, their rights are not affected by that law. The answer to this claim is, that they acquired their title under the order of the probate court made after the passage of that law, and made in pursuance thereof; and the liability is imposed upon those "to whom such share has been distributed under such an order."

The defendants cannot avail themselves, as a defense, of the fact that the intestate was an alien. She had the undoubted right to purchase and hold lands, and if forfeited on account of her alienage, the forfeiture was to the State; and the State alone could assert a right to them. *Gilman v. Thompson*, 11 Vt. 643; *Cross v. DeValle*, 1 Wall. 5.

The title to the share to which Mary Lenehan would have been entitled having vested in the defendants, a right of action was given her against them to compel payment thereof; and the important question is, what shall that compensation be?

The language of the law is: "He shall be entitled to his share of such estate, notwithstanding such distribution, and may recover in an action on the case for money had and received any portion thereof which any one received under such an order." The county court estimated that compensation to be the value of the share as it was ascertained at the time of distribution, and interest on the same from that date.

It will be observed that the time when the value of such share is to be estimated is not fixed by the law. The law in that respect is ambiguous; and in construing it we are to ascertain, if we can, what the design and intent of the framers was. It is evident to us that the intention in thus protecting the interests of absent heirs was to place them in as advantageous a position as they would have been in if the estate had not been distributed. If an executor or administrator, while he is administering upon an estate, expends money upon it which is necessary to its preservation and protection, and which it is for the interest of the estate to have expended, the expenditures become a charge upon the estate, and the shares to which the heirs are entitled are proportionally diminished; so that if this estate had not been distributed, the share of Mary Lenehan would have been chargeable with its proportion of any such expenditures made upon it while it was being administered.

The adoption of the rule that the value of a share is its value as ascertained at the time of distribution as an arbitrary one, and compelling distributees to pay upon that basis would frequently result in great injustice. The property may be wholly lost, or it may depreciate largely in value without the fault of the distributee, after distribution made and before the absent heir appears and demands compensation. To compel the distributee to bear the loss under such circumstances would be inequitable and unjust. It is to be borne in mind that the defendants acquired the title and came into the possession of the share in controversy rightfully, and without knowledge that there was any opposing claim to it; and the expenditures they have made upon the property are presumed to have been made in good faith, and in the belief that they had an indefeasible title.

If the share of the heir has appreciated in value, he should be entitled to the benefit of such appreciation; if it has become less valuable, without the fault of the distributee, the loss in value should be borne by the heir. If rents and profits have been or might have been derived from the use of such share, the heir is entitled to them. If necessary and proper expenditures have been made upon the property, the heir should be charged with his proportion of such expenditures in reduction of the amount which the distributees are compelled to pay him. Such a rule of accountability will effectuate what seems to us to be the spirit and intent of the law, and will work out just and equitable results.

It is evident that no proper judgment can be rendered upon the facts reported. The judgment is reversed and cause remanded in order that it may be recommitted for specific findings, as to the amount, kind and value of the repairs made upon the property by the defendants, and the necessity for making them, and as to any other expenditures made upon or for the care and preservation of the property; and the amount that has been or might have been received by the defendants for the use of the same, and its value at the time this suit was brought.

DAVIS v. WILLEY.

January, 1885.

TRUSTEE PROCESS — AGENCY — CLAIMANT.

The principal defendant, as agent of the claimant, entered into a contract to build a bridge for the trustee. Both the claimant and defendant worked on the bridge, the former employing the latter, and paying him. The officers of the town did not know of the agency. *Held*, that the trustee should be discharged; and that the fund belonged to the claimant.

Trustee process. Heard on a commissioner's report by the court. Judgment that the fund belonged to the claimant; and that the trustee be discharged.

The commissioner reported in part:

"Upon testimony objected to by the plaintiff's attorney I find, that in letting the said job the second selectman, Willey, did most of the talking on the part of the town, and that the bids were made to him; that the main part of the job was stone work; that the defendant was not a stone mason, which fact was known to Willey; that Willey, being anxious to have the stone work thoroughly done, and having in mind a man whom he thought qualified to do it, asked the defendant who was to do the stone work in case he bid off the job, and was informed by the defendant that the claimant Colburn, who was a stone mason, was to do it; and the defendant then referred Willey to some pieces of stone work which Colburn had done; that shortly before the final bid Colburn came to the place and there, in sight of the two selectmen, but not in the hearing of either of them, had a conversation with the defendant, after which Colburn went away, and after he had gone the defendant made the bid upon which the job was let; that after the bridge had been rebuilt the selectmen received word from Colburn that the job was completed and a request from him to examine the work and see if it was acceptable; and that from these facts Willey supposed that Colburn had some interest in the job, and, had the job been accepted on the part of the town, he (Willey) would have given an order for the pay to either the defendant or Colburn upon application for it by either of them. If the evidence to prove the facts stated in this paragraph was material and relevant and those facts are sufficient in law to warrant the finding, I find, from these facts, that before the beginning of this suit the town of Roxbury had notice of the interest and right of the claimant Colburn in and to the job of rebuilding the bridge and the pay for it; otherwise, I find that the town of Roxbury did not, until after the service of the writ in this cause upon the trustee, have any notice that the claimant Colburn had any interest or right in or to said job or the pay for it.

"I further find, upon evidence objected to by plaintiff's attorney, that the claimant, Colburn, was anxious to secure the job of rebuilding the bridge; that he did not expect to be present at the letting of the job, and for that reason took measures to have some one present to bid for him; that, as between the claimant and the defendant, the defendant bid for, and as the agent of the claimant, and the claimant was to do the job and have the pay; and that the claimant furnished all the materials for the job and bargained and paid for all the work not done by himself. None of these facts were known to the officers of the town (unless by reason of notice as hereinbefore stated), and the evidence upon which they are found was objected to by the plaintiff's attorney as immaterial and irrelevant.

"At the request of the plaintiff's attorney I report the fact that the defendant did the work, with his team of oxen, upon the job. But I find that he was employed to do so by the claimant; and that neither of these selectmen knew by whom any of the work was in fact done."

The commissioner found that the contract was not completed, and allowed the trustee to deduct \$10 from the contract price, — \$95.

Frank Plumley, for plaintiff. *Jas. N. Johnson*, for claimant.

ROYCE, C. J. The only controversy in this case was as to the right of the claimant to the funds in the hands of the trustee.

The contract made by the trustee was nominally with the defendant; but it is found that in making it the defendant was acting as the agent of the claimant; so, that as between the defendant and the claimant, certainly, the contract was the contract of the claimant, and he was entitled to all the benefits that might result from its execution. The contract was not, in fact, performed by the defendant or claimant, the work not having been done as the contract required. The defendant never attempted to perform it, and had no legal claim against the trustee for services rendered or money expended under it. All that was done under the contract was done by the claimant, not by the procurement of the defendant, but evidently because he understood that having authorized the defendant as his agent to make it he was under obligation to perform it. Having acted upon that belief and expended his time and money in the performance of the contract, his legal and equitable right to payment is superior to the claim of the trustee.

Judgment affirmed.

FOSTER v. STAFFORD NATIONAL BANK.

January, 1885.

CONSTITUTIONAL LAW—STATUTE AUTHORIZING STORING WATER ON ANOTHER'S LAND—TO CLEAR OBSTRUCTIONS IN RIVER TO FLOAT LOGS—COMPENSATION—INJUNCTION—CONSTRUCTION OF STATUTES.

The act of 1874 authorized the orator with others to remove the rocks, flood-wood, etc., from the bed and banks of Willoughby river, from its source at the outlet of Willoughby lake, so as to make it navigable for the running of logs, and to enter upon the bed of the river and its tributaries for that purpose; to make booms; to occupy land on the margin of the stream for the purpose of banking logs, by paying or tendering all damages. It was provided that if the parties could not agree upon the amount of damages, they were to be fixed by the selectmen; and if they were disqualified, then by three justices of the peace. No appeal was allowed, and no fund was provided, or security required, for payment of damages; but an action was given to recover them. This statute was amended by an act in 1878, which authorized the orator "to make, maintain, and control gates at the outlet of said Willoughby lake, for the purpose of saving water in said lake," etc., but could not raise the level of the waters above the ordinary high-water mark. The amendment contained no provision as to damages. The orator erected the gates on defendant's land, and brought this bill to restrain it from removing them. No compensation was made or tendered.

Held, that the statutes were unconstitutional, in that no adequate provision was made for compensation; that the rights under an award or judgment are not sufficient for the taking of private property; that there was a taking of defendant's property; and that compensation should have been made at the time of the taking.

Bill in chancery. Heard on demurrer to bill, September term, 1883, Orleans county, Ross, Chancellor. The chancellor stated that his opinion was, that the bill could not be sustained; but that the constitutionality of the acts of the legislature might be passed upon by the supreme court, and that the injunction might remain in force during the pendency of proceedings in court, he ruled *pro forma* sustaining the bill.

The bill set forth the claimed rights of the orator and his associate, Evans, under the acts of 1874 and 1878, and alleged that Evans declined to go on with the work and yielded up his rights to the orator; that the orator made the improvements in the bed and banks of the river, constructed the gates at the outlet of said lake "to regulate the flow of water in said river;" that he expended \$1,600 in said work; that all persons had had the right to use the river for floating logs, without hindrance by the orator; that the orator owned a saw-mill at Evansville, was largely engaged in the manufacturing of lumber, was the owner of large tracts of woodland near the said river and lake, and that he floated the lumber down to his mill, etc.

Belden & Ide and *Stafford*, for defendant. *B. F. D. Carpenter & O. H. Austin*, for orator.

ROYCE, C. J. This was a bill in equity brought for the purpose of restraining the defendant by injunction from intermeddling, interfering with or removing certain gates, which had been erected by the orator upon the land of the defendant at the outlet of Willoughby lake, for the purpose of storing water in said lake to be used as occasion might require to increase the flow of water in Willoughby river, so that logs and other lumber might be floated down said stream; and was heard on general demurrer to the bill.

The right of the orator to enter upon the land of the defendant and erect and maintain said gates is attempted to be justified under acts of the legislature, passed in 1874 and 1878. The act of 1874 (No. 181), entitled "An act to authorize the removal of obstructions from Willoughby river," by the first section, conferred the right upon the orator, and such others as might be associated with him, to clear out obstructions in the bed of said river, and upon its banks, from its source at Willoughby lake to Evansville, in the town of Brownington, so as to make it navigable for the running of logs and lumber, and to enter upon the bed of said river and its tributaries for that purpose, by paying or tendering all damages caused thereby in the manner stated in the third section of said act. It was provided by said third section that in case the parties could not agree upon the amount to be paid to any person sustaining *such damage*, the amount was to be fixed by the selectmen of the town in which the property is situated; and if the selectmen were disqualified, they were to be fixed by three justices of the peace in the county of Orleans. No appeal was allowed from the decision of the selectmen or justices, and no fund was provided, or security required, for the payment of the damages that might so be found to have been sustained.

The act of 1878 (No. 214), entitled an act to amend the act of 1874, amended said act by adding thereto the following words: "And they, the said Foster and Evans, are hereby authorized and empowered to make, maintain and control gates at the outlet of Willoughby lake for the purpose of saving the water in said lake, but shall not have power to raise the level of the waters in said lake above the ordinary high-water mark of the last fifteen years." It is by virtue of that amendment that the orator claims the right to erect and maintain said gates. No such right was conferred by the act of 1874, and unless it is given by the amendment of 1878 the orator fails to show any right that he can ask the aid of a court of equity to protect him in the enjoyment of.

No provision is made in the amendment for the ascertainment and payment of the damages that might be occasioned by the entry upon and occupation of the land of the defendant for the erection and maintenance of gates thereon, and the raising of the waters of the lake. It is claimed that the amendment is subject to the provisions of the act of 1874; but that act made no provision for the ascertainment and payment of damage for *such* acts as the orator was authorized to do under the act of 1878.

Article 2 of the State Constitution provides that: "Private property ought to be subservient to public uses when necessity requires it; nevertheless, when any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." And in article 5 of the Constitution of the United States it is said: "Nor shall private property be taken for public use without just compensation."

The Constitution limits the right to take private property to cases where necessity requires it for a public use; and then it can only be taken on making just compensation to the owner. In all grants of power conferred by the legislature upon corporations or individuals to appropriate the property of citizens, the right has been based upon an existing necessity for a public use, and careful provision has been made for compensation; and any legislative act authorizing such an appropriation when such a necessity does not exist, or which does not provide for compensation, is plainly in conflict with the Constitution. Gould on Waters, § 250, and cases there cited.

The compensation must be made at the time of the taking, or some certain security must be given, or fund provided for its ultimate payment. A party

whose property has thus been taken cannot be divested of it upon the security that an award or judgment may furnish him alone. In this case no compensation was made or tendered, and no adequate method was provided by which the damages could be ascertained, or security provided for their ultimate payment.

It is claimed that there was no such taking of the property of the defendant as entitled him to compensation. Any injury to the property of an individual which deprives him of the ordinary use of it, is equivalent to a taking, and entitles him compensation. *Cooley's Const. Lim.* 544. A right of entry upon land for the purpose of the erection and maintenance of gates upon it, and the flowage of land between high and low-water mark, is a legal injury to the proprietor, and necessarily deprives him of the ordinary and beneficial use of it. In *Newell v. Smith*, 15 Wis. 111, it was decided that an act of the legislature authorizing proprietors of a mill-dam to flow lands of other persons, without any provision for compensation except that they should pay the land-owners the value of the lands, to be ascertained by the verdict in an action of trespass, was in violation of that section of the Constitution which forbids the taking of private property for public use without making compensation therefor. In *Grand Rapids Booming Co. v. Jarvis*, 8 Mich. 308, it was held that the flowing of lands without the owner's consent was, in legal effect, such a taking of his property as violates the constitutional prohibition of the taking of private property without compensation; in *Henry v. Dubuque R. R. Co.*, 10 Iowa, 540, that the legislature had no power to authorize the taking of property for the use of a railroad before compensation made to the owner, or secured to be made when the amount thereof shall be ascertained.

We entertain no doubt but that, upon the facts stated in the bill, there was such a taking of the property of the defendant as entitled him to compensation.

We have not deemed it necessary to decide whether, upon the facts stated, the use for which the orator was authorized to appropriate the property was a public use or not; as the failure to make compensation or to give such security for its payment as the law requires rendered the act unconstitutional.

The decree of the court of chancery is reversed, and cause remanded, with a mandate that the bill be dismissed, with costs.

WAY v. POWERS.

January, 1885.

MASTER AND SERVANT — COURSE OF EMPLOYMENT — LICENSE TO USE HORSE.

The defendants were father and son. The son was twenty-eight years old, and, while living with his father as a hired man on his farm, took his father's horse and drove three miles to the railroad depot to get one of his own friends. The father did not know that the son took the horse until after he was gone; but expected and was willing that he should do so. The son had driven the team before without permission. The horse, tied to a post in the rear of the depot, where the defendants were accustomed to hitch, broke away, ran into the plaintiff's team, and injured him. The referee found that the son in tying the horse "did not exercise the prudence of an average prudent man."

Held, that the father was not liable, but that the son was; that license to use the horse could not be inferred from the fact of former use without leave.

Case for negligence. Heard on a referee's report, December term, 1883, Caledonia county, Ross, J., presiding.

Judgment for the plaintiff against the son; but judgment that the father recover his costs. The head note states the case.

Belden & Ide and Stafford, for plaintiff. *A. M. Dickey and Edwards, Dickerman & Young*, for defendants.

ROYCE, C. J. This action was brought to recover compensation for injuries to the plaintiff's person and property occasioned by the alleged negligence of the defendants.

It is found that the defendant Jonathan Powers was the owner of two horses, and the defendant Abner, who was his son and hired man, drove them as he had occasion for private driving, without special permission of his father. On the 19th day of May, 1879, Abner, who was expecting a friend to make him a visit at his father's home, took one of said horses and an open wagon, without the permission of his father, and drove them to the depot at West Burke to meet his friend. His

father did not know he had gone until he had been absent some time; but expected and was willing he should take the team to bring his friend from the depot, when he should need it for that purpose. Abner arrived at the depot more than an hour before the arrival of the train, and hitched the horse in as secure a place as there was around the depot, and at the usual place for the defendants to hitch. The horse was restive and pulling upon his halter, which was noticed once at least by Abner. He finally broke loose and ran into the team of the plaintiff, thereby causing the injuries to him, which are sought to be recovered for.

The horse broke away in consequence of a defect in the rope with which he was tied. The defect consisted in the knot in the end of the rope being too near the end of it, so that it worked out and was untied by the continual pulling of the horse. In all other respects it was suitable and sufficient. And it is found that Abner did not exercise the prudence of an average prudent man in using the rope with said defectively tied knot in the end; or, in other words, in not seeing that the knot was suitably and properly tied.

It is clear that the defendant Abner is liable; for it is found that the damage to the plaintiff resulted from his negligence in using the defective rope in tying the horse.

Abner was not at the time in the employment of his master, nor acting upon his business. He took the horse, as we have seen, without the permission or knowledge of Jonathan Powers. And no license to take him could be inferred from the fact that he had used him upon his own business upon previous occasions without leave. Abner was not intrusted by his master with the horse and carriage; and so his master is not brought within the rule of liability that has been held to apply in the cases to which we have been referred by the counsel for the plaintiff. If Jonathan Powers should be held liable, upon the facts found, it would, in legal effect, be holding him responsible for the damage resulting from the use of a defective article owned by him, when the use was without his permission or knowledge.

The judgment is affirmed.

NOTE.—20 Eng. Rep. 349, *note*; Abb. Annual Dig. (1883), 304; 4 Wait's A. & D. 410 *et seq.*; *Maddox v. Brown*, 71 Me. 432; S. C., 36 Am. Rep. 386, is in harmony with the principal case. The only difference in the facts being, that in the Maine case the horse was left unfastened. See, also, *Mulvihill v. Bates*, 47 Am. Rep. 796; *Campbell v. City of Providence*, 9 R. I. 262.—ED.

TROLL v. HANAUER.

January, 1885.

STATUTE OF LIMITATIONS—CAUSE OF ACTION ACCRUING IN ANOTHER STATE.

The statute of limitations is not a defense, when the cause of action accrued in another State, unless *both* parties resided there at the time the cause of action accrued.

The plaintiff resided in Ohio, and the defendants in Pennsylvania, when the debt was contracted, the residence of neither party having been changed.

Held, that the statute was not a bar.

General *assumpsit*. Pleas, general issue and statute of limitations. Replication, bankruptcy, absence from the State, and that the cause of action accrued in another State. Heard by the court, on demurrer to the replication. Demurrer sustained. The opinion states the case.

C. W. Porter, for plaintiff. Pitkin & Huse, for defendants.

Ross, J. The contention is, whether the plaintiff's replications are, either of them, a sufficient answer to the defendant's special plea, setting up the statute of limitations, that the causes of action did not accrue within six years next before the bringing of the suit. The first replication avers, among other things, that the cause of action accrued to the plaintiff in the State of Ohio, where he then resided, and ever since has resided; and that the defendants then resided, and ever since have resided, in the State of Pennsylvania. This replication is sufficient under section 970, R. L., which deducts from the time limited in which such actions may be brought, the time the person, against whom the cause of action accrues, is out of or absent from the State, having no known property in the State which can by the common process of law be attached, unless the pro-

visions of the section are rendered inapplicable by the facts stated in the replication, bringing it within the last clause, or proviso of the section, which reads: "But the provisions of this section shall not extend to a cause of action accruing in another State or government, when the parties thereto at the time of the accruing of such cause of action are residents of such other State or government." The plaintiff contends, that this proviso of the section applies, only when both parties to the action are residents of the State or government in which the cause of action accrues, at the time the cause of action accrues. The present wording of the proviso supports this contention. The word "such" before the words "other State or government," in which the parties to the cause of action are required to reside, naturally refers back to the single State or government in which the cause of action accrues, and requires that both of the parties should at that time be residents of that one State or government. There is reason in this requirement. Where both parties are residents of the State or government in which the cause of action accrues, the plaintiff has an opportunity to commence his action, and under the principles governing the statutes of limitations in all countries, the statute begins to run against the cause of action if the plaintiff neglects to bring an action. But if the defendant, at the time the cause of action accrues, is a resident of another State or government, and has no known property in the State where the cause of action arises, the plaintiff is without opportunity to commence an action in the jurisdiction in which he has his residence, and so without opportunity to stay or prevent the running of the statute of limitations, if the statute applies in such a case. This construction of the proviso, we think, is supported by the course of legislation in regard to it. It was first enacted by act No. 13, of the acts of 1854. That act provided, that the section in the Compiled Statutes in regard to the absence of the party, against whom the cause of action accrued, from the State, should not "extend to any cause of action which accrued in any other State or government, when the parties thereto, at the time such cause of action accrued, were residents of any other State or government." This, apparently, did not require that both of the parties to the cause of action should be residents of the same State or government. The compilers of the General Statutes, p. 508, § 15, added the act of 1854 as a proviso to the section of the Compiled Statutes affected thereby, so far as relates to the question under consideration, in the identical words of the act of 1854. But the legislature changed the language of the proviso, so that it read in the General Statute (Gen. Stat. 63, § 15) as it does now in the R. L., § 970. The change of the form of expression, in the last phrase of proviso, from "any other State or government," which is very general, to "such other State or government," which is special, and restricts the residence of the parties to the cause of action to the same State or government in which the cause of action accrues, is significant. But for an intentional change in the meaning to be given this phrase of the proviso, the expression used by the original act, and by the compilers in their report to the legislature, was as concise and definite as that used by the legislature. The change could hardly have been made without design. We cannot, therefore, yield to the contention of the defendant, that no change in meaning was intended by the change in the language used in this part of the proviso. On this construction of the proviso to section 970, R. L., the facts averred in the plaintiff's first replication are a sufficient answer to the defendant's special plea.

The plaintiff has added a second replication, setting up the bankruptcy proceedings of the defendants, and their termination without a discharge to them. This replication was added, though in violation of the rules of pleading, as both parties desired the views of this court thereon in case the first replication should be held insufficient. Inasmuch as the first replication is adjudged to be sufficient, the consideration of the second replication, and the determination of its legal sufficiency, become immaterial, and no opinion is expressed thereon.

The *pro forma* judgment of the county court is reversed and judgment rendered that the plaintiff's first replication is sufficient, and the demurrer thereto overruled, and the cause remanded to be proceeded with in the county court.

STATE v. TROY AND BOSTON RAILROAD CO.

January, 1885.

HIGHWAY — RAILROAD COMPANY OBSTRUCTING — LESSOR — EVIDENCE.

A railroad corporation may be indicted for obstructing a highway.

When a railroad corporation, without law or right, so obstructs a highway by building the road-bed within its limits, that it could be indicted for creating a nuisance, the lessee of such railroad company, from lapse of time, or acquiescence on the part of the town, gains no right to encroach further upon the highway, as the exigencies of its business may require, for the purpose of widening, repairing and straightening its track; and there is no presumption that the company in taking a part took the whole of the highway, when all the evidence tended to prove that the original obstruction was without authority of law.

And if such lessee, in repairing its track, suffer stone and gravel to run into the highway and remain there an unreasonable time so as to impede travel, it would be an indictable nuisance.

The defendant having been indicted for obstructing a highway, to show its dangerous condition and the relation of the highway and the railroad, evidence was admissible to prove that there were no cattle-guards at the crossings; and that water had been thrown from the side of an engine upon horses traveling in the highway.

Indictment for obstructing a highway in the town of Pownal. Plea, not guilty. Trial by jury. Verdict, guilty; and the respondent was sentenced by the court to pay a fine of \$100 and costs. The opinion states the case.

Batchelder & Bates, for respondent. *J. M. Martin* and *A. F. Walker*, for State.

Ross, J. It is well settled in this State and elsewhere, generally, that a railroad corporation may be indicted for obstructing a highway. *State v. The Vt. Cent. R. R. Co.*, 27 Vt. 103; *Pierce on Railroads*, 248.

It is not contended by the respondent, except inferentially from its requests, that it could not be indicted for such obstruction. But it contends, that it is to be presumed that the Southern Vermont Railroad Company, when it laid out and built its road for about forty rods wholly within the limits of the highway, took the whole highway, or if not the whole, sufficient of it to allow it to widen, repair, and straighten its road-bed and track from time to time, as the exigencies of its business might require. On the facts, which the evidence of the State tended to establish — and there is no statement in the exceptions of any evidence tending to establish the contrary — we do not think any such presumption arose. The facts which the evidence tended to establish are, that the Southern Vermont Railroad Company took the highway, so far as it occupied it in constructing its road, without right, without agreement with the selectmen of the town thereof, without the action of commissioners, and without having provided any substitute highway. The statute — R. L., § 3377 — then in force allowed a railroad corporation to take a highway for the construction of its railroad only upon agreement in writing with the selectmen of the town, or by the award in writing for a substitute highway of the commissioners to appraise land damages, which agreement and award are required to be recorded in the town clerk's office — R. L., § 3379 — and then vest in the corporation the right to take the highway only upon its construction of the substitute highway. There was no evidence in the case tending to show that the Southern Vermont Railroad Company ever acquired the right to take the highway in question by either of the methods given by statute. On the facts and evidence disclosed in the exceptions, it can hardly be doubted that the Southern Vermont Railroad Company might have been indicted for obstructing the highway, erecting and maintaining a nuisance therein. On general principles, relating to the law of nuisances, the maintenance of a nuisance is the constant creation of a fresh nuisance; and that the lessee of the premises on which the lessor has erected a continuing nuisance becomes liable to indictment by continuing to maintain the same, especially after due notice thereof. The county court held that the respondent, the lessee of the Southern Vermont Railroad Company, finding the railroad constructed over and along the westerly side of the highway, and the highway in use along the easterly side of the old highway, had, without notice to the contrary, the right to assume and presume that its lessor had legally acquired the right to occupy so much of the highway as it actually did occupy. With no agreement or award recorded, as required by statute, this holding is as favorable, if not more, to the respondent than it was

entitled to upon the law and evidence in the case. The court as fully complied with the respondent's first four requests as it was entitled to have them answered.

The county court substantially complied with the respondent's fifth, sixth and seventh requests, so far as they asked the court to hold and charge that the respondent was not guilty for what the Southern Vermont Railroad Company had done on said highway, nor for continuing the structure placed thereon by that company without being notified that the location and construction of the road in the highway was originally wrongful. It was not entitled to have that part of said requests complied with, which asked for a charge that the original location and construction of the railroad by the Southern Vermont Railroad Company was not an unlawful obstruction of the highway. Every obstruction of a highway by a railroad is unlawful, unless the right to use it for the construction of the railroad is first acquired in the manner pointed out by the statute.

The eighth request, "That if the jury find that the repairs that the respondent made in 1876 and 1877 were necessary and proper to be done, and were made in a proper and prudent manner, doing no unnecessary damage, respondent should not be found guilty," was substantially complied with, so far as relates to the then existing road-bed and track. After telling the jury that any obstruction placed upon the highway, that impedes or delays public travel, would be a nuisance, the court say: "It would hardly do to say that if in the proper exercise of their right to repair their railroad some gravel ran down on the highway and left a slight impediment to the public travel, that, if it was done prudently by the employees of the railroad company, that that should be called a public nuisance; because in many cases I can conceive such circumstances might necessarily follow from the very work in which they were engaged; but, if in doing their work, stone, gravel, or other material, is suffered to run into the highway, and suffered to remain there an unreasonable time and impede the use of it (such use as the public had the right to enjoy), that would be a nuisance for which these parties might be held answerable under this indictment." This allowed the respondent to repair in a reasonable and prudent manner the railroad which the Southern Vermont Railroad Company had constructed on the highway, but did not allow it to encroach further upon the rights of the public in the highway without being liable therefor. If the respondent could not be held liable for continuing what its lessor had placed in the highway, the foregoing was a reasonable and just statement of its rights and liabilities in regard to repairs upon the then existing road, and in regard to further encroachments upon the rights of the public in what remained of the highway. The same doctrine, substantially, is applied to the respondent's right to repair, or change the curvature in its track. We discover no error in the charge of the court injurious to the respondent, nor in its refusal to charge as requested. The views already expressed are conclusive that there was no error in the court's refusal to comply with the respondent's remaining requests, tenth to nineteenth inclusive. The presumptions, which under other circumstances might arise from the long acquiescence of the town, and from the lapse of time in regard to the original taking by the lessor, having been, by virtue of right, embodied in requests fifteenth and sixteenth, were rebutted by the evidence of the State, tending to show that such original taking was without the authority of law. Under the evidence it would have been error for the court to have complied with these requests. Upon the evidence and circumstances of the case, no error appears in the court's charge, nor in its failure to charge as requested. We discover no error in the admission of the testimony excepted to. It was necessary to give the jury a full picture of the relations of the railroad and highway to each other within the limits of the original highway, in order that they might correctly determine whether the obstructions complained of were a nuisance. This the testimony excepted to, tended to furnish.

The judgment is that the respondent takes nothing by its exceptions, and the sentence determined upon by the county court, but suspended, is imposed.

WHEELER v. WILSON.

January, 1885.

PLEADING—COLLECTOR—ASSUMPSIT—CASE—TAX—IMPLIED PROMISE—CONSTRUCTION OF STATUTES—R. L., § 2—CONSIDERATION—SPECIFICATION.

In an action given by the statute to a collector against a tax payer, when it is alleged that the plaintiff was collector of taxes for, etc.; that he has in his hands certain taxes named against the defendant, which were legally assessed and delivered to him as such collector for collection, and which are now due and unpaid against the defendant, which he is legally obliged to pay, and neglects and refuses to pay, although there is no allegation that the defendant promised to pay, the count is in *assumpsit*. Distinction between case and *assumpsit* stated.

As the statute authorizes the collector to commence suit "in his name," it is not a misjoinder to join two counts, when by one the defendant is attached to answer the plaintiff in his individual, and by the other in his official capacity.

When a statute prescribes the necessary requisites of a good declaration, none other need be added.

The statute impliedly prescribes that the action shall be *assumpsit*, by prescribing that the action, though unnamed, shall be by trustee process.

The first and third counts, are sufficient, and are not demurrable, for duplicity, although in each, the State, State school, and town taxes are sought to be recovered.

The allegation that the plaintiff was collector, and as such holds the taxes named due and unpaid against the defendant, is by force of the statute a legal consideration for the promise implied from the defendant; and the plaintiff could recover the tax at any time within three years.

Action to recover taxes. Heard on demurrer to the declaration. Demurrer overruled. The writ was dated March 4, 1882.

The first count:

"That the said Charles Wheeler on the first Tuesday of March, A. D. 1880, and from thence to the first Tuesday of March, A. D. 1881, was the legal constable and collector of taxes in and for the town of Brownington, in the county of Orleans; and that the plaintiff as such constable and collector of taxes has in his hands for collection, a State tax amounting to \$11.64, and a State school tax amounting to the sum of \$3.38, and a town tax amounting to the sum of \$43.65, making in the whole, the sum of \$57.62, all which taxes were legally assessed and delivered to the plaintiff as such constable and collector for collection during his said official year; all which taxes are now due and unpaid against the defendant James Wilson; and all which taxes the said James Wilson is legally obliged to pay, and which said James Wilson wholly neglects and refuses to pay, all which is to the damage of the plaintiff \$200."

Second count:

"That the said defendant, at Brownington on the day of the date of this writ, being indebted to the plaintiff in the sum of \$200 for goods, wares and merchandise, sold and delivered by the plaintiff to the said defendant at the said defendant's request; and in a further sum of the same amount for money by the plaintiff lent to the said defendant at the said defendant's request; and in a further sum of the same amount for money by the plaintiff paid for the use of the said defendant at the said defendant's request; and in a further sum of money of the same amount for money had and received by the said defendant to the plaintiff's use; and in a further sum of the same amount for interest for the plaintiff's forbearance at the said defendant's request of moneys due and owing from the said defendant to the said plaintiff; and in a further sum of the same amount for money found to be due from the said defendant to the said plaintiff on account stated between them; and also for the use and occupation of a certain messuage, tenement and land of the plaintiff, situated in, in the county of, by the said defendant at request and by permission of the plaintiff, for the space of before that time elapsed, used, occupied and enjoyed, in consideration thereof, promised to pay the said several sums to the said plaintiff on demand, yet no part of said sums has ever been paid."

Amended count:

"That the defendant, at Brownington, in the county of Orleans, on the day of the date of the writ in this cause, was indebted to the plaintiff in the sum of \$57.62 for

the amount of State, State school tax and town taxes duly assessed upon the defendant in and for the year 1880, in said Brownington, where he then inhabited, and which taxes were, with others, committed to the plaintiff to collect, in consideration thereof then and there, on the day of the date of this writ, promised the plaintiff to pay him that sum on demand; and the plaintiff avers that he is the collector of said town of Brownington and has said taxes due and unpaid against the defendant; yet, though often requested, he, the defendant, hath never paid said sums, or either of them, but wholly refuses or neglects so to do."

Edwards, Dickerman & Young, for plaintiff. *L. H. Thompson*, for defendant.

Ross, J. I. The first question raised by the demurrer is, whether the first count of the declaration is a count in case or in *assumpsit*. If in case, the second and third counts being counts in *assumpsit*, there is a fatal misjoinder. *Joy v. Hill*, 36 Vt. 833.

The first count, in substance alleges, that the plaintiff was the collector of taxes for the town of Brownington for the current year, commencing March, 1880, and has in his hand certain taxes named against the defendant, which were legally assessed and delivered to him as such collector for collection during that official year, and which are now due and unpaid against the defendant, which the defendant is legally obliged to pay, and which he neglects and refuses to pay, to the damage of the plaintiff, etc.

Sections 407 and 408, R. L., enact, that a collector, having an unpaid tax against a person who has not known personal property in the State sufficient to pay the tax, may, in his name, commence a trustee suit upon such tax against such delinquent; and the same proceedings shall be thereupon had, and the trustee shall be chargeable as in other trustee suits, etc., and that "the declaration in such case shall be sufficient if it states that the plaintiff is collector, and has a tax due and unpaid against the defendant." Inasmuch as the trustee process is only authorized in actions founded on contract, express or implied, as in actions of *assumpsit*—R. L., § 1067—the statute, by prescribing that the action shall be by the trustee process, impliedly prescribes that the action, though unnamed, shall be that of *assumpsit*.

The count contains all the elements required by the statute. The question is, is it a count in case, or a count in *assumpsit*? The statute is not specially counted upon. It need not be, says COLLAMER, J., in *Danville v. Putney*, 6 Vt. 512: "A general statute need never be declared on except in criminal or penal cases. The first count avers all things required by the eleventh section, and thus stating the liability thereupon raises the *assumpsit*, without setting up or expressly declaring upon the statute." Says Mr. Chitty, in his work on Pleading, p. 106: "Though a statute may, in some respects, be considered as a specialty, yet *assumpsit* may be supported for money, etc., accruing, due to the plaintiff under the provisions thereof, he not being thereby restricted to any other particular remedy." By the statute under consideration, an action is given to the plaintiff for money accruing, due to him under the provisions of the statute, nor is he restricted to any particular remedy. Applying the language of COLLAMER, J., *supra*, the count states the liability of the defendant, and thereby raises the *assumpsit*, the statute being general and the action of a civil nature. If the pleader had added, as in the third count, "that the defendant promised to pay said taxes," he would have added nothing to the legal quality of the count. The defendant never expressly promised to pay the plaintiff the taxes. The only promise is that which the law raises or implies, under the statute, from the facts stated. When the proper facts are stated, the implied promise arises, as really without the pleader alleging the promise, as it would if a promise was averred. So far as is disclosed by the printed case, the first count in the declaration in *Pawlet v. Sandgate*, 19 Vt. 621, which was a count upon the statute for the recovery of the expense of supporting a pauper, belonging to the defendant, who was ordered to remove from the plaintiff, but who was sick and unable to be removed, did not allege any promise, and yet the count was held to be a count in *assumpsit*. It was also held that *assumpsit* was the proper form of declaring for the compensation for the support of the pauper while sick, given by the statute, the statute not having prescribed the form of action, and that too, although the compensa-

tion for such support was unliquidated. In the opinion, *Rann v. Green*, 2 Cowp. 474, which was *assumpsit* on a private act of parliament, and in which Lord MANSFIELD says the statute was the only ground of action, and that without it there was no power to make the order, but when it was made, *the law raised assumpsit*, is cited with approval. But if we look for the distinctive elements of a count in case, we shall find them wanting in this count. Says ALDIS, J., in *Wright v. McKee*, 37 Vt. 161: "The gist of the matter and the allegation which especially distinguishes the counts in case from those in *assumpsit* is the omission of the consideration, and the averment of negligence." In the count in question, there is no averment of negligence, and there is an allegation of a consideration, declared by the statute to be sufficient legal consideration—the duly assessed, unpaid taxes against the defendant in the hands of the plaintiff as collector thereof. On these authorities, we think, the plaintiff's first count must be held to be a count in *assumpsit*. There was, therefore, no misjoinder of counts, and that cause of demurrer must be overruled.

II. The defendant is attached to answer the plaintiff in his individual capacity, and not in his representative or official character. The statute gives him the right to sue as an individual—"in his name" is the language of the statute. This is not varied by the provision, making an allegation that he is collector a requisite element of the consideration. The declaration is not demurrable on the ground that in the first and third counts the plaintiff declares in his official character, while in the second count he declares in his individual capacity. The entire declaration is "in his name" as an individual, as given by the statute. If the second count is held, as perhaps it must be, a count for the recovery of claims due from the defendant to the plaintiff as an individual, and the first and third counts for the recovery of taxes due to him as collector, inasmuch as the statute gives him the right to recover the latter in his own name as an individual, there is no misjoinder in said counts. *Aiken v. Bridgman*, 37 Vt. 249.

III. The statute having prescribed the necessary requisites of a good declaration, none other need be added. It was not necessary, therefore, to allege a legal demand of the taxes before suit, nor that the defendant had not known personal property in the State sufficient to pay the tax, nor that the defendant was a rateable inhabitant and tax payer in the town at the time the taxes were assessed, nor that the taxes were assessed on legal grand lists. It may be that these would have to be proved on the trial, in order to entitle the plaintiff to a recovery.

IV. The statute—R. L., § 379—gives a collector the right to collect a tax at any place within the State, at any time within three years from the time of receiving the tax bill. This makes him collector of such taxes for three years after receiving them. The suit was brought in March, 1882. The first count avers that the plaintiff, as collector, has in his hands for collection the taxes enumerated; and the third count alleges that the plaintiff is the collector of said town, and has the taxes due and unpaid against the defendant. These allegations state that the plaintiff is collector, as required by the statute, and are sufficient. *State v. Norton*, 45 Vt. 258. The demurrer on this ground cannot be sustained.

V. The defendant contends, that the first and third counts are demurrable for duplicity, because in each, the State, State school, and town taxes are sought to be recovered. He relies upon the language of the statute giving the requisites of the declaration, "has a tax due and unpaid against the defendant," and upon the fact that the several taxes are each raised and assessed in a different way, and may be assessed upon different grand lists. The statute is remedial. It cannot well be contended that the legislature intended that a separate action should be brought upon each tax, thereby largely augmenting the costs of collecting to the defendant; nor, having given a simple and condensed statement of what the declaration should contain, that the declaration should contain a separate count for each separate tax held by the collector; as the language is, we think, subject to the rule of construction of statutes contained in section 2, R. L., providing that "words importing the singular number may extend and be applied to more than one person or thing." Especially should this be so, in construing this statute, which converts a tax duly assessed, remaining unpaid in the hands of the collector, for the purpose of collection, into a debt due from the tax payer to the

collector. The statute manifestly was intended to cut directly across all technical rules of pleading, in furtherance of a speedy and certain collection of such taxes. Doubtless, under the third count, which states the aggregate amount of the several taxes named, the defendant would be entitled to a specification of the amount claimed under each tax. But as the count states the whole amount claimed, it is not subject to demurrer for failing to state the amount of each, inasmuch as the statute, for the purpose of collection, converts the aggregate amount into a debt against the defendant, and does not prescribe that the declaration shall set forth in detail the various steps necessary to be taken in the due raising and assessment of the taxes sought to be recovered.

VI. The only other cause for demurrer insisted upon, is that the third count does not disclose a legal or sufficient consideration for the promise therein alleged. If we are correct in regard to the nature of the action, and in the views expressed, in regard to the elements of the first count, the allegation, that the plaintiff is collector, and as such holds the taxes named due and unpaid against the defendant, is by force of the statute, a legal consideration for the promise, which is raised or implied from the defendant, to pay the taxes to the plaintiff.

On these views, the county court properly overruled the demurrer, and adjudged the declaration sufficient; and that judgment is affirmed.

BELLOWS v. SOWLES. *

January, 1885.

STATUTE OF FRAUDS — FORBEARANCE OF OPPOSITION TO PROBATE OF WILL — CONSIDERATION.

The promise of an executor to pay \$5,000 to one of the testator's heirs at law, who received nothing under the will, in consideration that he would forbear further opposition to the probate of the will, claimed to have been made as it was through undue influence, is not within the statute; and such forbearance is a sufficient consideration.

Assumpsit. Heard on demurrer to the declaration. Demurrer overruled.

Defendant *pro se* (with him *H. S. Royce* and *L. P. Poland*). *Geo. A. Ballard, Farrington & Post, Wilson & Hull, and Noble & Smith*, for plaintiff.

POWERS, J. Counsel for the defendant have demurred to the declaration in this case upon two grounds: first, that the consideration alleged is insufficient; secondly, that the promise, not being in writing, comes within, and is therefore not enforceable under, the statute of frauds.

It has been so often held that forbearance of a legal right affords a sufficient consideration upon which to found a valid contract, and that the consideration required by the statute of frauds does not differ from that required by the common law, it does not appear to us to be necessary to review the authorities, or discuss the principle. As to the second point urged in behalf of the defendant, this case presents greater difficulties. Although the statute of frauds was enacted two centuries ago, and even then was little more than a re-enactment of the pre-existing common law, and though cases have continually arisen under it, both in England and America, yet so confusing and at times inconsistent are the decisions, that its consideration is always attended with difficulty and embarrassment.

The best understanding of the statute is derived from the language itself, viewed in the light of the authorities which seem to us to interpret its meaning as best to attain its object. That clause of the statute under which this case falls reads: "No action at law or in equity shall be brought upon a special promise of an executor or administrator to answer damages out of his own estate."

This *special* promise referred to is, in short, any *actual* promise made by an executor or administrator, in distinction from promises implied by law, which are held not within the statute.

The promise must be "to answer *damages* out of his own estate." This phraseology clearly implies an obligation, duty, or liability on the part of the *testator's* estate, for which the executor promises to pay damages out of his *own*

* See 45 Am. Rep. 621.—Ed.

estate. The statute, then, was enacted to prevent executors or administrators from being fraudulently held for the debts or liabilities of the estates upon which they were called to administer. In this view of the case, this clause of the statute is closely allied, if not identical in principle, with the following clause, namely: "No action, etc., upon a special promise to answer for the debt, default or misdoings of another." And so Judge ROYCE, in delivering the opinion of the court in *Harrington v. Rich*, 6 Vt. 666, declares these two classes of undertakings to be "very nearly allied," and considers them together. This seems to us to be the true idea of this clause of the statute:—that the undertaking contemplated by it, like that contemplated by the next clause, is in the nature of a *guaranty*; and that reasoning applicable to the latter is equally applicable to the former.

We believe this view to be well supported by the authorities. Browne, in his work on the Statute of Frauds, p. 150, says: "In the fourth section of the statute of frauds, special promises of executors and administrators to answer damages out of their own estates appear to be spoken of as one class of that large body of contracts known as guaranties." And so on page 184, he interprets "to answer damages" as equivalent to *to pay debts of the decedent*. This seems to be the construction given to the statute by Chief Justice REDFIELD, in his work on Wills, vol. II, p. 290 *et seq.*

The Revised Statutes of New York, vol. II, p. 113, have improved upon the phraseology of the old statute as we have adopted it, by adding, *or to pay the debts of the testator or intestate out of his own estate*.

If we are correct in this view of the relation between these two clauses, the solution of the question presented by this case is comparatively easy.

It has been held in this State, that when the contract is founded upon a new and distinct consideration moving between the parties, the undertaking is original and independent, and not within the statute. *Templeton v. Bascom*, 33 Vt. 132; *Cross v. Richardson*, 30 id. 641; *Lampson v. Hobart*, 28 id. 697. Whether or not it would be safe to announce this as a general rule of universal application, it is a principle of law well fortified by authority, that where the *principal or immediate* object of the promisor is not to pay the debt of another, but to *subserve some purpose of his own*, the promise is original and independent, and not within the statute. Brandt on Sur. 72; 3 Pars. on Cont. 24; Bob. Fr. 232; *Emerson v. Slater*, 22 How. 28. And this seems to be the real ground of the decisions above cited in the 28th and 30th Vt., in which the court seems to blend the two rules just laid down.

PIERPONT, J., in delivering the opinion of the court in *Cross v. Richardson*, *supra*, says: "The consideration must be not only sufficient to support the promise, but of such a nature as to take the promise out of the statute; and that requisite, we think, is to be found in the fact that it operates to the advantage of the promisor, and places him under a pecuniary obligation to the promisee, entirely independent of the original debt."

Apply this rule to this case. Here the main purpose of this promise was, not to answer damages (for the testator) out of his own estate, but was entirely to subserve some purpose of the defendant. The consideration did not affect the estate, but was a matter purely personal to the defendant. Here there was no liability or obligation on the part of the estate to be answered for in damages. It could make no difference to the *executor* of that estate whether it was to be divided according to the will, or by the law of descent. If the subject-matter of this contract had been something entirely foreign to this estate, no one would maintain that the defendant was not bound by it, because he happened to be named executor in this will. Here the subject-matter of the contract was connected with the estate, but in such a way that it was practically immaterial to the estate which way the question was decided. There exists, therefore, in this case, no sufficient, actual, primary liability to which this promise could be collateral. This seems to us to be the fairest interpretation of the law. The statute was passed for the benefit of executors and administrators; but it might be said of it, as has been said of the protection afforded to an infant by the law of contracts, that "it is a shield to protect, not a sword to destroy." If this class of contracts was allowed

to be avoided under it, instead of being a prevention of frauds, it would become a powerful instrument for fraud. As in this case the plaintiff would be deprived of his legal right to contest the will, by a party who has reaped all the benefit of the transaction, and is shielded from responsibility by a technicality. We do not believe this was the result contemplated by the statute.

The judgment of the county court overruling the demurrer and adjudging the declaration sufficient is affirmed, and case remanded with leave to the defendant to plead on the usual terms.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

TOMPSON v. TAPPAN *et al.*

June 23, 1885.

MORTGAGE — FORECLOSURE BY ENTRY — EQUITY OF REDEMPTION.

An entry to foreclose under the statute is valid, although the mortgagee is the owner of the equity of redemption, subject to a second mortgage on the same premises, and the holder of the second mortgage is ignorant of the entry for more than three years thereafter.

The fact that before the expiration of three years from the date of the entry, the mortgagee receives the avails of other security held by him for the same debt, but to an amount less than the mortgage debt, does not of itself prove the intention on his part to waive the foreclosure.

Bill in equity to redeem certain real estate in Boston from a mortgage. The plaintiff is a holder of second mortgage upon the real estate, the first mortgage thereon having been held by the defendant Tappan. From evidence offered by the plaintiff, at the hearing before a single justice, it appeared that the original mortgage was made September 11, 1871, by Lemuel Pope to George A. Simmons trustee. In 1873 the defendant Tappan acquired the equity subject to this mortgage. February 5, 1875, Simmons assigned this mortgage to the defendant Tappan, who received at the same time an assignment from Simmons of his right to certain collateral security, consisting of a mortgage upon other property in Cambridge. It appeared that Tappan entered to foreclose under the statute for a breach of conditions contained in the mortgage. Defendants put in evidence the certificate of two witnesses in the usual form as required by Gen. Stats., chap. 140, §§ 1 and 2, showing that on March 18, 1875, Tappan, for the purpose of foreclosing the mortgage, made an open and peaceable entry upon the premises, not opposed by the mortgagor. This certificate was duly recorded. The plaintiff testified that he first knew of the entry to foreclose about two months before the filing of his bill. Before the three years expired which followed the date of Tappan's entry to foreclose, Tappan sold the property named in the collateral mortgage held by him at public auction, and the title was conveyed to him, and he has since been the holder. Other defendants in the case are the present owners of the estate sought to be redeemed. The case was reserved upon the evidence offered for the consideration of the full court.

W. E. L. Dillaway, for plaintiff. *M. & C. A. Williams*, for Tappan.

C. ALLEN, J. The plaintiff in this case presents but two questions: First, That the entry to foreclose was illegal and void, and secondly, that the receipt of money or value from the other security before the foreclosure became absolute was a waiver of the foreclosure.

1. The entry to foreclose, being made and recorded in the manner provided by statute, was valid and effectual for the purpose of foreclosure, although the mortgagee was the owner of the equity of redemption, subject to a second mortgage on the same premises, and although the holder of the second mortgage was ignorant that such entry had been made for more than three years thereafter. *Fletcher v. Cary*, 103 Mass. 475; *Ellis v. Drake*, 8 Allen, 161.

2. The fact that before the expiration of three years from the date of such entry, the mortgagee received the avails of other security held by him for the same debt,

but to an amount less than the amount of the mortgage debt, does not, of itself, and without other evidence, prove an intention on his part to waive the foreclosure. *Lawrence v. Fletcher*, 10 Metc. 344; *Bennett v. Conant*, 10 Cush. 167; *Hobbs v. Fuller*, 9 Gray, 98.
Bill dismissed.

MERCHANTS' NATIONAL BANK v. NATIONAL BANK OF COMMONWEALTH.

June 28, 1885.

PAYMENT — MISTAKE — ACTION TO RECOVER BACK — FAILURE TO RETURN BAD CHECK WITHIN TIME REQUIRED BY CLEARING-HOUSE RULES.

By the rules of the Clearing-House Association, of which plaintiff and defendant were members, mistakes made in the clearing-house by crediting checks which are not good, are settled between the banks themselves. Such checks are to be returned by the bank receiving them to the bank from which they are received as soon as it is found they are not good, and in no case are they to be returned after one o'clock. The plaintiff paid to the defendant through the clearing-house the amount of a check drawn upon it, and which the drawer had not sufficient funds in the bank to meet. By a mistake, caused by the wrongful act of the drawer, the check was not returned to the defendant until after one o'clock. In an action brought to recover back the amount paid on the check,—

Held, that inasmuch as the defendant had not changed its position in reference to the check during the interval between one o'clock and the time when the check was actually returned, and it appearing that the plaintiff had exercised reasonable care and diligence in the matter, that plaintiff could recover. That defendant could not, under such circumstances, on behalf of the owner of the check, take advantage of plaintiff's failure to return it within the time required by the rules of the association.

Held further, that plaintiff was only entitled to recover the difference between the amount paid defendant on the check, and the amount of the drawer's deposit in plaintiff's bank for which he had a right to draw.

Contract to recover back \$15,000, alleged to have been paid by the plaintiff, by mistake, upon a check, given by Benjamin F. Burgess & Sons, to the Massachusetts Loan and Trust Company, by which company it was deposited with the defendants, and paid by the plaintiff to the defendant through the clearing-house. The case was heard by a single justice and reported for the consideration of the full court.

S. Bartlett and *R. D. Smith*, for plaintiff. *S. Lincoln* and *H. D. Hyde*, for defendant.

DEVENS, J. The rules and course of business of the incorporated association, called the Boston Clearing-House Association, have been so often set forth in the recent decisions of this court, that they do not require to be here fully restated. They were adopted solely for the purpose of facilitating exchanges and adjustment of accounts between the banks. By a contract between them, an association is formed which is their common banker. To this association, each bank, which is indebted, by reason that more checks, etc., were presented, as drawn upon it, than it presents as drawn upon other banks, who are members, pays the balance found due from it to the association, while each bank that shows a balance in its favor receives from the association the amount, by its check. Mistakes in this computation that may be made, because checks were not good, are not settled by the association, but between the banks themselves, and such checks are to be returned by the banks receiving the same to the banks from which they are received as soon as it shall be found that they were not good, and in no case were they to be retained after one o'clock.

To the regulations of this association the customers of the banks are not parties, and whatsoever effect is to be given to them, as between the banks, their customers are not in a situation to claim the benefit of them, nor are they liable to be injuriously affected by them. *Merchants' Bank v. Eagle Bank*, 101 Mass. 281; *Manufacturers' Bank v. Thompson*, 129 id. 438; *Bank of North America v. Bangs*, 106 id. 441; *Exchange Bank v. Bank of North America*, 132 id. 147.

By these regulations it was, in substance, agreed in the case at bar, that if Burgess & Sons had to their credit a sum sufficient to meet the check, for which they were entitled to draw, the amount of which is here demanded, the provis-

ional allowance of it at the clearing-house should stand, but that if it appeared, on investigation, that they were not entitled to draw for any such sum, the check would not be returned by the Merchants' Bank after one o'clock. The bank which had sent the check to the clearing-house would thus be notified that it was not good, and that re-payment of the amount of it would be expected by the bank on which it had been drawn. The check was not returned to the Commonwealth Bank until after one o'clock. It is not disputed by the plaintiff that if, in consequence of this, the defendant had changed its position, as if it had paid over the amount of the check to the owner, who had deposited it with the bank for collection, the bank should not suffer, but it contends that when, by a mistake as to a matter of fact, it has delayed the return of the check until after one o'clock, this cannot be taken advantage of by the bank on behalf of the owner of the check, there having been no change in its position in the interval between one o'clock and the actual return of the check. The case of *Merchants' Bank v. Eagle Bank*, *ubi supra*, goes far to decide the case at bar.

In *Procter v. Canadian Bank of Commerce*, 23 Fed. Rep. 179, in the United States court for the northern district of Illinois, it was held otherwise, and there decided, that a mistake discovered after one and one-half o'clock, which was then the hour for returning checks, could not be corrected by the bank making it, nor the check then returned. But we have not overlooked the right of parties to make such agreement as they choose. The question is as to the interpretation of the rule, which they, as members of the clearing-house have adopted. The rule is "whenever checks, which are not good, were sent through the clearing-house, they should be returned by the banks receiving the same to the banks from which they were received, as soon as it shall be found that said checks were not good, and in no case shall they be retained after one o'clock." If it were intended that mistakes should never be corrected, unless discovered by one o'clock, this should in terms explicitly appear. As it does not, it seems to us the more correct interpretation to hold that the rule authorizes the bank receiving the check after one o'clock arrives, and the check is not returned, to treat it in all transactions as if it were good. If, therefore, the bank changes its position, it will suffer no loss by reason of it. On the other hand, if the mistake is discovered after one o'clock, and the bank receiving the check has not changed its position, by reason of the expiration of the time, it should rectify the mistake, where reasonable care has been exercised by the bank on which it was drawn. The case of *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397, was here distinguished.

In the case at bar there has been no change of circumstances after the time when the defendants had a right to treat the check as paid and before it was returned, which would, in any way, subject the defendant to loss, or render it unjust for the plaintiffs to recover. The fact that the defendant gave credit to its depositor in this interval did not make the defendant bank liable to him, when a mistake was discovered, which showed it to have been erroneously done. The mistake made by the plaintiff bank was such as would bring the case within the rule which has heretofore been held applicable on this subject. There was no carelessness as in *Boylston Nat. Bk. v. Richardson*, 101 Mass. 287.

The mistake in the case at bar was that the account of Burgess & Co. with the plaintiff bank was really different from that which appeared on its books, and this was effected by the wrongful act of Burgess. He had received a check for \$7,500, for property belonging, in specie, to the bank, which it was his duty to have delivered to the bank, as its property. Instead of doing this he deposited the check as the property of Burgess & Co., and by that act, obtained for them a credit on the books of the plaintiff bank, to which they were not entitled. Against the false balance thus produced, by depositing the money of the bank, as if it were their own, Burgess & Co. fraudulently drew the check in controversy, and it led to the retention of the check until a few minutes after one o'clock.

But, if money paid under a mistake of fact may be recovered, and if the credit to which the defendants were entitled at one o'clock might be reached on discovery of such a mistake it is urged that the plaintiff should then have been able to show mistake, misapprehension or ignorance of some definite and material fact, which directly affected the obligation of the plaintiff to pay

the check; that the credit was sought to be recalled under a vague apprehension of insecurity produced by reports of the embarrassments of Burgess & Co., and this, it is contended, is not sufficient, even if subsequent investigation has shown that the apparent credit of Burgess & Co. with the plaintiff bank had been fraudulently obtained in the mode above stated. It appears by the report that the president of the plaintiff bank, being led to think that Burgess & Co. were in financial trouble, then discovered that the avails of the sugar confided to Burgess to sell had not been received by the bank upon the indebtedness for which it was pledged as collateral, and, looking at the condition of Burgess & Co.'s bank account, directed the return of the check. But, even if, at the time of the return of the check, the president could not have stated the exact way in which the mistake had been made, when subsequently investigated, it is shown to have arisen from the same transaction to which he then attributed it, and which caused him to direct the return of the check, viz., the sale of the sugar confided to Burgess. He supposed that the proceeds of the sugar had not been paid into the bank at all, while, in fact, they had been paid, but so as to obtain, by spoken or acted falsehood, a wrongful credit for Burgess & Co. Nor can it be seen why the plaintiff bank might not have returned the check the next day if there had been no change in the circumstances, and if it had then discovered, as it did, the exact character of the mistake.

The defendant further urges that there has been such laches on the part of the plaintiff bank in its dealings with Burgess that it is not entitled to recover. *Dana v. Bank of the Republic*, 132 Mass. 156.

On August 23d or 24th demand was made upon Burgess for payment of demand notes, which were then deemed to be amply secured by sugars as collateral. Two days after this Burgess told the plaintiff's president that "he had sold or bargained 217 hogsheads and the warehouse receipts were delivered to him, as agent of the bank, to enable him to transfer the sugars sold, with the understanding that the money received therefrom would be applied upon the debt for which they were held as collateral security. A check was received September 21st therefor of \$7,500 which was the one wrongfully deposited by Burgess to the credit of Burgess & Co. The laches, which defendant alleges, is in looking after the proceeds of this sugar until September 24th. But, up to this time, the plaintiff bank had not supposed Burgess & Co. to be in financial straits. They had always been allowed to dispose of the goods pledged by them as collateral, and had always faithfully accounted for the proceeds of the same. That no suspicions were, in fact, excited until September 24th, is quite clear, and the circumstances are not such that we can say there has been laches on the part of the plaintiff that should deprive it of its remedy for the mistake into which it was led by Burgess' fraud.

At the hearing before a single judge the defendant contended that the remedy of the plaintiff was not against defendant, if any, but against the Massachusetts Loan and Trust Company, and that the plaintiffs got the benefit of the sale of the sugar by applying the proceeds on another loan. Neither of these positions is tenable. Where a party who has paid away money is entitled to recall it, he may do so provided the agent has not paid it over to the principal, and that no change has taken place in his situation which would render it unjust to him. The fact that the agent has passed the money in account with his principal, without a new credit being given to the principal, will not of itself be sufficient to enable the agent to retain it. *Story on Agency*, § 800.

Nor can the plaintiff obtain any benefit from the sale of the sugars by Burgess except by this action, which, to the extent to which it is maintained, will restore to them that which by Burgess' fraud they have been induced to pay out.

The question how much the plaintiff was entitled to recover remains. By the course of dealing between the banks composing the Clearing-House Association, where there is not enough money on deposit to pay a check in full, the ordinary custom is to return it as not good. This custom has no application to the inquiry how much the plaintiff may now recover, which is one outside of the clearing-house rules. These were not complied with by the return of the check within the time, and cannot control in determining how much shall be returned after payment of it has been made. If no mistake had been made and the plaintiff had followed

the custom, it is true that it would have refused the check entirely and thus have kept in its control the other funds of Burgess & Co., not the subject of mistake which it might have applied in offset to the other claims which it held against Burgess & Co. But the defendant is not bound to indemnify the plaintiff against all the incidental consequences of its mistake, but only to return that money which was the subject of the mistake. So far as Burgess & Co. were entitled to draw, the defendant has now the right to hold. The fact that if Burgess & Co. had overdrawn, and this had been known to the plaintiff, it would have wholly refused the check, should not deprive the defendant of that which it was the duty of the plaintiff to pay him upon a check properly drawn when it has, itself, honored the check as it was actually drawn. The plaintiff bank was entitled, if it saw fit to pay the check, to the amount actually due from it to Burgess & Co., if the defendant was willing to accept that sum. Nor is the plaintiff here entitled to recover any money to the use of Burgess & Co. It would do so if it recovered the money for which Burgess & Co. had a right to draw, even if, when recovered, it would go to the use of Burgess & Co., only by the payment of his other debts or liabilities to the plaintiff bank. The money, which was the subject of the mistake, was \$7,500. In the forenoon of September 24, and necessarily before the check of defendants could be treated as paid, three checks, amounting together to \$1,425, were drawn from the deposit of Burgess & Co., which was nominally \$17,145.56. These two sums being deducted from this deposit, there remained \$8,220.56, for which Burgess & Co. had a right to draw. The amount which the plaintiff is entitled to recover is the difference between this sum and \$15,000 with interest from date of writ.

Judgment accordingly.

JACKSON COMPANY v. BOYLSTON INSURANCE CO.

June 24, 1885.

INSURANCE — SUBROGATION.

The right of an insurance company insuring property *in transitu*, to be substituted to the rights of the insured as against the common carrier upon paying a loss, is subject to the owner's contract of carriage with the railroad company, provided there be no fraudulent concealment from the insurer. An insurance company insuring property *in transitu*, and making no provisions in regard to the nature of the contract of carriage, must be held to have insured subject to the actual contract of carriage so far as it was a lawful contract.

Contract to recover upon a policy of insurance for the loss of thirty-six bales of cotton destroyed by fire. The case was heard by a single justice who held the defendant liable and found for the plaintiff. It was thereupon reported for the consideration of the full court.

E. Merwin and *R. H. Gardiner, Jr.*, for plaintiff. *C. A. Prince* and *F. Peabody*, for defendant.

DEVENS, J. The action is on a policy of insurance, by which the defendant insured the plaintiff on cotton, in transit, between ports and places in the United States, and the plaintiff's mills, in New Hampshire. The cotton was bought by one Ivy, as broker for the plaintiff and shipped by him, by the Atlantic and West Point Railroad Company and connecting lines. It was in two lots, and Ivy, attaching the two railroad receipts to a draft, drew on the plaintiff for the amount of the purchases. The draft, with the railroad receipts attached, was received by the plaintiff's treasurer, on October 17, 1883, and paid on presentation, after which he gave notice to the defendant of the shipments and presented the policy, that they might be indorsed thereon, which was done. The railroad receipts, given on behalf of the Atlantic and West Point Railroad Company and connecting lines, contained a stipulation, that, in case of loss or damage to the cotton, sustained during transportation, whereby legal liability was incurred, only that company should be responsible in whose actual custody the cotton was, at the time of the occurrence; and further, that "the company incurring such liability shall have the benefit of any insurance which may have been effected upon, or on account of, said cotton."

Ivy did not read the railroad receipts, and it does not appear whether he did or did not know their contents, so far as the clause relating to insurance is concerned. The railroad receipts were not sent to the defendant, nor their contents communicated, nor did it ask to see them. It did not appear that the defendant knew whether they were received. The plaintiff's treasurer did not read them, nor did he or the plaintiff know that they contained this clause, nor did they know that receipts containing such a clause would be or were likely to be taken, and no fraud, or concealment from defendant was intended.

While in transit and in the actual custody of the South Carolina railroad, a common carrier, and one of the connecting lines of Atlantic and West Point railroad and in the State of South Carolina, thirty-six bales of the lot of cotton, before described, were destroyed by a fire, the origin and cause of which are unknown. For the value of these this action is brought.

It is the contention of the defendant that, whether the contract between the plaintiff and the carrier is governed by the law of Massachusetts, Georgia, or South Carolina, it was, so far as it is stipulated, in favor of the carrier for the benefit of any insurance that might have been effected, valid and binding upon the plaintiff.

While this question has been thoroughly discussed on both sides and with careful examination of statutes and decisions in each State, it will not be necessary to decide it. In the view we take of the case, we shall assume, in favor of the defendant's contention, that the stipulation was valid and binding between the plaintiff and the carrier.

If it be thus held, the defendant then contends that this was a contract in violation of the defendant's rights and rendered the policy void, for the reason that, when the insurer of goods, in the custody of a carrier, pays the loss on the goods insured to the owner, he is ordinarily entitled to be put in the place of the owner and clothed with all his rights. *Hart v. West. R. R.*, 13 Metc. 99. The defendant further contends that this being the well-recognized law at the time of the contract of insurance, both plaintiff and defendant must have contemplated this right of subrogation in case of loss, and if the plaintiff has destroyed it by a contract which would deprive the defendant of this right, the policy is avoided.

Subrogation is the substitution of one person in place of another, whether as a creditor or the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies or securities. It does not necessarily depend upon contract, but grows out of the relation which two parties sustain to each other, and the party subrogated acquires no greater rights than those of the party for whom he is substituted. The contract of insurance being one of indemnity, the insurer, when he has indemnified the insured, is equitably entitled to succeed to the right which he had against the carrier. But, as the insurance company obtains its remedy against the carrier, not by virtue of any contract of its own with him, but through the contract of the owner of the goods, such owner may make the contract of carriage, so as to suit his own interest, provided there be no fraudulent concealment from the insurer, and the right which the insurer obtains is subject to the agreement made with the carrier. Carriers have an insurable interest in the goods they transport and may, therefore, effect insurance upon them for their own benefit. There is no reason why they may not insure them jointly with the owner, and, if so, why they may not contract for the benefit of insurance, effected by the owner, in the absence of fraud, or of any contract to the contrary, with the insurer. *Chase v. Wash. Ins. Co.*, 12 Barb. 595; *Van Natta v. Sec. Ins. Co.*, 2 Sandf. 490.

The defendant contends that, by reason of the existence of this right of subrogation, the plaintiff has obtained its insurance at a lower rate than it otherwise would have done; but it is also true, that, by an agreement that the carrier shall have the benefit of the insurance, he has probably obtained the carriage of his goods at a lower rate of transportation. The insurer, as against the carrier, is entitled to preference, only when there is no agreement to the contrary, and the insured thus has a claim against the carrier. If the carrier may insure on his own account, he may contract with the person whose goods he carries that such person

shall insure for his benefit. While the question has not been the subject of discussion in this Commonwealth, these remarks are well sustained by respectable authorities elsewhere. *Mercantile Ins. Co. v. Cabela*, 20 N. Y. 173; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. 18; *Rintoul v. N. Y. Cent. R. R.*, 17 Fed. Rep. 905.

The case of *Carstairs v. Mechanics & Traders' Ins. Co.*, 18 Fed. Rep. 473, is distinguishable by the important fact that it was there expressly stipulated, that, in case of loss, the insurance company should be subrogated to all claims against the transporter.

There is no ground, in the case at bar, upon which any fraud or concealment can be asserted. The receipts, which would be given for carriage, the plaintiff well knew, would be various, as the cotton would pass through States controlled by different laws. The right of the owner so to contract that the carrier should have the benefit of his insurance, the defendant must have known had been asserted, as it became a subject of judicial decision as early as 1859. *Mercantile Ins. Co. v. Cabela*, *ubi supra*. It made no inquiries, and the plaintiff's officers did not know of the existence of the clause. Nor can the position of the defendant that this agreement was in violation of the clause in the policy, by which it agreed that "this insurance shall be void, in case the policy, or the interest insured thereby, shall be sold, assigned, transferred or pledged without the consent, in writing, of the insurers," be maintained. The policy, and the interest in it, is still retained by the owner; it is neither transferred nor pledged.

It being conceded that the contract between the plaintiff and the carrier was binding and valid, we are brought to the conclusion, expressed in the ruling of the judge who presided at the trial, that "in a case where there was no intention to deprive the insurance company of its rights and no intentional fraud and concealment, and where the plaintiff itself was actually ignorant of the stipulation relied on at the time it made the insurance, or obtained the indorsement on the policy, and was ignorant, when it ordered the cotton, that any stipulation would be made, and there was no actual misrepresentation, an insurance company insuring property *in transitu*, and making no provision in regard to the nature of the contract of carriage, and not requesting to see the bill of lading or receipt, and making no inquiries about them, must be held to have insured it under and subject to the actual contract of carriage, so far as it was a lawful contract."

The defendant has no just ground of complaint against the ruling, which was in these terms.

Judgment on the verdict.

[See 24 Eng. Rep. 212; 26 Am. Rep. 544; 8 id. 149; 29 id. 171.—Ed.]

THOMPSON, Trustee, v. THOMPSON.

June 24, 1885.

WILL — CODICIL — REAL ESTATE IN TRUST — DUTY TO RENT.

A testator, by his will, gave to his grandchildren certain moneys in trust, to be paid to them at a certain time together "with the interest it had gained or received." By a codicil he also gave to them certain real estate "in trust, the same as mentioned in my aforesaid will."

Held, that by the terms of the will and codicil, construed together, it was the duty of the trustee to obtain a reasonable rent from the real estate for the benefit of the infants.

Appeal from a decree of the judge of probate for Middlesex county, disallowing certain items of rent charged by the plaintiff, in his account as trustee, under the will of Leonard Thompson. The case was heard by a single justice on appeal and the decree of the probate court was affirmed. The plaintiff appealed.

G. W. Norris, for plaintiff. M. T. Allen, for defendant.

DEVENS, J. The question presented by the appeal from the probate court in the case at bar is, whether Justin E. Thompson is rightfully entitled to the use and occupation of a certain piece of real estate, known as the "Marcy Place," or whether he is liable to pay rent therefor. The solution of it depends upon the construction to be given to the will of Leonard Thompson, deceased, the father

of Justin E., and the codicil thereto. The sixth clause of the will gave to the testator's son, Justin E., \$8,000, "to be held in trust as hereinafter directed, and the same clause gave to the three children, naming them, of Justin E., each \$100, as hereinafter directed." The eighth clause appoints the appellant trustee, to hold all the sums of money given to Justin E., so "that he shall have no right to demand any part of said legacy of money," orders the trustee to grant to Justin E. such aid and assistance as his situation may require until the whole sum is expended, and, upon his decease, whatever remains is to be "equally divided among and between his children then living." The same clause permits, in a certain event, the trustee to pay over the whole sum to Justin E., and thus discharge himself as trustee. It adds a direction to the trustee to take the full care of his (Justin E.) "children's legacy, until they arrive at a legal age to receive it, if they should need it sooner, then pay it over to or for them, with the interest it has gained or received." The codicil gives to Justin E. Thompson's children, named, the Marcy Place, so called, and provides that if there are after-born children of Justin E. they shall receive equal shares. "This estate," the codicil says, "I give in trust, the same as mentioned in my aforesaid will, and I hereby order and direct said trustee to not allow any account or claim against the said Justin E., or his heirs' legacies, previous to the date of this codicil, from any estate, but to see that the full amount of the legacy to him and his heirs be saved for them, the trustee to be fairly paid and to receive the same from said legacies, and to have the same duties and powers in this codicil as given in said will."

The contention of the appellee is, that, connecting the codicil and that clause of the will (clause eight) which recites the trust therein for the benefit of Justin E., and reading them together, the use, at least, of the Marcy Place is given to Justin E., under the same trust which gives him the sum of money bequeathed for his benefit. But the eighth clause provides for two trusts, viz.: for the two sums given by the sixth clause, respectively, for the father and for the children, in accordance with the direction, which is to follow that clause, and it is the trust, created by the eighth clause for the benefit of the children, which is referred to in the codicil by the words, "in trust, the same as mentioned in my aforesaid will." Although the codicil describes the Marcy Place as that which Justin E. now has "as his homestead," he is not in any way spoken of as a beneficiary under the codicil, and the estate is in terms given in addition to the legacy under the will, which the children named have therein bequeathed to them.

The controlling object of the codicil is to enhance, by the devise of the real estate, the trust estate in personal property, created by the will for the benefit of the children, although the devise would operate in favor of after-born children, so far as the realty is concerned, who are not provided for by the trust in favor of the children named in the eighth clause of the will. That the trust referred to by the codicil is not the one in the will relating to Justin E., and the sum of money set apart for him is shown by considering that those children who are to have the benefit of the remainder of the legacy in favor of Justin E. are not those mentioned by name in the will and codicil, but only those of them who may be living at the decease of Justin E. It is further seen, by observing, that it is in the power of the trustee, upon being satisfied that Justin E. will take care of himself and his property bequeathed for his benefit by the will, and that then, the receipt of Justin E., with the consent of his friends and the trustee, will be a full discharge of the trust. As neither the real estate nor the use thereof was devised in terms for the benefit of Justin E., and as he had, therefore, no legal right to the occupation thereof, the trustee was entitled to charge the trust estate held by him for the benefit of Justin E. with the rent of the Marcy Place, in order that the estate held by him for the benefit of the children might receive the benefit of it in the adjustment of accounts between the two trusts and with the trustee.

The trust in the will (apart from what would otherwise be the duty of the trustee) contemplates that the trustee, in his care of the children's legacy, will invest it so as to obtain interest therefor. In holding the real estate for their benefit under a similar trust, it would be his duty to obtain a reasonable rent therefor.

Decree reversed.

ATTORNEY-GENERAL v. WILLIAMS.

June 23, 1885.

BOND GIVEN FOR DEED BY COMMONWEALTH — BAY-WINDOWS PROJECTING OVER STREET — ACTION BY ATTORNEY-GENERAL TO REMOVE.

The defendant owned lands conveyed by the Commonwealth to his assignor by a bond given for a deed. The property was described as running to a passage-way sixteen feet wide; and the bond referred to a plan which showed the property in question was part of a plot of ground that had been filled in and improved by the Commonwealth, laid out with streets and passage-ways, and sold in lots to be used exclusively for residence purposes. The plan also contained a stipulation "that a passage-way sixteen feet wide is to be laid out in the rear of the premises, the same to be filled in by the Commonwealth and to be kept open and maintained by the abutters in common." The defendant built up to the line of the passage-way on his lot and then constructed a bay-window from a point eight feet above the sidewalk, extending three or four feet into the passage-way. In an action brought to compel its removal,—

Held, that the projection should be removed; and that the action was properly brought in the name of the attorney-general.

Information, brought on the relation of the harbor and land commissioners, to restrain the defendant from erecting or maintaining on certain lots of land, situate at the corner of Boylston and Exeter streets, in the city of Boston, a building with bay-windows or projections, extending into or over the passage-way laid out in the rear of said lots in alleged violation of the stipulations contained in bonds for a deed, given by the Commonwealth to certain parties, which bonds were assigned to the defendant. The case was heard by a single justice and decided as if the defendant held a deed from the Commonwealth containing all the agreements and stipulations set forth in the bonds. The case was reserved upon the pleadings and evidence for the consideration of the full court.

H. N. Shepard, for attorney-general. *F. A. Brooks*, for defendant.

C. ALLEN, J. The first question which we have considered is whether an information in the name of the attorney-general can be maintained to enforce the stipulations in respect to the passage-way. In *Attorney-General v. Gardiner*, 117 Mass. 492, it is declared that the Commonwealth, in devising the scheme of improvement of the Back Bay lands, acted in a two-fold capacity, as the proprietor of lands which it held and might sell, and as the sovereign power authorized to lay out highways for the benefit of the public; and that, in the latter capacity, it might enforce these provisions and restrictions against all persons bound by them by an information in equity in the name of the attorney-general. It is suggested that there is a distinction between that case and the present. But the Commonwealth properly reserved to itself the right to enter upon the premises by its agents, and, at the expense of the party in fault, to remove or alter, in conformity with the stipulations, any building or portions thereof which might be erected on the premises in a manner or to a use contrary to the stipulations. Also, by Rev. Stats., chap. 19, § 5, in all cases where the Commonwealth has such right, all grantees under the deed by which such right is reserved, and their legal representatives or assigns may, by proceeding in equity, compel the board of harbor and land commissioners to so enter and remove or alter such building or portion thereof.

It does not in this case appear affirmatively that the Commonwealth has sold all of its land, in the neighborhood of the premises in question, and that it has no direct pecuniary interest in enforcing the stipulations. But assuming the fact to be so, it still has a duty to perform in this respect. Moreover it might be said to have constituted itself a trustee for all the parties in interest by the form of the stipulation, with the implied assent of each grantee, who takes a deed containing it. In either aspect it has such an interest and duty as to entitle it, by its proper officer, to sue in this court, on behalf of the rights and interests of those who claim its protection.

The principal ground of objection to the maintenance of the information is, that the defendant has not infringed upon the stipulations referred to. The leading case upon this subject is *Atkins v. Bordman*, 2 Metc. 457. See, also, *Schooner v.*

Boylston Market Association, 99 Mass. 285; *Brooks v. Reynolds*, 106 id. 31; *Salisbury v. Andrews*, 128 id. 845.

It is necessary to look at the terms of the bond, in which the stipulation relied on in the present case is contained, in order to see what it means. In the first place it is to be borne in mind, that the place in question is a part of a great scheme of improvement of waste land in a city for streets and dwellings. The description of the land carefully defines the width and lines of the passage-way; "running one hundred and twelve feet to a passage-way sixteen feet wide; thence westerly on the line of said passage-way." "Also all that part of said passage-way, sixteen feet wide, that lies southerly of its center line and between the easterly and westerly lines of said premises extended; reference being had to the plan, accompanying the fifth annual report of the commissioners on the Back Bay." A reference to the plan shows a system of streets, covering an extensive territory, with passage-ways for the accommodation of the houses in two streets and for access to their rear entrances. "Any building erected on the premises shall be at least three stories high for the main part thereof and shall not in any event be used for a stable or for any mechanical or manufacturing purposes." There were also other provisions, showing that dwelling-houses of a high class were contemplated; afterward followed the particular stipulation relied on, "that a passage-way, sixteen feet wide, is to be laid out in the rear of the premises, the same to be filled in by the Commonwealth and to be kept open and maintained by the abutters in common." It is contemplated that buildings might be erected on both sides of the passage-way. Each owner might build up to the line of it. The defendant has done so, and has built bay windows, from a point eight feet above the sidewalk, and extending from three to four feet into the passage-way, to the top of his house, six stories high. If the opposite owner should do the same, the passage-way between the buildings extending upward from a point beginning eight feet above the surface of the ground would be eight feet instead of sixteen feet in width. It would be half closed up so far as light and air and prospect are concerned. And, if this may be done, it is difficult to place any practical limit to what might be done in this matter. The passage-way was designed as a thoroughfare for the accommodation of many persons. It is connected at each end with broad and important streets. It was to be left open. No gates could be put at the end of it. It was to be "maintained," that is, in good order, for use. Its width shows that it was designed for vehicles drawn by horses as well as for travelers on foot. The supplies for all the houses on both sides of it for its entire length would be chiefly deliverable and all refuse matter removable by its means. Thus we have a passage-way of defined dimensions in the rear of all the houses on two broad streets designed for use by all who may have occasion to seek the rear entrances to any of the houses on either street; a passage-way available also for police purposes, and for use in the extinguishment of fires; a passage-way which is to be maintained and kept open, and designed for horses and wagons in a part of a large city, which is designed to be wholly occupied by dwellings of a high class, to which air and light and prospect are not only desirable but essential in the rear as well as in the front, with no limitation to the use which may be made of it or of the persons by whom it may be used. In view of these considerations we think the language of the stipulation was designed to signify a separation of sixteen feet at least between the rear portions of the buildings abutting on the passage-way. A passage-way sixteen feet wide was to be kept open, not merely at the ends, but open throughout its entire length for the general convenience and benefit. It would be easy to see that the rights of others would be lessened upon any other construction. The opposite owner who might wish in like manner to build into the passage-way would have in the rear of his house a space just so much the narrower. The adjacent owner on the same side, who did not wish to occupy a part of the passage-way with his building, would have light, air and prospect cut off. The right to occupy the passage in this manner themselves would be no equivalent to owners who did not wish to build their houses so as to extend back to the line of it. There is nothing in the facts proved at the hearing and reported to us, which in any way controverts the construction thus put upon the language of the stipula-

tion. The result is that a decree must be entered for the removal of the projections.

Decree accordingly.

LODGE v. WELD.

June 23, 1885.

UNAUTHORIZED USE OF ANOTHER'S NAME — PARTIES — "LEGAL REPRESENTATIVES."

An action to restrain the unauthorized use of another's name in business, under Pub. Stats., chap. 76, § 6, must be brought in the name of the party whose name is used, or his legal representatives — his executors or administrators. Such an action cannot be maintained in the name of a daughter to restrain the use of her deceased father's name.

Bill in equity by Mary E. Lodge, the only surviving child of John D. Williams of Boston, deceased, against Otis E. Weld, doing business in Boston, under the style of John D. & M. Williams, in which the plaintiff sought to enjoin the defendant from the further use, in his said business, of the name of her deceased father, John D. Williams. The case was heard by a single justice and reported by him for the consideration of the full court.

W. Gaston and *C. L. B. Whitney*, for plaintiff. *E. R. Hoar* and *M. & C. A. Williams*, for defendant.

C. ALLEN, J. There was no consent of John D. Williams, or of his legal representatives, to the continued use of his name in the firm by the defendant. The only consent, in writing, which he gave personally, was to Moses Williams and David W. Williams. Nobody assuming to represent him, has given any such written consent to the defendant. It would be a strained construction to hold that the note of the plaintiff to the Messrs. Williams, ordering some crockery ware, carried with it a consent sufficient to satisfy the statute. Moses Williams, the executor of John D. Williams, never gave a written consent, in his representative capacity; although his letters may fairly be held to show his personal consent that the defendant, Weld, might use the name of John D. Williams in the firm. It is to be assumed, therefore, that the use by the defendant of the name of John D. Williams in his business is within the prohibition of Pub. Stats., chap. 76, § 6.

The question remains, whether the plaintiff can maintain a bill in her own name, to restrain such use. It is a natural inference from the phraseology of the statute, that the persons, whose consent in writing is required, in order to justify the use of the name, would be the only persons entitled to remedy the wrong, if committed; and so it has been considered heretofore. Bills in equity, for this purpose, have always been brought, so far as appears in the reports, in the name of the person himself, whose name was used without authority, or of his executor or administrator. *Bowman v. Floyd*, 3 Allen, 76; *Morse v. Hall*, 109 Mass. 409; *Hallett v. Cumston*, 110 id. 82; *Rogers v. Taintor*, 97 id. 291.

But in the present case, the estate of John D. Williams has been settled, and there is no executor or administrator living, and the plaintiff, being his daughter, seeks to enforce the remedy, and contends that, under the circumstances, she is to be deemed a legal representative, within the meaning of the statute.

There can be no doubt that the ordinary meaning of the term "legal representatives" is executors and administrators. *Cox v. Curwen*, 118 Mass. 200; *Price v. Strange*, 6 Madd. 159. In wills, the term may mean whatever the testator intended; but if the meaning is not controlled by the context, it means executors or administrators. 2 Williams on Exec. 1013-1017. In the construction of statutes, technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law are to be construed and understood according to such peculiar and appropriate meaning, unless such construction would be inconsistent with the manifest intent of the general course, or repugnant to the context of, the statute. Pub. Stats., chap. 3, § 3, cl. 3. Accordingly in a particular statute, this term was held to include heirs. *Johnson v. Ames*, 11 Pick. 180. Looking at the legislation now before us for construction, nothing is found to change the ordinary meaning of the term. The enactment was first passed in 1853, chap. 156; and was contained

in Gen. Stats., chap. 56, §§ 3, 4, and is now found in Pub. Stats., chap. 76, §§ 6, 7. But for the statute, clearly the plaintiff would have no right to maintain the bill. The only question is, whether she is within its meaning. The statute looks rather to the matter of property, and seeks to enable a profitable disposition to be made of partnership assets, to enable the executor or administrator to sell the good-will and the right to use the partnership name, and to give effect to such sale, by securing the purchaser in the use of it. If it had been intended to go further, it is reasonable to suppose that the legislature would have used appropriate language to show that meaning. Some confirmation of this view is also derived, from taking into account the state of the law, as it existed independently of the statutes. Ordinarily, an assignment of the good-will and business of a firm includes the exclusive right to use the name of the firm. *Levy v. Walker*, 10 Ch. D. 436; *Hall v. Barrows*, 4 De G., J. & S. 150; *Churton v. Douglas*, Johns. (Eng. Chy.) 174; *Lindley on Part.* 861, 862. This right is regarded as property. The statute, in putting a limitation upon the rights to be acquired, after its enactment by a mere succession in business, and in prohibiting an unauthorized use of another person's name, would naturally confine the remedy to those representing the property rights of such persons.

It was further contended, in behalf of the defendant, that he had a vested right to the use of the firm name of John D. & M. Williams, by succession under the assignment executed by John D. Williams, prior to the enactment of the statute of 1853, and also that the plaintiff's right, if any, would be barred by laches. But, being of the opinion, for the reasons above stated, that the plaintiff's bill cannot be maintained, we do not enter upon the consideration of these further objections.

Bill dismissed.

["Legal representative," 22 Am. Rep. 85; 2 Edm. Sel. Cas. 447.—Ed.]

NEW YORK COURT OF APPEALS.

KIRKLAND v. KILLE, Impleaded, etc.*

June 16, 1885.

MANUFACTURING CORPORATION — FAILURE TO FILE ANNUAL REPORT.

When the condition of a company organized under the general act of 1848, chap. 40, is such that the end and object for which it was formed are destroyed, and there is neither an ability nor intention on its part at any time to further prosecute its business, it is no longer required to make the report mentioned in section 12 of that act.† *Bruce v. Platt*, 80 N. Y. 379, followed.

Appeal from judgment of general term, first department, affirming a judgment entered on verdict of a jury.

Mr. Hubbard, for defendant. *Mr. Hand* and *Mr. Sergeant*, for plaintiff.

DANFORTH, J. The plaintiff proved that the bonds in question were part of a series of first mortgage bonds, issued by the Globe Smelting Company, and authorized by its trustees for the sole purpose "of borrowing money in order to successfully conduct the business for which it was incorporated." It appeared that the bonds were, to the plaintiff's knowledge, diverted from the purpose for which they were intended, and for that reason the court below denied a recovery according to the prayer of the complaint, but against the objection of the defendant, directed a verdict in favor of the plaintiff for \$1,500 and interest. Both parties appealed to the general term; the plaintiff because he was not permitted to recover according to his claim, and the defendant because the complaint was not dismissed. We agree with the courts below so far as they went against plaintiff, and as the case is now presented, discover no ground on which even his partial success can be secured.

The complaint states a single cause of action — a debt due from the company to

* 16 W. Dig. 227, reversed.

† For a construction of this section by the U. S. supreme court, see *Chase v. Curtis*, 81 Alb. L. J. 408.

the plaintiff as holder and owner of the bonds. He took part in their creation, and however honestly conceived, they appear to have been unavailing in any legitimate business of the corporation, and serviceable thus far only as a pretext for subjecting its trustees to a penalty imposed by statute (Laws of 1848, chap. 40, § 12), for the benefit of creditors, whose debts, fairly contracted, were enforceable against the company. The recovery is placed, not upon the debt named in the complaint, but upon an alleged indebtedness of the company for the plaintiff's salary as its president. The evidence disclosed that \$3,000 of the bonds were turned out to him in payment, and to the extent of that salary the trial court held the defendant liable to the plaintiff. The defendant was not brought into court to answer such a claim. Concerning it there was no allegation, and it may well be that injustice has been done by its allowance. Code, § 1207; 85 N. Y. 189; 81 id. 296; id. 268; 83 id. 92. But I do not need to go into that question. The circumstances upon another trial, if one is had, may be different, and now for other reasons the defendant's appeal must prevail. Even if the plaintiff is regarded as a creditor having a valid debt against the corporation, he has failed to bring the case within the statute upon which he relies, and by which it is enacted "that every such company shall annually, within twenty days from the first day of January, make a report which shall be published" in the place "where the business of the company is carried on" "and filed in the office of the clerk of the county where the business of the company shall be carried on." Nor is it necessary to discuss with any minuteness the cases which have given construction to its provisions. They were referred to with much detail in *Bruce v. Platt*, 80 N. Y. 379, and result in this, that when the condition of the company is such that the end and object for which it was formed are destroyed, and there is neither an ability nor intention on its part at any time to farther prosecute its business, it is no longer required to make the report mentioned in that section. In other words, when these events happen, it ceases to be a company "carrying on business," and the direction of the statute has no application. This proposition was presented to the trial court as ground for dismissing the complaint, and it was error to disregard it. The request was justified by the evidence.

Although formed in April, 1874, the company seems at no time to have had existence, except in contemplation of law. Its organization was avowedly for the purpose "of carrying on a mining, smelting and metallurgical business, to accumulate, conduct and supply water for mining purposes." Its capital was fixed at \$500,000, but none was paid in nor subscribed. The whole was transferred in payment for mining property, smelting-works, water-works and real estate once owned by the "Ingot Mining Company," but it became extinct and was at this time in the hands of one Jones. He received the entire stock of the new company and deeded those things to it. The plaintiff and his son were active projectors of the enterprise; one or the other, as evidence might be credited, receiving under previous arrangement a large amount of first mortgage bonds of the new company for services in getting together, as one testified, "five or six reputable and respectable gentlemen who would file a certificate of incorporation." This was done by the plaintiff and others on the 18th of April, 1874, and on the 20th of that month the plaintiff was chosen president. His salary was fixed at \$3,000 per annum. On the 23d of May the trustees resolved to issue the bonds already referred to, secured by a first mortgage on the entire property of the company, for the purpose above mentioned. The plaintiff, as president, executed the bonds and mortgage, and on the 3d of June the trustees resolved to purchase of Jones \$100,000 of the company's stock, and pay therefor \$100,000 of the first mortgage bonds just referred to. This transaction was completed, and of these bonds, thirteen, amounting to \$6,500, came to the plaintiff and form part of his cause of action. The company received no money for them. He continued president for six months. During that time the property was not worked, but, as he says, "efforts were made to secure a superintendent." On the 17th of July, 1874, a consulting engineer was employed to ascertain and report what was the best course to pursue in developing the property. On the 20th of October, 1874, at a meeting of the trustees it was stated that immediate action was required to protect the property of the company, and pay expenses already contracted on that account; that

\$4,000 would be sufficient for that purpose, and that could be had on pledge of the company bonds, as collateral to a loan, at ten per cent per annum. The secretary tendered his resignation and asked that in providing funds, enough be raised to pay his salary, then amounting to \$600, and his bill of \$50 for services in organizing the company. The loan was authorized, "the proceeds to be applied to protecting the property of the company, in redeeming property already pledged, and payment of expenses incurred." The plaintiff then resigned as president; so did Bissell, one of the trustees, but all the resignations were laid upon the table, and both president and secretary announced, that for any further services rendered, they should make no charge for salary, and although only \$1,500 was owing to the plaintiff, the company gave to him and he received bonds to the amount of \$3,000 in payment, out of \$150,000 before authorized. These constitute the other part of those set out in the complaint.

The defendant came into the board of trustees in October, 1874. Proceedings were begun for the foreclosure of the mortgage given to secure the \$150,000 of bonds — precisely when does not appear, but they were consummated by a decree so that the mortgaged premises were advertised to be sold December 29, 1875, and after adjournment, actually sold in February, 1876. There is testimony from Carnagham, who succeed Kirkland as president, that "the company incurred no debts after November 1, 1875; they did no business after November, 1875, every thing that was done by the company or in connection with it after about the middle of January, 1875, was in connection with the foreclosure proceedings that had been begun about that time, and after that, all that was done was to foreclose that mortgage and sell out the property of the company."

In November, 1875, the salaries ceased, and after that time at any rate no meeting of the trustees was held, nor any business transacted.

Not only was there no evidence that any other than formal acts were performed by the company in furtherance of the objects of its organization, but it was proven without contradiction, "that it never got into business," "that it never conducted or carried on a mining, smelting or metallurgical business, or that of accumulating, storing or conducting a supply of water for mining purposes." In short "that it never performed any part of the business for which it was incorporated." The bonds were not negotiated, and even the preliminary work of examination of the property by the consulting engineer, and "assessment work," that is work done on the claim to protect the title, ceased in the early part of 1875. "It never dug out any ore with a view to smelting." The last of any kind was in June, 1875. There was at no time a superintendent.

Under these circumstances we think no report in 1876 was required from the company. It never had the material capacity to do business. Even its effort to acquire it ceased, and its intention to do so was given up in 1875.

The statute invoked by the plaintiff has often been declared to be highly penal and not to be extended by construction. We think the case made by him comes neither within its phraseology nor its intent. It follows that the plaintiff must fail on his appeal, and the defendant succeed.

The judgment of the court below is therefore reversed and a new trial granted, with costs to abide the event.

All concur.

N. Y., L. E. & W. R. R. Co. v. N. Y., L. & W. R. R. Co.

June 16, 1885.

APPEALS — ORDER OF RAILROAD COMMISSIONERS NOT APPEALABLE.

An appeal to this court does not lie to review questions of fact passed upon by commissioners appointed under the General Railroad Law.

D. C. Robinson, for appellant. *J. McGuire*, for respondent.

RAPALLO, J. This application was made under section 22 of the General Railroad Laws. Commissioners were appointed by the supreme court to examine the route originally located by the respondent and the change proposed by the appellant. This change, so far as it related to the route, was very slight, and the

main object of the application seems to have been to change the manner of crossing the appellant's road, from a grade to an over-crossing. The commissioners, after taking testimony and personally inspecting the location of the route proposed by the respondent and the submitted route proposed by the appellant, reported in favor of retaining the route originally located, assigning as the reason for their conclusion that an overhead crossing was quite as practicable by one route as the other, and that there was nothing in the testimony bearing upon that question, which gave to the alternate route any advantage over that originally located.

From this decision of the commissioners, the appellant appealed to the general term where it was affirmed, and from that order of affirmance the present appeal is taken.

We think the question involved was one of fact; and, independently of the general question of the appealability to this court of orders in proceedings of this description, under the General Railroad Law, it is very certain that such an appeal does not lie to review questions of fact passed upon by the commissioners after hearing testimony and personally inspecting the *locus in quo*.

The question whether the crossing of appellant's road should be at or over grade was determinable under subdivision 6 of section 28, and should be brought under that section.

The appeal should be dismissed.

All concur.

PEOPLE, ETC., *et rel.* CAYUGA NATION OF INDIANS RESIDING IN CANADA v. COMMISSIONERS OF THE LAND OFFICE.*

June 2, 1885.

CERTIORARI — COMMISSIONERS OF LAND OFFICE — INDIAN TREATIES — CLAIMS OF NON-RESIDENT INDIANS TO SHARE IN ANNUITIES.

The commissioners of the land office do not constitute a court, and have no power to declare a debt against the State. Neither can they annul or vary existing treaties between the State and Indian tribes. The action of the commissioners is legislative; their powers and duties are to propose and institute measures which must be approved by the governor to be of any force or effect.

Under the laws of this State and its treaties with Indian nations, that portion of the Cayuga nation of Indians residing in Canada has no claim upon any part of the annuities payable by the State to the various Indian tribes. To entitle any Indian tribe or portion of a tribe to a standing before the commissioners in reference to sharing in the annuities, they must be recognized as such by the laws of this State.

Mr. Strong, for respondents. *Mr. O'Brien*, attorney-general, for appellant.

DANFORTH, J. We think this appeal was well taken. The office of the writ of *certiorari* is to correct errors of inferior tribunals when exercising judicial powers, but it does not lie to review their determination upon a matter either submitted by statute for their discretion, or which is legislative in character rather than judicial, or concerning which their decision is not final. Nor can it issue except upon the application of a person aggrieved by the determination to be reviewed. Upon these points the law has been well settled by numerous decisions of the courts, and it is now in substance so declared by statute. Code of Civil Procedure, art. 7, chap. 16, title 2.

First. The board of commissioners of the land office is not a court. It is composed of certain State officers declared by statute (1 R. S. 113), to be, "by right of office," commissioners of the land office, "and as such are classed among administrative officers." *Id.* They are to care for and superintend the lands of the State, and execute such other duties as may be prescribed by law. 1 R. S. 197; Const., art. 5, § 5. In 1839 (Laws of 1839, chap. 53, § 1) they were authorized to direct payment, in their discretion, to the Oneida tribe of Indians, "or any part of them recognized as such party by the laws of this State," of certain moneys.

Second. "To direct the payment to them, or any party or portion of them, of the principal of the annuities or such portion thereof as the commissioners may

* See *ante*, 81.

from time to time deem proper, remaining under the control of this State, for the benefit of said Indians or any party or portion of them."

Third. * * * * *

Fourth. "To make such treaties, contracts and arrangements with the said Indians, or any party or portion of them, in relation to the lands of the said Indians in this State, or any moneys belonging to them under the control of this State, as the said commissioners of the land office, or a majority of them, may deem just and proper."

Fifth. "To hear and determine all questions which may arise in relation to any moneys under the control of this State, belonging to said Indians, or any party or portion of them, and all questions which may arise between the various parties of the said Indians, in relation to any of their lands in this State, or the avails thereof."

Subsequent sections declare that no act of the commissioners done under or by virtue of the first section, "shall have any force or effect until the same shall be approved by the governor of this State," but when approved by him "shall have the same force and effect as an act of the legislature upon the parties concerned therein."

This was followed in 1841 by "An act in relation to certain tribes of Indians" (Laws of 1841, chap. 234). Upon this alone the learned counsel for the respondents relies as not only conferring jurisdiction upon the commissioners of the land office to entertain the claim submitted by him, and giving the respondents a standing before the commissioners, but as so qualifying their determination as to render it the subject of review by a judicial tribunal. By the first section the commissioners are authorized "to direct the payment in their discretion to the Caughnawaga and St. Regis tribes, representing the Seven Nations of Canada Indians, or any part or portion of them, of the principal of the annuities, or such portion thereof as the said commissioners may from time to time deem proper, remaining under the control of this State, for the benefit of said Indians or any part or portion of them." (2.) To make certain payments of annuities to the Brothertown tribe of Indians. (3.) To direct the payment of the principal of the annuity due to the Cayuga chief, Fish Carrier. (4.) "To hear and determine all questions which may arise in relation to moneys under the control of this State belonging to any Indian tribe or nation, or individual Indian, or his descendants, or any part or portion of them, and all questions which may arise between the various parties of such tribe or nation in relation to any of their lands in this State or the avails thereof." (5.) "To make such treaties, contracts and arrangements with any tribe or nation of Indians, or with any party or portion of them, or with any individual Indian or Indians who have any claim upon any lands in this State, or any moneys belonging to them under the control of this State, or for the purchase of any portion of such lands as the said commissioners may deem just and proper, or in relation to the expenses of laying out and keeping in repair any public road passing through any portion of the lands occupied by said Indians."

All the foregoing provisions are contained in the first section of the statute, and it is declared that "no act of the commissioners of the land office," "done under or by virtue of" it, "shall have any force or effect until the same shall be approved by the governor."

In 1850 (Laws of 1850, chap. 87, § 7) it was enacted that "the commissioners of the land office shall report annually to the legislature all their proceedings under that act, and all other acts which confer upon them powers in reference to Indian affairs."

These provisions seem to continue the general policy of the law which, in 1783 (Laws 6th session, p. 290), vested in three commissioners power to superintend and conduct the affairs of the Indians, but whose acts were to be submitted to the legislature for confirmation before they could become valid, and in 1784 (Laws of 7th session, p. 27) authorized the governor and the three commissioners to enter into such compacts and agreements with the Indians within the State as might be for the interest of the public. These statutes relate to the same subject, to the same class of persons and transactions; they are, therefore, *in pari materia*, and although made at different times and not referring to each other, must be taken and con-

strued together as forming one system and as explanatory of each other, for it is to be implied that they are intended to be harmonious and consistent. *Ree v. Lordale*, 1 Burrows, 445; *Smith v. People*, 47 N. Y. 330. It is obvious that the only part of the statute of 1841 which gives any color of support to the petitioner's contention is subdivision 4 of section 1, *supra*. The relators are described as "that portion of the Cayuga nation of Indians residing in Canada." The commissioners may deal with a part, or portion, or party of a nation of Indians in respect to certain matters (Laws of 1841, § 1, *supra*), but the relators are in error in supposing that they are such part or portion within the meaning or intent of the statute.

The act of 1839 (§ 1, sub. 1, *supra*) shows the contrary. There, as we have seen, the commissioners are directed to pay certain money to a certain "tribe of Indians, or any party of them, recognized as such party by the laws of this State." The phrase "any party or portion" is repeated in subsequent subdivisions of the same section, and in all cases it is to be construed as so limited or explained. The same phrase is carried into the act of 1841, which confers, in substantially the same language, power upon the commissioners to direct the payment of money to, and transact the same affairs with other tribes of Indians. The later act is to be construed in light of the earlier, and so construed requires "the part" or "portion" or "party" who comes to the commissioners to be a part, portion or party of Indians "recognized as such by the laws of this State." There are parts or portions of the Cayuga nation so recognized, but the relators are not. The treaties of 1789, 1790 and 1795 were with the nation of Indians called the Cayugas. So was the treaty of 1829, although the Cayugas were described as residing at Sandusky in the State of Ohio. The treaty of 1831 described one portion of the Cayuga nation as residing at Sandusky, and another portion as residing on the Seneca reservation near Buffalo, and the annuities agreed upon in 1789 and 1795 were then to be in the future divided between them in certain proportions. The treaties of May and July, 1846, are described as being between "that portion of the tribe or nation of Indians called the Cayuga Indians, residing in the western part of the State of New York, of one part, and the State of New York of the other. The commissioners acted for the State, and referred to the act of 1841, § 1, sub. 5, as authorizing them to do so.

In various statutes also (Laws of 1848, chap. 122; Laws of 1849, chap. 355; Laws of 1878, chap. 760) the two portions have been recognized as distinct bodies, but together constituting the Cayuga nation.

The relators seem unknown to the State, and I do not find that they have in any manner or at any time been recognized as a "part" or "portion" of the Cayuga nation of Indians. If this is so they had no standing before the commissioners of the land office.

Second. The action of the commissioners in the premises, was entirely legislative. Both the act of 1839 and that of 1841 (*supra*) declare that no act by virtue of the section invoked by the respondent shall have any effect until approved by the governor, and the act of 1839 declares that the proceedings of the commissioners, when approved by him, shall have the same force and effect as an act of the legislature upon the parties concerned therein.

It follows that the power and duty of the commissioners is to propose or initiate a measure, but not to consummate it; that the concurrence of the governor is necessary to complete it, and that they together make a law, but do not construe it. They have no judicial functions, and while they determine or answer questions, it is by giving relief and enacting what shall be, and not by determining what from existing relations or laws ought to be.

Third. But if these propositions are not correct it cannot be doubted that at the time the petition of the relators was presented to the commissioners, there were in full force and virtue treaties executed in such manner as to bind the State, regulating and providing for the complete distribution of all the annuities to become due the Cayuga nation, made by parties recognized by the State as authorized to act. The commissioners had no power to inquire into the validity or propriety of these treaties. They might order a new distribution. That would not be a judicial determination, but a resolution or a contract, of no force until

approved by the governor. No court could require it to be made, nor review the discretion which refused to make it. It is the governor who can approve or withhold his approval. If he approves, the proceedings of the commissioners have the force and effect of an act of the legislature. They are therefore creative or legislative, not judicial. The learned counsel for the respondent is in error in supposing that the board have power to carry out their own decisions as to divisions of Indian moneys under control of the State. The statutes referred to are otherwise.

It is obvious that the last sub-division, the fifth, is of no moment in the discussion, for first, no treaty, contract, or arrangement was asked for; and second, if it had been asked for, its making and terms would depend altogether upon the disposition or opinion of the commissioners. The power to act to these ends is a delegated power. Under it the commissioners represent the legislature, but like it they can effect nothing without the co-operation of the executive. It should not be overlooked that the statute does not give the commissioners any power to direct payment of annuities as such, nor any control over them. Such power was given by the act of 1839, in case of the Oneida Indians. It is not included in the act of 1841. Nor does that authorize any act by them in relation to the indebtedness of the State, or its payment.

The relators claim nothing under the treaty of 1807. That was a cash transaction. Under the treaties of 1789 and 1795, "The Cayuga nation of Indians became entitled to receive annually \$2,300 through the hands of the agent of the United States at Canandaigua until 1829, when by a treaty between the chiefs or sachems of that nation, residing at Sandusky, on one side, and the governor of this State on the other, it was provided that the money should thereafter be paid upon the draft or bill of exchange to be drawn by at least four of the principal chiefs of said nation" upon the agent of Indian affairs residing at Albany, and it was thereby recited that "the said Cayuga nation of Indians released the State of New York from payment in manner before provided for."

In 1831, at a treaty held at Albany between the governor of the State, Enos T. Throop, and the chiefs or sachems of the same tribe or nation of Indians residing at Sandusky and on the Seneca reservation near Buffalo, after reciting the arguments made for payment in 1829, the intention of the Cayugas at Sandusky to go west of the Mississippi, and a treaty at Buffalo on the 8th of September, 1831, between "Tall Chief" and others representing those about to move beyond the Mississippi river, and "Jack Wheelbarrow" and others on the part of those of the Cayuga nation residing on the Seneca reservation, by which the gross annuities of \$2,300 were divided between them in the proportion of \$1,700 to the former, and \$600 to the latter, it was agreed by Governor Throop that the moneys should be thereafter annually so paid on draft on each, signed by four of the principal chiefs of each of these two portions of Indians, specifying the treaties of 1789, and of July 27, 1795, as those under which the annuities were payable, and it was stipulated that the "said Cayuga Nation of Indians do hereby forever release and discharge the people of the State of New York from the payment of the moneys payable by the said treaties, in the manner prescribed by said treaty of 1829.

In 1807 and 1810, a portion of the Cayugas who up to that time had shared in the distribution of the moneys, and included, it is said, more than three-fourths of the then nation," left the United States and moved over to Canada, taking up their residence in that country, and have remained there ever since.

The legislature upon different occasions acted in the matter. In 1848 (chap. 122), they directed a census of the Cayuga Indians to be procured, and upon it that the annuities be apportioned between those of said nation residing in New York and those residing west of the Mississippi river according to their representative numbers. Whatever may have been the cause it is a fact that from the time of that removal (1809 or 1810) to 1849, and in face of these various treaties, no application was made by the Cayugas in Canada for any part of the annuities, but in that year (1849) they prayed the legislature for the payment to them of a portion of the annuities.

The petition was referred by the assembly to the commissioners of the land office, with a request for information as to existing treaties or contracts between

the State and the Cayuga Nation of Indians, and for information as to whether any existing contract made it obligatory upon the State to pay "any portion of such annuities to any party, band or individual of the Cayugas residing without the jurisdiction of the United States." They reported accordingly, and "suggested action on the part of the legislature favorable to an apportionment of the annuities between the New York and Canadian Cayugas," but beyond a reference to a committee no further action was taken. In that year, however, the legislature repealed the act of 1848, and "in relation to the Cayuga Indian annuity," enacted that of the annuity granted by treaties of 1789 and 1795, and apportioned to the Cayugas of Sandusky by the treaty of 1831, \$600 should be used to ascertain the number of the Cayugas who went west, and provide for their return to this State, and referred the application of that portion of the Cayugas who reside in New York for a portion of the annuity "to the commissioners of the land office, with the powers granted to them in such cases by the act of May 25, 1841 (chap. 284, *supra*), and that they report their proceedings under this act to the legislature." They did so on the 12th of March, 1850. After referring to the treaty of 1795, by which the annuities were provided for, they state that after the war of 1812, no part was paid to the Canadian Cayugas; that upon application by them for their ratable share, it was opposed by the Cayugas residing in this State, each party appearing by counsel. That at this meeting aged chiefs were present and evidence received, and the commissioners framed the resolution which they report. It apportions the whole annuity to the New York and Sandusky Indians, thus in effect denying the application of the Canadian Indians. Among the facts stated in their report are those showing that before 1812, the tribe, in common with others of the six nations, owned lands and property both in Canada and in New York; that at that time at a council at which the various tribes, including the Cayugas, were present, it was finally determined that each nation and part of nation, as divided by the place of residence, might engage in that war upon its own responsibility, and it was mutually agreed that thereafter they should no longer participate in the annuities or emoluments flowing from the governments they were to oppose, "but each division take the whole from the government to which it is allied." "In other words," it is said, "that all property and interest on the British side should belong to the British Indians, while that on the American side should be the sole property of the American Indians; that it has continued to be so from that time to this; that the permanence of the division was insisted upon by the Indians in Canada as late as 1840, when the American Cayugas proposed to move to Canada and have a re-union of the nation and a common property.

In 1882, the Canada Cayugas, through counsel, again applied to the legislature for practically the same relief as that now asked, and were again denied. The petitioners now claim that the State is indebted to them for the amount of their share of the annuity which became due on the 1st of June, 1884, and that to become due thereafter forever, under the treaties of 1789, 1795, and it is a declaration upon that which they ask. The statute relates to moneys under the control of the State, and concerning which questions may arise. By treaty of 1831, recognized by the legislature (Laws of 1849, chap. 355), the disposition of the annuities between the Indians at Sandusky and those of New York was determined. The question is, therefore, with the legislature and not the commissioners. There is no question here, between portions of the tribe, or Cayuga nation. The petitioners seek to establish a debt against the State. The commissioners cannot declare one. The substantial, although not the formal, claim of the respondent is upon subdivision 5 (*supra*) of the act of 1841, but the commissioners cannot rescind a treaty already made, nor interfere with an arrangement which the State has perfected. If they could, however, it would be for the purpose of substituting such other as they might "deem proper," thus performing a legislative or ministerial act. The State acted by its legislature. No power to annul or vary the existing treaty was delegated to the commissioners. Until the State otherwise directs, it must stand.

The argument of the learned counsel for the respondent has been extended.

It has touched many questions of expediency and general equity. They may properly be addressed to the legislature. It may no doubt deal with foreign or domestic Indians according to its sense of right and moral duty. As the case now stands it discloses no legal error on the part of the appellants.

The order of the general term should, therefore, be reversed, and the *certiorari* quashed.

RUGER, C. J., and MILLER, J., concur; EARL, J., concurs in result; FINCH, J., dissents; RAPALLO and ANDREWS, JJ., not voting.

SUPREME JUDICIAL COURT OF MAINE.

PERKINS v. ALDRICH.

January 28, 1885.

DEED — RESERVATION.

When a deed of land reserves a building standing upon it "and one rod of land equal distance around it," the lines of the lot reserved correspond with the lines of the building, and if that be rectangular the lot will be rectangular.

George C. & Charles E. Wing for plaintiff. *Savage & Oakes*, for defendant.

WALTON, J. A grant of land contained this exception: "*Excepting the Free Chapel and one rod of land equal distance around it.*"

The only question is in relation to the exterior lines of the land excepted. The plaintiff claims that the corners of the lot must be rounded, so that no portion of the land reserved shall be more than one rod distant from the chapel. The defendant contends that the language of the deed, when applied to the subject-matter of the exception, and fairly interpreted, according to the manifest intention of the parties, reserved a piece of land in form like the chapel; that is, bounded on its four sides by straight lines, and having angles at its corners corresponding to the angles of the building; and the judge presiding at the trial so ruled. We think the ruling was correct. Of course a building lot with rounded corners may be reserved or conveyed. But such lots are not common. And when, as in this case, the lines are to be run at a certain distance from a rectangular building like an ordinary church or school-house, and there is nothing in the deed or the situation of the land to indicate the contrary, we think it is fair to presume that the parties intended that the exterior lines should be run so as to correspond with the lines of the building, although by so doing small portions of land in the angles at the extreme corners of the lot may be more than the distance named from the building. We cannot resist the conviction that such was the intention of the parties in this case.

Exceptions overruled.

Nonsuit confirmed.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

SMITH v. MCGLINCHY.

March 6, 1885.

NEGOTIABLE INSTRUMENT — PROMISSORY NOTE — ILLEGAL CONSIDERATION — EVIDENCE.

The makers of a negotiable note are competent witnesses in an action by an indorsee against his immediate indorser, or in suits between their personal representatives, to show that the consideration for the transfer of the note was illegal.

Snow & Pason, for plaintiffs. *John J. Perry* and *D. A. Meaher*, for defendant.

WALTON, J. The exceptions must be overruled. The rule that the parties to a negotiable note are not competent witnesses to prove that it was given for an illegal consideration is not applicable to suits between the immediate parties to an illegal contract. It is for the protection of innocent parties only. Thus in

Fox v. Whitney, 16 Mass. 118, in an action between the personal representatives of the parties to a note, the court held that a surety on the note was a competent witness to prove the note usurious, because the action was between the personal representatives of the immediate parties to the illegal contract. And this limitation of the rule was sanctioned in *Thayer v. Crossman*, 1 Metc. 416, and the further limitation deduced from it, that the rule does not apply when the note is not negotiated till after it is overdue; the reason being that, inasmuch as the indorsee of an overdue-note obtains no rights except such as were possessed by the payee, and the rule not being applicable to a suit by the payee, it could not be applicable to a suit by his indorsee.

In this case, the action is not based upon the contract created by the note itself. It is upon the contract created by the negotiation and transfer of it. It is an action against an indorser. And the true defense is, not that the note was given originally for intoxicating liquors (although such seems to have been the fact), but that it was negotiated and transferred to the plaintiff's testate for a like illegal consideration; and it is the latter illegality, and not the former, that constitutes the true defense to the action. And in such an action, so defended, the rule of exclusion does not apply. Consequently, the objection to the testimony of the makers of the note was not well founded, and the exceptions must be overruled.

Exceptions overruled.

PETERS, C. J., VIRGIN, EMERY and HASKELL, JJ., concurred.

HODSDON v. KILGORE.

March 6, 1885.

TRESPASS—DAMAGE BY SHEEP.

If the defendant admits, in an action of trespass *quare clausum*, that his sheep were upon the plaintiff's land, the burden is upon him to show some justification or excuse; and if the sheep entered from the highway, and no justification or excuse is shown by the defendant, the plaintiff is entitled to recover damages.

Trespass *quare clausum fregit*.

Seward S. Stearns, for plaintiff. *C. A. Chapin*, for defendant.

WALTON, J. It being an admitted fact, that the defendant's sheep were several times upon the plaintiff's land within the time mentioned in the declaration, the burden of proof is upon the defendant to show some justification or excuse for their being there. This he attempts to do by evidence that they escaped from his own close, into the plaintiff's, through a defective partition fence, which it was the duty of the plaintiff to maintain. The evidence upon this point is conflicting, and it is difficult to say on which side it preponderates. There is no doubt that the sheep sometimes entered upon the plaintiff's close through the piece of fence in question, but whether it was the duty of the plaintiff or the defendant to keep that piece of fence in repair is not so easily decided. And we do not find it necessary to decide it, for we think the evidence fairly preponderates in favor of the proposition that one or more times the sheep entered upon the plaintiff's premises from the highway, and for these entries no justification or excuse is shown. True it may be, as contended by the defendant's counsel, that in these instances the sheep first entered upon the plaintiff's close through the piece of fence in dispute, and then strayed from there into the highway, and then back into the plaintiff's close, so that, if it was the duty of the plaintiff to keep this piece of fence in repair, it was his fault that they were in the highway. But of this we are not satisfied. We think the evidence fairly preponderates in favor of the proposition, that the sheep were first in the highway, through the defendant's fault, and then entered upon the plaintiff's close from the highway; and, for such an entry, as already stated, there seems to be no justification or excuse. Our conclusion therefore is, that the action is maintained, and that the plaintiff is entitled to recover some damages.

Judgment for plaintiff for \$10 damages.

PETERS, C. J., WALTON, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

Frye v. Crockett.

March 6, 1885.

EXECUTOR—STATUTORY BOND—ACTION AGAINST SURETY.

Where the bond of an executor fails to require the principal to render an account upon oath, within one year, it is not conformable to statute, and an action cannot be maintained upon it in the name of the successor of the judge to whom it was given.

The following is the condition of the bond upon which the action was brought :

"The condition of this obligation is such, that if the above bounden Nathaniel B. Crockett, executor of the last will and testament of Asa S. H. Wardwell, late of Rumford, in said county of Oxford, deceased, shall make, or cause to be made, a true inventory of all the real estate, and all the goods, chattels, rights and credits of the testator, which are by law to be administered, which have, or shall come to his possession or knowledge, and return the same so made under oath into the probate court for said county of Oxford, within three months from the date hereof, and shall administer according to law, and to the will of the said testator, the same goods and chattels, rights and credits, and all other goods and chattels, rights and credits of the said deceased at the time of his death, or which at any time after shall come to the possession or knowledge of the said executor ; and shall also pay, or cause to be paid, all the debts and legacies of the said testator, unless the estate of said testator, from some unexpected event, should prove insufficient for the payment of the same, in which event the said executor shall render upon oath a just and true account of his administration and of his proceedings therein within the time required by law, and at any other times when required by the judge of probate for the time being for said county of Oxford, and pay and deliver any balance, or any goods and chattels, rights and credits remaining in his hands upon the settlement of said accounts of administration to such person or persons as the said judge of probate by his decree or sentence pursuant to law shall direct ; and shall also account, in case the estate should be represented insolvent, for three times the amount of any injury done to the real estate of the deceased by him or with his consent, between the time of the representation of insolvency and the sale of such real estate for the payment of debts by waste or trespass committed on any building thereon, or on any trees standing and growing thereon, except as may be necessary for repairs or fuel for the family of the said deceased, or by waste or trespass of any other person for the like waste or trespass committed on any such real estate.

Then the foregoing obligations shall be void and of no effect, or otherwise shall abide and remain in full force and virtue.

H. C. Davis, for plaintiff. *Enoch Foster*, for defendant.

WALTON, J. This is an action against one of the sureties upon an executor's bond, the other surety being dead, and the action against the principal having been discontinued. One objection to the maintenance of the suit is, that it is brought in the name of the wrong person; and, upon examination, we are satisfied that this objection must be sustained.

* R. S., chap. 64, § 9, reads as follows:

§ 9: Every executor, before entering on the execution of his trust, shall give bond, except when otherwise provided in the will, with sufficient sureties resident in the State, in such sum as the judge orders, payable to him or his successors, conditioned, in substance, as follows:

I. To make and return to the probate court, within three months, a true inventory of all the real estate, and all the goods, chattels, rights and credits of the testator, which are by law to be administered, and which come to his possession or knowledge.

II. To administer according to law and to the will of the testator, all his goods, chattels, rights and credits.

III. To render, upon oath, a just and true account of his administration within one year, and at any other times, when required by the judge of probate.

IV. To account, in case the estate should be represented insolvent, for three times the amount of injury done to the real estate of the deceased by him, or with his consent, between such representation and the sale of such real estate for the payment of debts, by waste or trespass committed on any building thereon, or on any trees standing and growing thereon, except as necessary for repairs or fuel for the family of the deceased; or by waste or trespass of any other kind, and for such damages as he recovers for the like waste or trespass committed thereon.

It is settled law that an action upon an executor's bond, not conformable to statute, can be maintained only in the name of the judge to whom it was given. Such a bond, being good only at common law, cannot be sued in the name of a successor. The bond in suit in this case is not conformable to statute. It contains omissions and additions. The principal in the bond was not an administrator nor a residuary legatee. He was the executor named in the will, but no legacy was therein given to him, residuary or otherwise. The bond required of such an executor differs from that which is required of an executor who is a residuary legatee; and it differs from that which is required of an administrator. And the statute is precise with respect to the form of each of these three kinds of bonds. And yet the bond in this case does not conform to either of them. It omits one important condition required of ordinary executors — namely, that which requires them to account upon oath within one year — and substitutes others which are applicable only to administrators and executors who are residuary legatees. This will appear upon inspection of the bond, and by comparing it with the requirements of the statute. How such a form for a bond came into existence, it is difficult to conceive. Very clearly it is not a statute bond; and a suit upon it, if maintainable at all, can be maintained only in the name of the judge to whom the bond was given. This suit is not in the name of the judge to whom the bond was given. It is in the name of a successor. Such an action is not maintainable. *Cleaves v. Dockray*, 67 Me. 118, and cases there cited.

Plaintiff nonsuit.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

MOSHER v. VEHUE.

March 9, 1885.

REPLEVIN — TIMBER CUT FROM MORTGAGED PREMISES.

One who has purchased timber trees, that were wrongfully cut from mortgaged premises by the husband of the mortgagor, cannot maintain replevin for the same against the assignee of the mortgage, though the mortgage was assigned after the trees were cut.

Replevin of a quantity of peeled hemlock logs.

H. L. Whitcomb, for plaintiffs. *S. Clifford Belcher*, for defendant.

WALTON, J. We think the ruling in this case was correct. There can be no doubt that when timber trees are wrongfully cut upon mortgaged premises by the mortgagor or a stranger, without the consent of the mortgagee, the latter is entitled to take and hold possession of them. And we think it is equally clear that if the mortgagee assigns his mortgage, the assignee has the same right in this particular which the mortgagee before had; and that, as against the mortgagee or his assignee, neither the wrong-doer, nor a purchaser from him, can maintain replevin for timber so cut. Such in effect was the ruling in this case. We think the ruling was correct. *Smith v. Goodwin*, 2 Me. 173; *Gore v. Jenness*, 19 id. 58; *Page v. Robinson*, 10 Cush. 99.

Exceptions overruled.

Judgment on the verdict.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

DONNELL v. SCHOOL DISTRICT No. 3, in Webster.

March 9, 1885.

PAYMENT — RESCISSION — NEW TRIAL.

Where one who holds a claim against a school district receives pay for the same from the town in which the district is located, it is not competent for him to rescind the payment and make the district again his debtor without the latter's consent.

Where a motion for new trial, on the ground of newly-discovered evidence, does not aver, and the evidence does not show, that the party making the motion used due diligence in preparing the case for trial, a new trial will not be granted.*

* See 8 Abb. N. Y. Dig. 409; *Kochel v. Bartlett*, 88 Ind. 287; *Griffith v. Eliot*, 60 Tex. 334; *Moran v. Abbey*, 68 Cal. 56. — Ed.

At the trial the presiding justice instructed the jury as follows:

"I instruct you that if this plaintiff did furnish the labor and materials sued for, he is entitled to recover so much for the same as they were reasonably worth. I also instruct you that if, after that labor was performed, he presented the bill to the selectmen of the town of Webster, approved by the committee, and the selectmen thereupon drew him an order for the same upon the town treasurer and he accepted that order in payment of the bill, and thereafter the order was presented to the treasurer, paid by him, and the plaintiff received the money for it, that that payment to him would bar this action, and that all the evidence relating to the payment of the money back and the legality of the commitment and the collection of the tax, is entirely immaterial."

Asa P. Moore, for plaintiff. *Savage & Oakes*, for defendant.

PER CURIAM. The motion and exceptions must be overruled. The evidence tended to show, and the jury must have found, that the plaintiff had been once paid for his labor in moving the school-house. Such being the fact, it was not competent for him to rescind the payment and make the school district again his debtor without the latter's consent; and no such consent is shown. The ruling upon this point was correct. And the motion for a new trial cannot prevail, for the reason that it does not aver, nor does the evidence show, that the plaintiff used due diligence in preparing his case for trial. For aught that appears the newly-discovered evidence, with the exercise of due diligence, could have been found before the trial as easily as it was afterward, if the same search had been made for it. But no search whatever appears to have been made by him, and only a very superficial one by anybody.

Motion and exceptions overruled.

Judgment on the verdict.

EAMES v. SAVAGE. SAME v. BICKFORD.

March 20, 1885.

CONSTITUTIONAL LAW—MUNICIPAL DEBT—EXECUTION AGAINST PRIVATE PROPERTY.

Executions upon judgments against towns, may be levied upon the goods and chattels of the inhabitants. The statute of Maine authorizing this process is not in conflict with the fourteenth amendment, United States Constitution.

Strout & Holmes and J. J. Parlin, for plaintiff. *D. D. Stewart and A. H. Ware*, for defendant.

EMERY, J. The plaintiff was an inhabitant of the town of Embden, at the time Sarah J. Savage began suit, and recovered judgment against that town in this court. The execution upon that judgment was issued, and was levied upon the plaintiff's goods, pursuant to R. S. of 1871, chap. 84, § 29, now R. S., chap. 84, § 30, which expressly provides that executions against towns shall be issued against the goods and chattels of the inhabitants thereof, and shall be levied upon such goods and chattels. The plaintiff, however, claims that the statute is forbidden, and made null by the last clause of section 6 of the Maine Bill of Rights, which declares that a person accused shall not "be deprived of his life, liberty, property or privileges but by the judgment of his peers, or by the law of the land," and also by that clause in section 1 of the fourteenth amendment to the Constitution of the United States, which declares that no State shall "deprive any person of life, liberty, or property without due process of law."

The presumption is the other way, in favor of the validity of the statute, and it is a presumption of great strength. All the judges and writers agree upon this. Chief Justice **MARSHALL**, in *Fletcher v. Peck*, 6 Cranch, 87, says, that to overturn this presumption the judges must be convinced, and "the conviction must be clear and strong." Judge **WASHINGTON**, in *Ogden v. Saunders*, 12 Wheat. 270, declared, that if he rested his opinion on no other ground than a doubt, that alone would be a satisfactory vindication of an opinion in favor of the constitutionality of a statute. Chief Justice **MELLEN**, in *Lunt's Case*, 6 Me. 413, said, "the court will never pronounce a statute to be otherwise (than constitutional), unless in a case where the point is free from all doubt." This strong presumption is to be constantly borne in mind in considering the question here presented.

The statute itself in this case has existed for half a century, since February 27, 1833, but it introduced no new principle or rule in the jurisprudence of this State. It merely affirmed a well-known custom or law that had long before existed. The practice of bringing suits against a political division or municipal organization and collecting the judgment, from the individuals composing it, is believed to have existed in England and to have been brought thence to New England. Actions against "the hundred," were known as far back as Edw. I, stat. 13 Edw. I, chap. 2; 3 Comyn's Dig., "Hundred," chap. 2. As "the hundred" had no property, except that of individuals, the judgments must have been collected from the individuals. In *Russell v. Men of Devon*, 2 T. R. 667, Lord KENYON said, that indictments against counties were sanctioned by the common law, though they would be levied on the men of the county. In *Atty.-Gen. v. Exeter*, 2 Russ. 45, the chancellor said: "If the fee farm was charged on the whole place called Exeter, he who was entitled to the rent might have demanded it from any one who had a part of, or in the city, leaving the person who was thus called on, to obtain contributions from the other inhabitants as best he could." In New England the practice obtained from the earliest times, without any statute. "About the year 1790, one Gatehill was imprisoned on an execution against the town of Marblehead for a debt the town owed." 5 Dane's Abr., chap. 143, art. 5, §§ 10 and 11, page 158. Mr. Dane as early as his Abridgment, said the practice was justified "by immemorial usage." Ibid. Such an imprisonment so soon after the revolution, when the principles of liberty were so freshly vindicated, would never have been permitted had it not then been a familiar practice. The practice has been regarded as settled law in Massachusetts, and has been repeatedly alluded to in the opinions of the courts, as sanctioned by immemorial usage. *Riddle v. Proprietors on Merrimack River*, 7 Mass. 187; *Sch. Dist. v. Wood*, 13 id. 198; *Brewer v. New Gloucester*, 14 id. 216; *Marsy v. Clark*, 17 id. 330, 335; *Merchants' Bank v. Cook*, 4 Pick. 414; *Chase v. Merrimack Bank*, 19 id. 568; *Gaskill v. Dudley*, 6 Metc. 546; *Hill v. Boston*, 122 Mass. 344; S. C., 23 Am. Rep. 332. The constitutionality of the law does not seem to have been really questioned, till the case of *Chase v. Bank*, 19 Pick. 568, as late as 1837, and its constitutionality was there said to be so well established as not to be an open question. The people of Maine, while a part of Massachusetts, were familiar with the law and the practice. The Maine courts have repeatedly recognized it as long established, and as in harmony with the State Constitution. *Adams v. Wiscasset Bank*, 1 Me. 361; *Fernald v. Lewis*, 6 id. 264; *Baileysville v. Lowell*, 20 id. 178, 181; *Spencer v. Brighton*, 49 id. 326; *Hayford v. Everett*, 68 id. 507. Its constitutionality does not seem to have been questioned by the profession till *Shurtleff v. Wiscasset*, 74 Me. 180. In Connecticut, also, the antiquity and constitutionality of the law have been repeatedly affirmed. *Burs v. Botsford*, 3 Day, 159; *Beardsley v. Smith*, 16 Conn. 368.

That a statute, or rule of law or custom has so long existed, unquestioned, and has been so often invoked, and universally approved, and has become ingrained like this, in the jurisprudence of State, is a strong, if not conclusive reason for pronouncing it constitutional, and a part of the "law of the land." *State v. Allen*, 2 McCord, 525; *Sears v. Cottrell*, 5 Mich. 251.

The plaintiff urges that such a method of enforcing executions against towns arose out of the early theory that all the inhabitants were parties to the suit, and could appear personally and be heard. It is claimed that when New England towns were first formed, they did not have their present corporate character; that they were an aggregation of individuals, generally owning a large amount of territory in common, and with common rights and common liabilities in respect thereto. These individuals would necessarily be parties in any suit affecting their common liabilities, and execution must have issued against them as individuals. In the progress of time, such inhabitants were by statute made "bodies politic and corporate." Massachusetts Laws of 1786. Though they continued to be sued by the name of "the inhabitants of the town of —," the individuals no longer appeared in court, but the defense was conducted by the town as a unit, through its officers. The argument is, that the town having been made a corporation, and the individual inhabitants debarred from defending personally, he is entitled to his day in court, through some appropriate mesne process, before final process of execution can issue

against his private property. It is claimed that a method of enforcing judgments against the inhabitants, which might not have been unjust, when such inhabitants were really parties, has become so, and therefore unconstitutional, since such inhabitants can defend only through a corporate organization. Towns are not, however, full corporations. They have no capital stock, and no shares. They are only *quasi* corporations, created solely for political and municipal purposes, and given a *quasi* corporate character for convenience only. They remain still an aggregation of individuals, dwelling within certain territorial limits, and under the direct jurisdiction of the legislature. But legislatures in creating purely private corporations have an unquestioned power to prescribe the personal liability of a stockholder therein for corporate debts, and the method of enforcing it. They can limit this liability to the amount of his stock, or to his proportionate share, or can make him liable without limit. *Morawetz on Corp.*, § 606 *et seq.*; *Pollard v. Bailey*, 20 Wall. 520; *Hawthorne v. Calef*, 2 id. 10. The common method of enforcement is by first recovering judgment against the corporation, and then bringing some specified process against the stockholder. But under such proceedings against him, the stockholder cannot question the judgment against the corporation except for fraud. He is bound by such judgment until reversed. *Morawetz on Corp.*, § 619; *Marsh v. Burrough*, 1 Woods, 470; *Milliken v. Whitehouse*, 49 Me. 527. The proceedings against the person alleged to be stockholder are to establish the fact that he is a stockholder, within the statute liability. In some instances, the statutes have permitted a judgment creditor of a corporation to determine for himself at his peril (of course, indemnifying the officer), what persons are stockholders, liable for the debt, and to levy the execution directly on the property of such person without any intermediate process. The question of liability as stockholder would then be tried in a suit against the officer. This latter mode of enforcement, though perhaps harsher than the other, has been repeatedly held to be constitutional, and we do not know of any case holding otherwise. *Morawetz on Corp.*, §§ 618, 619, and notes; *Leland v. Marsh*, 16 Mass. 391; *Marcy v. Clark*, 17 id. 330; *Stedman v. Eveleth*, 6 Metc. 115, 124, 125; *Gray v. Coffin*, 9 Cush. 205; *Holyoke Bank v. Goodman Paper Co.*, id. 576. See, also, *Merrill v. Suffolk Bank*, 31 Me. 57; *Came v. Bridgman*, 39 id. 35. In *Penniman's Case*, 103 U. S. 714, the statute of Rhode Island authorized the arrest of a stockholder, on an execution against the corporation. The constitutionality of the statute was directly affirmed by the State court, and was assumed without question by the United States supreme court. The principle is analogous to that which permits a creditor holding an execution against A. at his peril to levy directly upon certain goods as the goods of A. without first instituting any process to determine their ownership. If B.'s goods be taken, he has a remedy against the officer, or can successfully resist him. A. is not injured in either event. If the person whose goods are sought to be taken on an execution against a corporation is liable as stockholder for the debt, he is not injured thereby. If he is not liable he has the same rights and remedies as B.

But the plaintiff urges, that whatever may have been the adjudications heretofore, upon this method of enforcing a judgment against a municipal or other corporation, by levying upon the property of any member, it is now forbidden by that clause of the fourteenth amendment to the United States Constitution already quoted. He claims that "due process of law," as there used, requires a notice to him personally and an opportunity for him to be heard in court, before execution issue against his property. The general proposition would be that "due process of law" means judicial process with *judex, actor and res*. This proposition may seem to be supported by some general remarks of judges, and writers, but no case in point is cited, nor, indeed, any direct assertion.

The phrase "due process of law" in the United States Constitution, and in the Constitutions of many of the States, and the phrase "law of the land," in the Constitutions of others of the States, including Maine, have long had the same meaning. 2 Coke's Inst. 50, 51. English political history is full of the strife between the crown and the people, the crown seeking to enlarge its irresponsible prerogatives, and the people insisting on fixed and certain laws. The Magna Charta, and the various Bills of Rights, in which these phrases were used, were demanded

from the kings, as safeguards against arbitrary action, against partial or unequal decrees. The barons and people insisted on general laws, *legum terrae*, on uniformity, "due process of law." They insisted on law, however harsh, as better security than the prerogative, however indulgent. These phrases did not mean merciful, nor even just laws, but they did mean equal, and general laws, fixed and certain. The solicitude was to preserve the property of the subject from inundation of the prerogative. Broom's Const. Law, 228. The English colonies in America were familiar with the conflict between customary law and arbitrary prerogative, and claimed the protection of those charters. When they came to form independent governments, they sought to guard against arbitrary or unequal governmental action, by inserting the same phrases in their Constitutions. They insisted that all proceedings against the individual or his property should be uniform, and by general law. They put the same limitation upon the Federal government in the fifth constitutional amendment. In commenting on these phrases, Mr. Cooley cites with approval the language of Mr. Justice JOHNSON in *Bank of Columbia v. Okely*, 4 Wheat. 235: "As the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice." Cooley on Const. Law, 355. Judge GREEN, in *Bank v. Cooper*, 2 Yerger, 599 (24 Am. Dec. 523), said: "By law of the land is meant a general and public law, operating equally on every individual in the community." He also said that such was the opinion of the distinguished Judge CATRON and of Lord COKE.

Chief Justice HEMPHILL, in *Janes v. Reynolds*, 2 Texas, 251, said: "The terms 'law of the land' are now in their most usual acceptance regarded as public laws, binding upon all the members of the community under their circumstances, and not partial or private laws." O'NEAL, J., in *State v. Simmons*, 3 Spear, 767, said: "The words mean the common law, and the statute law existing in the State at the time of the adoption of the Constitution." But it has been expressly decided, that due process of law does not always mean judicial process. The individual's property is often taken for taxes without his being first warned and heard, and it is nowhere contended now that such summary process is not due process of law. It is the fixed, certain process, applicable to all, and not partial, nor unequal. *McMillen v. Anderson*, 95 U. S. 87. Mr. Justice MILLER in the opinion said: "By summary is not meant arbitrary, or unequal, or illegal. It (the collection of the tax) must, under our Constitution, be lawfully done."

But that does not mean, nor does the phrase "due process of law" mean by a judicial proceeding.

In *Murray v. Hoboken Land Co.*, 18 How. 272, a warrant of distress was issued by the solicitor of the treasury against the collector of New York, upon a certificate of the first comptroller, that the collector was indebted to the treasury. The collector had not been notified nor heard so far as appears. The statute authorizing such a process was held constitutional. Judge CURTIS, on page 276, said: "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what the principles are to be applied to ascertain whether it be due process." See, also, *Davidson v. New Orleans*, 96 U. S. 97; *Walker v. Sauvinet*, 92 id. 90. It does not follow that every statute is the "law of the land," nor that every process authorized by a legislature is "due process of law." It must not offend against "the established principles of private rights and distributive justice." This statute does not. It does not transfer A.'s property to B. It only makes A.'s property liable to be taken for a debt he, in common with others, owes to B. A. can save his property by paying the judgment against his town, which judgment binds him and all the other inhabitants, and is a judgment he and each of the others ought to pay. Whether he pays or let his property be sold, he can recover full damages of the town, and have the same final process for the collection of his debt. In the end he only pays his ratable share of the common debt. The statute is general, and is uniform in its application, to every town, and every inhabitant. It may not be

in theoretical harmony with other methods of procedure, but it accomplishes its laudable purpose of compelling towns to pay their debts, without doing any injustice. Towns readily obtain credit at low rates of interest upon the strength of it, and to now pronounce it void would destroy this credit, would work widespread disaster among those who have so confidently invested their savings in loans to towns.

The words "due process of law" in the fourteenth amendment do not have any enlarged nor different meaning from that heretofore ascribed to them. The amendment does not make Federal law, and Federal process of law, the law of the land and due process of law in each State. Whatever was due process of law in any State before the amendment, is due process of law in that State since the amendment. Before the amendment, the final determination of the question whether a State statute was according to the law of the land, rested with the courts of the State. Since the amendment, it rests with the supreme court of the United States. It is through this operation of the amendment, that the citizen receives additional protection against unequal and partial laws.

The United States supreme court considering and determining such a question, will look mainly at the fundamental law, and general jurisprudence of the State. If the statute or process is found to be of ancient origin, to have been fully acquiesced in, to be general in its character, and impartial in its application, and interwoven with the business of the people, that court will not pronounce against it, because it is anomalous or has not been adopted elsewhere. The plaintiff cites *Rees v. Watertown*, 19 Wall. 107; and *Meriwether v. Garrett*, 102 U. S. 472, not as decisive or applicable authorities, but for some general observations in the opinions upon "due process of law." In neither case was there a comparison of a State statute with the fourteenth amendment, and in both cases — 19 Wall. 122, and 102 U. S. 519 — the New England method of enforcing judgments against municipalities is expressly noticed as an exception to the application of the general observations quoted by plaintiff, and is not even incidentally condemned. Elsewhere in the opinions of the same court, this method has been alluded to as actual, existing and binding law, and nowhere has it, even by implication, been declared contrary to the New England law of the land, or the fourteenth amendment. *Riggs v. Johnson County*, 6 Wall. 191; *Supervisor v. Rogers*, 7 id. 180; *Barkley v. Levee Commissioners*, 93 U. S. 265.

The statute in question must be held to be constitutional, and unaffected by the fourteenth amendment.

Judgment for the defendant in each case.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and FOSTER, JJ., concurred.

ANDREWS v. KING, Mayor.

March 24, 1885.

OFFICE AND OFFICER — CITY MARSHAL OF PORTLAND — REMOVAL — CERTIORARI.

By a special law the city marshal of Portland is "subject after hearing to removal by the mayor, by and with the consent of the aldermen," for "inefficiency or other cause."

Held, (1) that the hearing must be by the mayor and aldermen as a board; (2) that a hearing by the aldermen alone, by the consent of the marshal even, is not sufficient; (3) that the mayor and aldermen must find a sufficient cause to exist and pass upon the truth of each charge before a valid order of removal can be made.

Where the presiding judge rules *pro forma*, by consent of the parties and without exercising his own judgment, that a petition for a writ of *certiorari* be dismissed, the law court will entertain exceptions, and upon them determine whether the writ should issue.

William L. Putnam and C. W. Goddard, for plaintiff. *Charles F. Libby*, for defendants.

EMERY, J. The office of city marshal is not a corporate nor even a municipal office. While the appointment of the incumbent is usually delegated to the municipal government, it is competent for the legislature to intrust it to the governor. Cases are not uncommon in large American cities where the State has taken to itself the appointment and government of the police force of the city. The city marshal has other than municipal duties. He has to preserve the public

peace — the peace of the State. He has to enforce the laws of the State. He is essentially a State officer, and the people of the whole State are interested to have such legislation, and judicial interpretation, as to his appointment, tenure and removal, as will secure the most efficient administration of his office. *Dillon on Mun. Corp.* (3d ed.), §§ 58, 60, 210; *Farrell v. Bridgeport*, 45 Conn. 191; *Cobb v. Portland*, 55 Me. 381. The court, therefore, in passing upon the questions here presented, must regard the rights and interests of the people as well as those of parties. It is a question of public as well as of private right.

Formerly the city marshal of Portland was appointed by the mayor and aldermen, annually, subject to removal for good cause. This practically gave the mayor and aldermen power to remove at will, at the end of the year, by merely not reappointing. By the act of 1877, chapter 346, and the amendatory act of 1878, chapter 16, the legislature provided that the marshal should "hold office during good behavior subject, however, after hearing, to removal at any time by the mayor, by and with the advice and consent of the aldermen, for inefficiency or other cause." The tenure of the office was made to be during good behavior, a tenure as long as that of the justices of the supreme court of the United States. We must assume that this important change in tenure was made advisedly. We must assume that the legislature investigated and deliberated sufficiently. We must assume that its action herein was expedient and necessary, and to unhesitatingly give it full scope and effect.

A power of removal is always necessary to insure good behavior, and in this case a power of removal was vested in the mayor and aldermen, to be exercised, however, only when there was "inefficiency or other cause" existing, and then only upon hearing. The discretionary power of annual removals by not reappointing was taken away. Removals were now to be made only when necessary, for causes affecting the administration of the office, and only after examination and deliberation. In these proceedings for removal, the public, for whose benefit the legislation was enacted, and the incumbent himself have a direct interest.

While the incumbent of a legislative office has no vested right to his office, as against the State; while he has no such property in it as can be conveyed, yet his right or title to the office and its emoluments has always been recognized by the courts as a valuable interest, as a privilege entitled to the protection of the law. He ought not to be deprived of it, "but by the judgment of his peers or by the law of the land."

In view of the importance to the public as well as to the parties of the principles which must govern the discussion of this case, we deem it advisable to consider at some length the various requirements of the statute for a valid removal. The removal can only be for cause, but the statute does not specify in detail what the causes are which will justify a removal. "Inefficiency or other cause," however, must mean substantial cause. In determining the meaning of these words they should be considered in connection with the preceding words declaring the tenure of the office to be "during good behavior." We think they embrace any act of nonfeasance, or malfeasance in office from corruptness, as well as nonfeasance or misfeasance from inefficiency. They may also be fairly held to embrace the commission of an infamous crime while in office, or a conviction of a misdemeanor and sentence to imprisonment for a term which will prevent the officer from discharging the duties of his office.

The composition and character of the tribunal constituted by the statute for hearing and determining the cases should also be considered. The legislature, it must be assumed, intended it to be disinterested and impartial. In this case, as is usual, the mayor and aldermen are constituted the tribunal. In proceeding under the statute they do not act as municipal officers, nor as agents of the city, but *pro tempore* as judges. It has been held that when sitting as judges to try charges against an officer, municipal officers must be specially sworn for that purpose. *Tompert v. Lithgow*, 1 Bush (Ky.), 176. We doubt if such a special oath is necessary, but the case illustrates and supports the proposition, that the mayor and aldermen act under this statute, apart from their mere municipal duties, and in a judicial capacity. The act of hearing and deciding is always a judicial act. It should always be done deliberately and without bias.

The statute provides that the mayor shall take the initiative in passing an order of removal, and that the aldermen shall have power to negative the order. The mayor, however, cannot exercise his initiative until after the hearing. The language is, "subject, after hearing, to removal by the mayor," etc. The statute does not expressly declare before whom the hearing shall be; whether before the mayor alone, or the aldermen alone; or the mayor first and the aldermen afterward, or before the mayor and aldermen together. Only one hearing seems to be contemplated, however, and yet the concurrence of both the mayor and the aldermen is required for vote of removal.

The inference would be, that the hearing should be by both and by both together. In the statutes and in the city charter of Portland, as in all city charters, certain powers and duties are vested in the mayor; certain others are vested in the aldermen, while the general administrative powers of the city, including the administration of the police, are vested in the "mayor and aldermen." The mayor and aldermen constitute a board distinct from the board of aldermen. The mayor is required to preside at all meetings of the mayor and aldermen (city charter, § 3), but the aldermen select their own chairman when in session by themselves. When any thing in municipal matters is to be done by the mayor and aldermen, it is done in a session of that board. The mayor and aldermen, in such cases, sit together in the considering of municipal affairs, and while their final action may be concurrent, their hearings and deliberations are in common. In the absence of any declaration to the contrary, we think that when the legislature provided for a hearing before removal, it intended that both the mayor and the aldermen should hear the matter, and should hear it as they hear other matters, sitting as a board of mayor and aldermen, with the mayor in the chair. This view is supported by the subsequent legislative provision, that "the mayor and aldermen" (of Portland) should have power to send for persons and papers and compel the attendance of witnesses, "at any meeting of said board of mayor and aldermen," at which a hearing is to be had. Special Laws of 1881, chap. 86.

The tribunal is composed of two factors, whose concurrence is necessary to a valid sentence. The public and the respondent are entitled to the unbiased judgment of each, after hearing and as a result of the hearing. It is a part of the "law of the land," that the authority which strikes, must hear.

The proceedings before this tribunal should be according to "the law of the land," which is the common law wherever the statute is silent. Specifications of the alleged causes should, therefore, be formulated, with such reasonable detail and precision as shall inform the people and the incumbent of what dereliction is urged against him. The charges should be specifically stated with substantial certainty, though the technical nicety required in indictments is not necessary. Dillon on Mun. Corp. (3d ed.) 255. They may be presented by any one. It is not improper for the mayor, as the chief executive magistrate of the city, required to be vigilant and active in causing the laws of the State to be enforced, to formulate the charges even *suo motu*. In his supervision over the conduct of officers, it may be his duty to do so. But he should not prejudice the case; he should not act as prosecutor at the hearing; there, he should divest himself of his executive functions and assume the judicial; he should suspend his own judgment till the hearing is completed, that it may be the result of the hearing, and not of a preconceived opinion.

The incumbent should have reasonable notice of the charges as formulated, and of the time and place of the hearing. At the hearing, he should be allowed to cross-examine the witnesses against him within the rules of evidence. His own testimony and that of the witnesses for the defense should be fully heard within the same rules. The hearing should be full and fair, and by a patient unprejudiced tribunal. The proceeding is adversary or judicial in its character, and where the statute is silent, the substantial principles of the common law must be observed. Dillon on Mun. Corp. (3d ed.) 253; *Murdock v. Phillips Academy*, 7 Pick. 303; 12 id. 244.

After hearing and before sentence, for the order of removal is a *quasi* sentence though we use the word for purpose of illustration merely, there should be an adjudication upon the truth or falsity of the charges as matters of fact; for upon

such adjudication the sentence is based. This adjudication must be by the tribunal that hears the evidence—here the board of the mayor and aldermen. The removal cannot be made unless the alleged cause in fact exists, and such existence should be ascertained and declared, as the legal basis for the sentence of removal. Such is the immemorial practice in prosecutions in the common-law courts. (We do not refer to civil proceedings.) No sentence is there pronounced until the respondent has been found and declared guilty of the particular charge alleged. The records of the higher courts recite first the fact that the respondent is found guilty by verdict, or plea, and “therefore it is considered or whereupon it is ordered,” etc. At the preliminary hearing before a magistrate, when there is a plea of “not guilty,” the record always shows, that upon hearing the respondent is adjudged guilty or not guilty as the case may be, and that the sentence or order is based on such finding of fact.

In special courts established for the trial of officers alleged to be unfaithful, such as courts of impeachment, and courts-martial, we believe it is the universal practice for the court to pass first upon the truth or falsity of each charge, before passing sentence; this must needs be the course, otherwise the court might pronounce sentence where no one charge was believed by a majority of the court. There might be as many charges as there were members of the court, and no one charge receive the assent of more than one member, yet that member vote to sentence, on account of his belief in the truth of that one charge, which all his associates believed to be false. If each member did so, there would be sentence, without conviction, and without guilt. Such a result would be monstrous, and hence the practice of first ascertaining and declaring whether the court agrees, or concurs upon any one charge as proved.

We think it may be assumed, in the absence of specific directions, that the legislature intended this special tribunal should follow the course so long, and generally followed by the common-law courts, and special courts charged with similar duties. The same reasons for such a course certainly exist.

In this case now before us, are seven different charges. The mayor might be convinced of the truth of only one, and think it his duty to remove for that cause. The aldermen might be unanimous in the belief that the particular charge relied upon by the mayor was not proved, and yet be of the opinion some other charge was true. The mayor might remove upon his belief, and the aldermen consent upon their belief, and the officer be thus removed without any concurrence of belief. Again, no one charge might be proved to the satisfaction of more than one alderman, while each one of the seven aldermen might be satisfied with the proof of one of the charges, and consent to the removal for that charge. There might be, in this way, a unanimous vote for removal where six-sevenths of the board believe every charge to be false. Again, the mayor and aldermen might believe in the truth of such charges only as are not legal cause for removal, and disbelieve the others, and yet vote to remove, and the incumbent thus be deprived of his office against the evident will of the people. The evil and unjust results that might follow from an omission of the tribunal to first ascertain and declare the facts as to the charges, before considering the sentence, are cogent arguments that such ascertainment and declaration must be an essential part of the procedure, for a valid removal. No course of procedure of an inferior tribunal, that could so nullify the intent of the statute, and so elude the supervisory power of the the supreme court over such tribunals, can be according to “the law of the land.”

If any charge be found true by the concurrent finding of the mayor and aldermen, substantially in the manner above indicated, and the officer's removal be thought advisable, there must then be an order of removal. The adjudication upon the facts, and that upon the advisability of removal are distinct acts. The latter cannot precede nor be coincident with the former, but must follow it. Though the board of mayor and aldermen may find some of the charges proved, *non constat* that the mayor will remove or the aldermen consent. Repentance, reparation, or other conditions may induce a suspension of sentence.

If removal be determined upon by the mayor, he should make an order to that effect, and if the aldermen consent, that consent should be formally expressed.

We do not mean that these things are to be done with stateliness of manner, nor that the record is to be minutely formal. The manner may be familiar and the record brief. The finding of the facts, and the consequent order may be expressed simply, and in a condensed form. All that is necessary is a substantial observance of the essentials, and some expression thereof, in some intelligible form.

In the absence of any statute provision, the procedure above outlined appears to us upon principle and analogy to be that required by "the law of the land," according to which the officer must be deprived of his office, if at all.

Now let us in the light of the principles above stated, examine the proceedings of the mayor, of the aldermen, and of the board of mayor and aldermen, and see wherein they are erroneous, if there be any error. They are generally regular. Two at least of the charges, the fourth and fifth, were sufficient in form and substance. There are two matters, however, that seem to us irregular, and if not sufficiently cured, erroneous in substance.

I. There was no hearing before the mayor and aldermen. The mayor evidently did not consider himself a part or member of the tribunal that was to hear and afterward determine. From his letter to the marshal of April 21, 1884, it would seem he did not understand that he was to give a hearing, but rather that the marshal could be heard before the board of aldermen on the question presumably of their concurrence in the predetermination of the mayor to remove. At the hearing he did not preside, as he was by law bound to do at all meetings of the aldermen, and although he remained in attendance, it was only as a spectator or prosecutor. The official hearing was by the aldermen alone. For the reasons heretofore stated, we do not think that such a hearing was sufficient basis for sentence of removal. The respondent and the people were entitled to the judgment of the mayor, and that, after hearing, and as the results of the hearing. They were entitled to be heard by him as a judge before he should pass sentence. There has been no hearing by the statute tribunal, if we have correctly assumed that the statute intended a hearing by the mayor as well as by the aldermen.

II. At the conclusion of the hearing, the mayor took his seat, as mayor and presiding officer (the board of mayor and aldermen being thereby in session), and without stating what charges he found proved, or upon which of them he based his action, without putting to the board the question of guilt or innocence, without any finding of facts by either factor of the board, upon either charge, he passed sentence of removal. He then put the question whether the aldermen would advise and consent thereto.

The aldermen did not pass upon the truth or falsity of any charge. There was no ascertainment nor declaration of any facts. Their only vote or act was that of sentence. We cannot know from the record that a majority of the aldermen believed in any one charge, nor whether the removal was upon a sufficient or insufficient charge. The record does not disclose what was the basis for the sentence, nor that there was any basis, according to the principles of law heretofore stated. This want of a proper basis renders the sentence of removal invalid.

The first-named irregularity was an abuse of jurisdiction. The court constituted by the statute did not sit. The mayor, an essential factor of that court, abdicated his judicial functions. The board of aldermen assumed to themselves the power that was only to be exercised by the board of mayor and aldermen.

The second-named irregularity was an error in procedure. They are both within the superintending power of this court, which "has general superintendence of all inferior courts, for the prevention and correction of errors and abuses, where the law does not expressly provide a remedy." R. S., chap. 77, § 3. This jurisdiction is broad enough to include a superintendence of the mayor and aldermen where they are sitting in any judicial capacity. Such power has been repeatedly exercised in England and this country, and in cases of removal of officers of private corporations as well as of public officers. It does not extend to a re-trial of the facts, nor to a review of the evidence, nor to a revision of any matter of discretion. It does extend to an examination of the grounds of the proceedings and of the course of the procedure, to determine whether the inferior court kept within its jurisdiction, and proceeded according to law. Whether the inferior

court is legally constituted; whether the allegations made to it are sufficient in form and substance to authorize it to proceed; whether its procedure is correct, and whether its sentence is lawful, are questions for this court to determine. If abuse or error be found in any of these matters, this court can, by proper process, annul the whole proceeding, where no other mode of correction is provided. The foregoing proposition as to the extent of the supervisory power of this court, and that it comprehends cases of attempted removals of officers for cause, is well established by authority. *People v. Fire Commissioners*, 72 N. Y. 445; *People v. Nichols*, 79 id. 582; *People v. Campbell*, 82 id. 247; *State v. Lupton*, 64 Mo. 415; *Rex v. Richardson*, 1 Bun. 517; Dill. on Mun. Corp. (3d ed.) 250, 251 and notes. In an English case — *Osgood v. Nelson*, 41 L. J. Q. B. 329, and L. R., 5 H. L. Cas. 636 — the statute authorized the mayor, aldermen and council to remove the registrar for "inability, misbehavior, or for any other cause which may appear reasonable to them." The court of queen's bench and the house of lords, on appeal, considered and determined for themselves the reasonableness of the alleged causes. They decided that habitual non-attendance was a reasonable cause, but they did so upon their own judgment, and not upon that of the mayor, aldermen and council.

The respondent before the mayor and aldermen comes to this court as a petitioner for the writ of *certiorari*, which the court has the power to issue in the furtherance of justice. R. S., chap. 77, § 5.

This writ is the usual and suitable remedy, and its effect is to annul the proceedings of the inferior court, if found to be erroneous.

In accordance with the approved practice in this State, the mayor and aldermen, the respondents to the petition, not only sent up their records, but also an answer on oath alleging other proceedings and matters that do not appear in the record.

They claim that their answer is conclusive as to all matters of fact alleged therein, and that these show that the seeming irregularities did not really occur, or were waived, or that the petitioner was not prejudiced thereby. *Levant v. Com'rs*, 67 Me. 429. The answer, however, is not conclusive of the legal effect of the facts alleged, and the sufficiency of the allegations for their purpose is next to be considered. We need only to consider allegations relating to the two errors already indicated, that of the mayor's omitting to sit officially at the hearing; and that of the mayor and aldermen omitting to adjudicate upon any of the charges.

As to the first, the respondents answer, that the mayor was in attendance and heard the testimony. We do not understand them to mean that the mayor attended and heard officially as a judge. The record shows that the hearing was before the board of aldermen only, and that the mayor was present as a spectator or prosecutor. An answer is not to be construed as contradicting the record, but rather as supplementing it. The respondents also answer that the counsel for the present petitioner expressly stated he made no complaint about the mayor leaving the chair, and was not sure it was not, upon the whole, the most becoming method. The argument of course is, there was a waiver of the mayor's performance of his judicial duty in the matter, and that it was competent for the petitioner to waive it, and so give jurisdiction to the board of aldermen alone.

If it were matter of form, or of practice, or even of procedure only, it was perhaps competent for the then respondent to waive it, and be bound by the waiver. But this matter involves the composition of the tribunal, indeed, its very authority and existence, in which the people have a manifest interest, as before stated. The statute contemplated a hearing by the mayor and aldermen sitting as a board, the mayor in his place as mayor and presiding officer. The incumbent of the mayoralty was not simply an individual member of the tribunal who might be absent and yet have a quorum. He was an essential factor. There could be no board of mayor and aldermen without an acting mayor. There could be no legal hearing under this statute without the mayor or his vice being present, sitting in his place as mayor, as one branch of the tribunal composed of two branches. There could be no sentence without a prior legal hearing. The city marshal might have resigned his office, or have confessed the charges, but he

could not confer on the board of aldermen alone, the jurisdiction to hear, nor upon the mayor the jurisdiction to sentence without hearing, or confession. Neither branch could exercise by consent a jurisdiction it did not have by statute. It is a familiar principle that consent will not confer jurisdiction on an inferior court.

A superior common-law court when trying questions of fact is composed of two factors, a judge and a jury. Both must be present and hear. In civil causes, the statute permits the parties to waive the jury, and submit the case to the judge. In criminal causes, however, which are more analogous to this proceeding, there is no provision for the waiver of a jury. If a respondent, while adhering to his plea of not guilty, should verbally offer to submit to a hearing by the judge alone, such offer or waiver would not authorize the judge to dispense with the jury, and proceed to hear and sentence. This would be very apparent in the case of the graver offenses where the penalty might be long imprisonment, or even death. The principle, however, would be the same in the case of all offenses. If, then, a superior court will not eliminate or suppress one of its factors upon the verbal consent of a respondent, pleading not guilty, it would seem that an inferior and limited tribunal cannot do it. It must not be forgotten that the people as well as the respondent are interested in the proceedings.

As to the second error, the respondent's answer, that it was the judgment of the mayor, and of those aldermen voting for removal, upon the evidence at the hearing that all the charges were proved, and that the sentence and consent thereto were based on that judgment. Reading this answer in the light of the record, the meaning seems to be that the evidence induced in the mind of the mayor, and in the mind of each alderman voting with him, a belief in the truth of all the charges. The most that the answer and record taken together indicate was a mental status in certain individuals. By their use of the term "judgment" in the answer, we do not understand the respondent to assert that their individual mental beliefs were formulated into an expressed judgment of the tribunal, in the technical law sense of the term. Individual members of this court may, in relation to a case, have certain views or opinions induced by the arguments. Each member may have the same opinion in his own mind, but such individual opinions do not constitute a judgment of the court upon which further proceedings could be had. These opinions must be formulated and expressed officially to become a court judgment. It is only after such formulating and expression that the consequences of a judgment can follow. We have said there should be an adjudication upon the facts. That adjudication is something more than a mental process or conclusion in individual minds. It is an expression, a giving out by the tribunal, of the resultant of the opinion of the members, such expression being an open act, a step in the procedure. It should properly appear on the record, but if the recording officer omitted it, and such expression was actually made, the record may be amended, or the fact can be shown in answer to a petition for *certiorari*. 67 Me. 429. We do not, however, understand the answer in this case, to assert there was any such expression, any such formal articulation of judgment. Indeed, the record expressly declares that the board of aldermen was requested to make it by one of its members and refused. The answer is not sufficient to cure the second error.

The respondents, however, further argue that the granting of the writ of *certiorari* does not necessarily follow from their omission to show regular proceedings. The granting of the writ is a matter of judicial discretion, and they urge that, even if these particular proceedings are erroneous, new ones can at once be instituted, from which the same result must follow, and, therefore, these may well be permitted to stand. The great majority of cases in which the writ is asked for are purely civil proceedings, such as those about taxes, roads, etc., and, in such cases, the writ is always granted, if there be an excess of jurisdiction by the inferior court, or any unauthorized step or omission in the procedure which may work an injustice. This proceeding before the mayor and aldermen, however, is somewhat akin to a criminal prosecution. It charges the petitioner with offenses. It may result in his condemnation and disgrace, as well as in the loss of some privilege. It has been said that in such cases the injured party is entitled to the writ *ex delicto justitia*. Dill. Mun. Corp. (3d ed.) 925.

It is also suggested in the argument that the proceedings of a special court, unlearned in the law, are not required to be regular nor its records so full and accurate as those of a superior court.

The court is reminded of the indulgence shown to the records and proceedings of municipal bodies. The courts will labor to discover and give effect to the real intention of these bodies in all municipal matters as expressed in any vote or proceedings, however informal. But, even in such matters, the court cannot supply votes that were not passed, nor overlook the illegality of the votes that were passed. In such adversary proceedings as these, moreover, distinct form and more solemn than those in municipal matters; in proceedings so summary, affecting the character of a citizen and the peace of a State, the proceedings and record should be reasonably regular and precise. No intendments can be indulged as to the jurisdiction and regularity of the procedure of the mayor and aldermen in such cases. *State v. Lupton*, 64 Mo. 415.

This case is brought before us, upon exceptions to various rulings of the presiding judge at the hearing on the petition, and it is contended that the law court has no jurisdiction over questions arising on the petition, but only over those arising on the writ itself. In the enumeration of the cases that may come before the law court in section 42, chapter 77, R. S., the last case named is "questions arising on writs of *certiorari*." Early in the same list, however, is named "bills of exceptions." Again, in section 51 of chapter 77, it is provided that "a party aggrieved by any opinion, direction or judgment of the presiding judge" may have a bill of exceptions to the law court. This would seem to be sufficient authority for this court to determine this bill of exceptions. The exceptions present questions of law solely. If it be suggested that the final ruling dismissing the petition was a matter of judicial discretion not reviewable by this court, it may be answered that the presiding judge did not exercise any such discretion. He heard no evidence. He looked at the petition, record and answer only. They presented a grave and delicate question. He made a *pro forma* ruling only, with the apparent consent of the parties, and with the evident intention of thereby bringing the whole case before us for more full consideration. The case might properly have come up upon report or agreed statement, but the form in which it comes is not essential. *Barrows, J., in Collins v. Chase*, 71 Me. 435.

We have only considered the principal question, that presented by the final ruling dismissing the petition, as the result we have arrived at renders any consideration of the minor rulings unnecessary. We have discussed and passed upon two errors in the proceedings of the inferior court, when, perhaps, one was sufficiently decisive of this particular case. We have thought it advisable, however, to state at some length the legal principles we deem applicable to the case. It is highly important that all inferior tribunals, especially those vested with a jurisdiction to deprive a person of his property and condemn him to disgrace, should keep within their jurisdiction, perform their whole duty, and proceed according to law. Our somewhat lengthy discussion may serve as a guide to such tribunals who, we are glad to assume, desire to act impartially and lawfully, and who only err, as in this case, from a misapprehension of their duty.

We think the errors noted are substantial, that they are not cured by the answer, and that they are of such a nature as requires the writ to issue.

Exceptions sustained.

Writ to issue.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

CHAPMAN v. DENNISON PAPER MANUFACTURING CO.

March 30, 1886.

COMPOSITION — LACHES — TENDER.

A creditor agreed in writing to accept of his debtor twenty-five per cent of the amount due him and discharge his debt, whenever "it shall appear by legal adjudication, reference or otherwise, that I am the true owner of" the debt. July 7, the creditor notified the debtor that the court had decided that he was the owner of the debt and that he was ready and willing to accept the percentage according to agreement. No payment being

made the creditor sued the original debt September 8. On November 19, the debtor tendered the twenty-five per cent.

Held, (1) that the tender was not seasonably made; (2) that the agreement of composition was forfeited; (3) that the original cause of action was revived.

Action on promissory notes. The opinion states the facts.

S. C. Strout, H. W. Gage and F. S. Strout, for plaintiff. *Strout & Holmes*, for defendant.

VIRGIN, J. The plaintiff's agreement of November 7, 1879, cannot bar this action on the ground of accord and satisfaction, for it has never been fully executed. *Heathcote v. Crookshank*, 2 Term. 24; *Bragg v. Pierce*, 58 Me. 65; *Miller v. Hatch*, 72 id. 481.

Assuming (without deciding) that it was made upon sufficient consideration; that a composition had been entered into by all of the defendant's creditors save two; and that the defendant, in the absence of any stipulation in the composition agreement requiring the assent of all, might lawfully settle with those who did not sign it on such terms as he and they might agree, without thereby releasing those who did sign, then the agreement alone which the plaintiff signed, in the absence of any reference therein to the general composition agreement, is the only one that can affect him. We must look, therefore, at the terms of his agreement in order to ascertain what is to operate as a satisfaction or discharge of his original debt. *MacKenzie v. MacKenzie*, 16 Ves. 372.

There is a familiar class of cases wherein by the agreement a debtor's promise is received by his creditors in satisfaction of his debts; and there is another class where the performance and not the promise is intended to operate as satisfaction. 1 Sm. L. Cas. (8th Am. ed.) 554; 2 Sm. L. Cas. 24; *Evans v. Powis*, 1 Exch. 599, 606; *Richardson v. Cooper*, 25 Me. 450, 452. In the former class the new promise is given as a substitution for or satisfaction of the debt. *Good v. Cheesman*, 2 B. & Ad. 328. Where the composition deed contained an absolute and immediate release of the debtor, with a covenant on his part to pay the composition money in instalments, without any proviso declaring it void unless paid, the non-payment was held not to remit the creditors to their original debts, for the reason that they were discharged, and that the creditor's remedy was upon the covenant. *Lay v. Mottram*, 19 C. B. (N. S.) 479, 484. But if, instead of a release, the composition agreement contained a mere stipulation that the creditors will accept a certain sum or percentage of their respective debts in full satisfaction thereof, the debtor must punctually pay to entitle him to a discharge. *Cranley v. Hillary*, 2 M. & S. 120. For the creditor, not being obliged to enter into any composition agreement, has the sole right of modifying his first contract and of prescribing the conditions of its discharge; and if the debtor fail to pay, the condition to accept a part is broken, the new contract is thereby forfeited and is no bar to the original cause of action. *Sewell v. Musson*, 1 Vern. 210; *Clark v. White*, 12 Pet. 178, 191. Still, while such a composition agreement is in force, and before any infraction thereof on the part of the debtor, the remedy on the original debts being suspended thereby, they cannot be the subject of an action. *Cranly v. Hillary*, *supra*; *Chem. N. Bank v. Kohner*, 85 N. Y. 189.

The plaintiff's agreement comes within this rule, and the question arises, was it in force when the defendant first moved to perform on his part on November 19, 1883? By its terms the plaintiff agreed to accept twenty-five per cent of the amount due on the notes on July 1, 1879, to be paid in cash "whenever the question" of their ownership "is decided."

A composition agreement is an act of favor and indulgence on the part of creditors. But when it is signed and delivered favor ceases, and the debtor, in the absence of any waiver by the creditors, is remanded again to the law which requires of him a strict compliance if he would avail himself of its advantages, visiting upon him, for his default, no harsher penalty than a renewed liability to pay the debt which he already owes. When money is to be paid by him within a specified time the debtor must pay or tender it at the time stipulated. *Evans v. Powis*, *supra*; *Fessard v. Mugnier*, 18 C. B. (N. S.) 286; *Cranly v. Hillary*, *supra*. And if no definite time be fixed the law imposes upon him the obligation to pay within a reasonable time. *Attwood v. Clark*, 2 Me. 249; *Saunders v.*

Curtis, 75 id. 493, 495; *Wildon v. Spragus*, 50 id. 354; *Bowen v. Holley*, 38 Vt. 574. And whether this question is one of law or fact we need not discuss it here, as the case comes before us on report, and the court is to decide it on so much of the evidence as is legally admissible.

By the terms of the agreement the defendant was to pay in cash "whenever the ownership of the notes is decided." The most favorable construction which the defendant can ask is that he was thereby required to pay within a reasonable time after that decision was made known to him.

What is a reasonable time in a given case depends upon a consideration of all of its circumstances. This court has declared that a reasonable time is such time as is necessary conveniently to do what the contract requires should be done. *Howe v. Huntington*, 15 Me. 350; *Saunders v. Curtis*, 75 id. 493.

In this case nothing but money was to be paid. The defendant had obtained a like agreement with the other contingent owner of the note, so that the money was to be ready at all hazards. The parties resided within forty miles of each other, and there was railroad communication twice daily between their places of business. The defendant's treasurer was in Portland (plaintiff's place of business), "very often during the months of July, August and September, 1883." He was notified July 7, 1883, by letter, that the court had settled the ownership of the notes in the plaintiff, that they were then in his possession, and that he was ready to settle as by his agreement. On July 14, the plaintiff was notified by letter that the defendant would meet him in Portland the ensuing week and "arrange the matter." On July 23, the plaintiff notified the defendant of the "amount which he made due on the notes." The plaintiff waited until September 8, and then sued out this action returnable on first Tuesday in November, and no offer of payment was made or excuse for the delay was offered until November 19. "This long delay which the defendant has not seen fit to explain, we think is unreasonable." *Saunders v. Curtis*, *supra*; *Kingsley v. Wallace*, 14 Me. 57.

Judgment for the plaintiff for the amount of the notes.

PETERS, O. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

NOTE.—See 25 Eng. Rep. 258; 16 id. 458; 8 id. 594; 18 Bank. Reg. 133, 443; 11 id. 21.—Ed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

LEDDY v. BARNEY.

June 24, 1885.

RELEASE—JOINT WRONGDOERS—SETTLEMENT WITH ONE.

Plaintiff and defendant were employed by C. Plaintiff was injured by the negligence of defendant moving a derrick. After the accident, C. paid to plaintiff's attorney, \$150, and took from plaintiff a general release from all causes of action for damages.

Held, that the release was a bar to the action against the defendant.

Action of tort for injuries sustained by the plaintiff, by the alleged negligence of the defendant. Both parties were employed by one Augustus Chace. The plaintiff as a common laborer, and the defendant as superintendent of the work.

At the trial in the superior court, the plaintiff introduced evidence that he was injured by the negligence of the defendant, moving a derrick. The plaintiff disclaimed any cause of action against Chace. The defendant set up in defense of said suit, among other things the carelessness of the plaintiff, and a release of Chace, which he said was a bar to this action. There was evidence on the part of the plaintiff, tending to show that after the accident the plaintiff consulted Milton Reed, an attorney at law, and laid claim for damages against the defendant, that Mr. Reed saw Mr. Chace, and that Mr. Chace, after denying all liability, made a gift to Mr. Reed of \$150, as a charity to the plaintiff, and the plaintiff received of Mr. Reed \$120 and signed the following paper:

Know all men by these presents, that I, William Leddy of Fall River, in the county of Bristol, in consideration of \$150 to me paid by Augustus Chace of said Fall River, the receipt whereof I do hereby acknowledge, do hereby discharge and release the said Chace from all actions, causes of actions for damages or otherwise held by me against said Chace for any causes heretofore existing from the beginning of the world until the date hereof.

WILLIAM LEDDY, [L. s.]

Witness my hand and seal at said Fall }
River, this October 13, A. D., 1883. }

Witness:

M. REED.

Mr. Reed was called as a witness by the defendant and testified that Leddy came to see him relative to the claim and to the settlement with Chace. The defendant asked Mr. Reed if the paper was read to Leddy, according to his best recollection and belief. He stated that it was. The plaintiff objected to the admission of this testimony. Mr. Chace testified that he paid Mr. Reed \$150, that he considered it a gift on his part mainly out of sympathy.

Another reason was, to release the claim the man made upon him. The plaintiff objected to the admission of Chace's testimony.

At the close of the case the plaintiff asked the court to rule, among other things, that the defendant was not discharged from liability by the release, but the court declined to give the ruling, and instructed the jury that, if Mr. Chace paid the money in charity, the payment was not a bar to this suit; but, if Mr. Chace paid it partly on account of charity and partly in settlement of the claim and to avoid a suit, then the release was a discharge of this action and a bar to this suit. The court also instructed the jury that it was not competent for the plaintiff to object to the release, under such circumstances. The jury returned a verdict for the defendant and the plaintiff alleged exceptions.

E. L. Barney and J. M. Wood, for plaintiff. *J. M. Morton and A. J. Jennings*, for defendant.

W. ALLEN, J. The release, under seal, was valid between the parties to it and could not be controlled by parol evidence. The plaintiff's own testimony showed that it was executed and delivered by him at the time he received the money. The fact, if true, that the paper was not read to him, and that he understood it to be a voucher for Mr. Reed, is not material on this point. There can be no question of the delivery and acceptance of the instrument, nor of its sufficiency to discharge the cause of action against Chace, whether particularly intended or not.

The other question is, whether the plaintiff is barred by the release, from his action against the defendant, as well as against Chace. The rule that a release of a cause of action to one of several persons liable operates as a release to all, applies to a release given to one, against whom a claim is made, although he may not be in fact liable. The validity and effect of a release of a cause of action does not depend upon the validity of the cause of action. *Brown v. City of Cambridge*, 3 Allen, 474; *Goss v. Ellison*, 136 Mass. 503. If the cause of action against the defendant in this suit was released to Chace, this action cannot be maintained. As the release is general of all causes of action, the identity of the cause of action against the defendant with a cause of action against Chace must be shown. *Stone v. Dickinson*, 5 Allen, 29. If, when the release by Chace was given, the plaintiff was asserting against him a liability for the same act for which it now asserts the liability of the defendant, the two causes of action are the same, so that a release of one will discharge the other. It was upon this point only that the effect of the release was submitted to the jury and the instructions given, as applied to the evidence, permitted them to find the payment and release a bar only, if the payment was made by Chace in settlement of a claim made, and to avoid a suit threatened for the act for which recovery is sought against the defendant. The instructions were correct, and the rulings asked for by the plaintiff were properly refused. The evidence of Reed and Chace, which was objected to, was competent upon the point covered by the instructions reported.

It tended to show that Reed was acting as attorney of the plaintiff, and what the transaction between the plaintiff's attorney and the defendant was.

Exceptions overruled.

See 26 Am. Rep. 330; 20 Eng. Rep. 340; 21 id. 790; 75 N. Y. 495; 35 Hun, 94; 10 Daly, 406; 63 Cal. 157.—Ed.

McKIMBLE, Administratrix, v. BOSTON AND MAINE RAILROAD.

June 24, 1885.

NEGLECTANCE — PASSENGER — EVIDENCE — DUTY TO PASSENGER LEAVING TRAIN.

In an action against a railroad company for the negligent killing of plaintiff's intestate, it is not necessary in order to maintain the action, for the plaintiff to show exercise of ordinary care on the part of the deceased, if at the time of the killing he was a passenger on defendant's road.

A passenger who has bought a ticket or paid his fare continues to be such while lawfully leaving the train or station.

Where a railroad company has made provisions for passengers to leave the cars only upon one side of the track, and it is dangerous to leave upon the other, it is a question for the jury whether it is negligence on the part of the company not to provide some means to prevent passengers from leaving on the wrong side, or to notify them not to do so.

Action of tort brought by the administratrix of the estate of Jeremiah McKimble, to recover damages for his death. There was evidence at the trial in the superior court tending to show that the plaintiff was appointed administratrix January 23, 1883, of the estate of Jeremiah McKimble; that the intestate took the five o'clock train from Boston on the defendant's railroad, January 10, 1883, and was killed, after leaving the train at Prison Point, Charlestown, on the left hand side, and while in the act of crossing the inward track to get off the defendant's premises, by a freight car, which was moving toward Boston, pushed by a shifting engine. It also appeared that the conductor had not come into the car, in collecting fares; that there was found on McKimble's body about a quarter past six o'clock that night, a five trip commutation ticket over the defendant's road, from Boston to Malden, which had not been punched. The superior court ruled that the action could not be maintained and directed a verdict for the defendant, and reported the case for the consideration of the supreme judicial court.

O. G. Fall, for plaintiff. *S. Lincoln*, for defendant.

W. ALLEN, J. While there was evidence proper to submit to a jury of the negligence of the defendant, and of the gross negligence of its servants, or agents, there was no evidence of the exercise of ordinary care by the deceased; and the ruling of the court that the action could not be maintained was correct, if the burden was upon the plaintiff to prove such care. Whether such burden was upon the plaintiff depended upon whether the deceased was a passenger. If he was a passenger and his life was lost through the negligence of the defendant, or the gross negligence of its servants or agents, it would not be necessary to prove that he was not negligent. Pub. Stats., chap. 112, § 212; *Comm. v. Boston and Lowell Railroad Corporation*, 134 Mass. 211. If, therefore there was evidence to be submitted to the jury, that the deceased was a passenger when he was injured, the ruling was wrong; the deceased was upon a regular passenger train from Boston, and the only ground for contending that he was not a passenger upon it, was that he left it without surrendering his ticket or paying his fare. He had a ticket, which gave him a right to ride as a passenger, and he had no opportunity to surrender it or to pay his fare. There was evidence tending to show that the deceased left the train after it had stopped at a station, where passengers were accustomed, and had a right, to take and leave the cars. If a passenger, he would continue to be such, while rightfully leaving the train and station.

It is objected that he had no right to leave the car, in the manner in which he left it, and that, before he was injured, he had ceased to be a passenger, by leaving the car negligently and as he had a right to. But it does not appear that he did not so leave it, in consequence of the negligence of the defendant. The defendant had made provisions for passengers to leave the cars only upon one side

of the track, and it was dangerous to leave upon the other side. Upon the evidence it was a question for the jury, whether it was negligent in the defendant not to have provided some means to prevent passengers from leaving on the wrong side, or to notify them not to do so. If there was such negligence of the defendant, and in consequence of it, the deceased, being a passenger upon the car, left it upon the wrong side, and thereby lost his life, we think he must be regarded as a passenger, within the meaning of that word in the statute, although it did not appear he was so negligent in leaving the car. To this extent, we think that the rulings at the trial were wrong.

Verdict set aside.

CROMBIE v. McGRATH.

June 24, 1885.

NEGOTIABLE INSTRUMENT—CONSIDERATION—INDENTURE OF APPRENTICESHIP.

A note given by a father, in consideration of the release of his minor son from an apprenticeship agreement, to which the father was a party, is founded upon a sufficient consideration.

Contract to recover upon a promissory note. The defense relied upon, was want of consideration. At the trial in the superior court it appeared that on April 16, 1880, the defendant, the defendant's son and one John L. Connolly, a wood engraver, entered into a written agreement, being an apprenticeship indenture, and the same day the defendant and Connolly executed, each to the other, bonds in the sum of \$200 to secure the performance of the agreement. In March, 1881, Connolly sold out to the plaintiff, and on October 25, 1881, the defendant signed the following, which was written by the plaintiff on the back of the original agreement:

"BOSTON, October 25, 1881.

"I hereby continue the within agreement and indenture with Albert D. Crombie, successor of John L. Connolly, for the full unexpired balance of the term of apprenticeship.

"WM. McGRATH."

On April 22, 1882, young McGrath left the plaintiff, the plaintiff having released him from any further obligation to remain, and the defendant gave the note declared on in consideration of such release. At the close of the evidence in the case, the defendant requested the court to rule that the plaintiff had not maintained his action. But the court declined so to rule, and directed a verdict for the plaintiff, and the defendant alleged exceptions.

O. T. Gray, for plaintiff. *J. A. Maxwell*, for defendant.

W. ALLEN, J. The only question is, whether there was any evidence of consideration for the note declared on. The contract, though not a statutory indenture of apprenticeship, was valid between the parties to this suit, and under it the plaintiff had a right against the defendant to the services of his minor son. *Day v. Everett*, 7 Mass. 145; *Loddell v. Allen*, 9 Gray, 381; *Caden v. Farwell*, 98 Mass. 138. The release of the right to such service was, therefore, a sufficient consideration. Besides the son was in the actual service of the plaintiff, and the condition of his leaving that service and obtaining higher wages was the giving the release by the plaintiff.

Exceptions overruled.

WALTON v. NEW YORK CENTRAL SLEEPING-CAR CO.

June 24, 1885.

NEGLIGENCE — RAILROAD EMPLOYEE — ACTS NOT WITHIN SCOPE OF EMPLOYMENT.

A railroad company is not responsible for damages caused by the negligence of an employee, in the performance of an act not within the scope of his employment.

Action of tort, tried by the court without a jury, to recover damages for personal injuries alleged to have been sustained by the plaintiff. At the trial in the superior court it appeared that the plaintiff was in the employ of the Boston and Albany Railroad Company, as a laborer and track repairer, and on the morning of August 5, 1885, was, under the direction of said railroad company, rightfully on its track, engaged in the performance of his duties and in the exercise of due care, when an express train passed rapidly by on an adjoining track, and a bundle thrown from the passing train hit the plaintiff and injured him. In this train was a drawing-room car owned by the defendants. The defendants employed on the car a conductor and a porter, one Maxwell, whose business it was to take charge of the car, keep it clean and in order, serve the passengers, and remove rubbish from the car. As this car was passing through Newton on its way west, on said morning, Maxwell, the porter, went out upon the platform of defendant's car, and threw off a paper bundle containing soiled clothing belonging to himself. The bundle thrown by Maxwell struck the plaintiff and caused the injuries complained of. The plaintiff requested the court to rule, as a matter of law, "that if Maxwell was in the employ of the defendants, paid by them for taking care of the car, allowed to keep articles of personal property of his own in the car, and having such articles in his possession in the car, on this occasion, carelessly, and negligently threw the same from the car, while passing over the railroad therein, in the performance of his general duties in the care of the car, and hit the plaintiff, then being in the exercise of due care, rightfully on the railway, the defendants would be liable for all damages resulting therefrom as would be legally recoverable for the injury occasioned thereby." The court refused so to rule, but ruled, among other things, that upon the evidence presented, the plaintiff could not recover. The plaintiff alleged exceptions, and at the request of the plaintiff the case was reported for the consideration of the supreme judicial court.

D. G. Haskins, Jr., for plaintiff. *A. L. Soule* and *F. H. Gillett*, for defendant.

W. ALLEN, J. The ruling and instructions of the court were correct. There was no evidence that Maxwell was employed by the defendant to take care of his own clothing and personal effects. The act complained of was not within the scope of his employment; and it is wholly immaterial that he was at the moment riding in a car of the defendant, in which he was employed by it for other purposes.

Judgment on the verdict.

PROCTER v. HARTIGAN.

June 24, 1885.

NEGOTIABLE INSTRUMENT — ORDER — CONDITIONAL ACCEPTANCE — EVIDENCE.

In an action upon a written order drawn upon and accepted by defendant, "to be paid out of the last payment."

Held, that the language quoted, was part of defendant's contract of acceptance, and that evidence of a building contract between drawer and drawee, in reference to which the order was made and accepted, and of conversations between the parties referring to it, were competent to aid in the construction of the writing.

Action of contract upon the following order:

Boston, August 19, 1882.

\$500.

Bartholomew J. Hartigan, pay to the order of Procter & Drummey, five hundred dollars, value received, and charge the same to the account of

JAMES WALSH.

"To be paid out of the last payment."

"I accept this order,

B. J. HARTIGAN."

At the trial in the superior court, the defendant offered evidence of a conversation between the defendant, one Lafield, the defendant's architect, said Walsh and one of the plaintiffs, prior to the acceptance of said order and relating to its acceptance, to show that Lafield then told the defendant that he could accept the order, to be paid out of the last payment, called for by his contract with Walsh, that the plaintiff Procter then assented thereto, provided his partner would assent and, after conference with his partner, did assent to such acceptance, and that thereupon the defendant signed the acceptance. The defendant also offered to put in evidence the written contract between himself and Walsh. The court excluded the conversation offered and also the contract, to which the defendant took exceptions. The defendant asked the court to rule that the acceptance was conditional, and that the plaintiff could not recover until the last payment provided for in the contract between the defendant and Walsh was due, but the court declined to give the instruction, but ruled that the acceptance was unconditional. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to ruling and the refusal to rule.

R. Lund and H. F. Napfen, for plaintiff. *J. F. Cronan*, for defendant.

W. ALLEN, J. The words "to be paid out of the last payment" were part of the defendant's contract of acceptance, and evidence of the contract between the drawer and drawee, and of the conversation between the parties referring to it, was competent to aid in the construction of the writing. *Franklin Savings Institution v. Reed*, 125 Mass. 365; *Stoops v. Smith*, 100 id. 63.

Exceptions sustained.

WALES v. CHASE.

June 24, 1885.

LEASE — GENERAL ASSIGNMENT — LIABILITY OF ASSIGNEE FOR RENT.

Where it is not shown that the relation of landlord and tenant exists, an assignee of an insolvent is not liable for rent.

Action of contract for the use and occupation of premises at 235 Franklin street, Boston, from February 16 to April 17, 1883. At the trial in the superior court, without a jury, it appeared that the premises were hired and occupied by the Ashcroft and Barker Manufacturing Company, which went into insolvency February 16, 1883, and that the defendants were appointed assignees of that company March 16, 1883. Evidence was offered by the plaintiff tending to show use and occupation of the premises by the assignees. The defendants denied any liability to pay the rent, the only witness called by them being Stephen H. Tyng, one of the assignees. At the close of the evidence the plaintiff asked the court to rule that upon all the evidence the plaintiff was entitled to a finding in his favor. The court declined so to rule and found and ordered judgment for the defendants. The plaintiff alleged exceptions.

I. D. Van Duzee, for plaintiff. *S. H. Tyng & A. F. Converse*, for defendants.

W. ALLEN, J. Whether the plaintiff was entitled to recover depended upon what of the testimony was found to be true. If the judge who tried the case believed the testimony of the witness Tyng, not only did he properly refuse to rule, as requested, that upon all the evidence in the case the plaintiff was entitled to recover, but he could not have found that the relation of landlord and tenant or any contract between the parties was proved so as to give the plaintiff a right of action. Whatever inference might have been drawn from the undisputed fact, that goods of the insolvent, which passed to the defendants by assignment, remained on the premises with the knowledge and consent of both parties for a month after the appointment of the defendants as assignees, if it stood alone, the circumstances testified to by the witness for the defendants would negative the inference of an express or implied promise by them to pay for the use and occupation of the premises. *Leonard v. Kingman*, 186 Mass. 123.

Exceptions overruled.

[*Parkhurst v. Wolf*, 47 N. Y. Super. 320; *Bish. on Insolv. Debtors* (2d ed.), §62.—Ed.]

SCOTT v. CALKIN.

June 24, 1885.

GUARANTY — OF PAYMENT — CONSIDERATION.

Defendant C. owned real estate subject to a mortgage which she had assumed and agreed to pay, given to secure the note in suit. Several payments being overdue the holder of the note threatened to foreclose the mortgage, whereupon it was agreed between them that he should forbear foreclosure, and that she, in consideration thereof, should become responsible to him for the payment of the note, and for that purpose signed her name upon the back of the note. In an action to recover the balance due on the note, and while the case was under consideration by the court, the plaintiff was permitted against defendant's objection to write upon the original note over the signature of C., the words "I guarantee the payment of the within note."

Held, that the indorsement of the note by C. imported a guaranty of the payment of the same, and gave plaintiff authority to write over her name, the contract imported by law; and that if necessary at all it could be done during the trial.

Action to recover the balance of a promissory note, originally made for \$3,000, bearing date August 31, 1875, payable to Hepsibeth Pierce, or order, signed by the defendant Calkin, and indorsed by said Pierce to the plaintiff. It bore upon the back the signature of Louise Cherrington. The declaration contained three counts, one against the defendant Calkin, as maker, one against the defendant Louise Cherrington, as guarantor, and another against Cherrington as a maker and original promisor to pay the note, as it was at the time she signed her name upon it. Calkin did not defend. Cherrington answered, among other things, that she had received no notice of non-payment of the note and that her promise was to pay the debt of another and was not in writing. At the trial in the superior court, without a jury, it appeared that Calkin made the note at the time it bears date and gave it to said Hepsibeth Pierce, with a mortgage upon his real estate to secure it. Pierce indorsed the note and assigned the mortgage for a valuable consideration to the plaintiff. Calkin sold said real estate to Louise Cherrington, who assumed and agreed to pay the debt secured by the mortgage upon it. In the fall of 1880, several payments being overdue, the plaintiff who had then become the owner of the note, had an interview with Louise Cherrington and told her the note must be paid or he should foreclose the mortgage. It was finally agreed between them that he should forbear foreclosing the mortgage for six months, and that she, in consideration thereof, should become responsible to him for the payment of the note. She then signed her name upon the back of the note, for the purpose of making herself so responsible, and the plaintiff forbore to foreclose the mortgage. There was no evidence of any subsequent notice to her of demand upon Calkin and his non-payment, but the court found that she undertook to make payments upon the note herself and repeatedly promised to pay the plaintiff and waived demand and notice, if, in any event, it might have been required. After the arguments, and while the case was under consideration by the court, the plaintiff was permitted, against the objection of the defendant Cherrington, to write upon the original note over the signature of Louise Cherrington the words, "I guarantee the payment of the within note." The court found for the plaintiff as against both the defendants and, at the request of the defendant Cherrington, reported the case for the consideration of the supreme judicial court.

E. B. Powers and *A. E. Scott*, for plaintiff. *W. R. Richards*, for defendant Cherrington.

W. ALLEN, J. The indorsement of the note by Louise Cherrington, under the circumstances proved, imported a guaranty of the payment of the note to the plaintiff, and gave him authority to write over her name the contract imported by law; and this, if necessary at all, could be done during the trial. *Josselyn v. Ames*, 3 Mass. 274; *Tenney v. Prince*, 4 Pick. 385.

The finding of the court renders immaterial the question whether demand and notice was necessary.

Judgment for the plaintiff.

[35 Am. Rep. 782.—Ed.]

FRAZIER v. SIMMONS.

June 24, 1885.

CONTRACT — SALE OF STOCK — RULES OF STOCK EXCHANGE — TRANSFER OF TITLE BY PAYMENT OF MARGIN AND DEPOSIT OF CERTIFICATES.

There may be a bargain and sale of goods sufficient to transfer the title, and that to support an action for goods bargained and sold, without any such delivery as will amount to a transfer of possession.

Plaintiff sold defendants certain shares of stock, "payable and deliverable, buyer's option, sixty days;" thus showing that the parties did not intend a present transfer. By the rules of the stock exchange of which both parties were members, on all contracts for stocks sold on time, either party might require a deposit to be made any time during the existence of the contract; but the seller should have the privilege of depositing the stock in lieu of the cash, in which case the margins should be paid to him by the buyer, and the amount credited on the contract. Three days after the sale in question the defendants, on plaintiff's demand, paid plaintiff a margin of twenty per cent, and plaintiff, on the same day, in conformity with the rules of the exchange deposited the certificates of stock with a trust company, with power of attorney for their transfer executed in blank; and the trust company delivered to plaintiff a receipt therefor, agreeing to deliver upon return of the receipt indorsed by both plaintiff and defendant. In an action to recover the balance due on the stock —

Held, that the transaction amounted to a transfer of the title; that a deposit of the stock in lieu of the cash by the plaintiff, and payment of the margin by defendants to be credited on the contract price under the rules of the exchange, showed a change in the condition of the parties amounting to a transfer of the title, entitling the plaintiff after sixty days to maintain an action for balance due on the stock.

Action of contract in which the plaintiff sought to recover the balance of the purchase-money for certain shares of stock sold by the plaintiff to the defendants. At the trial in the superior court it appeared that on the 25th of October, 1881, the plaintiff and the defendants, then both being members of the Boston Mining and Stock Exchange, in open board and at auction agreed upon a sale by the plaintiff to the defendants of three hundred shares of the stock of the Milton Mining and Milling Company, at \$1.19 per share, "payable and deliverable buyer's option sixty days," and on October 26, in pursuance of the usages of the Exchange, the papers were passed and contract completed. At the time of the execution of papers and the completion of the contract, the plaintiff had in his possession certificates of three hundred shares of the stock of said company, which he was duly authorized to sell, each certificate bearing upon its back, at that time, the usual power of attorney to transfer the stock, executed in blank, in the usual way, by the party to whom the certificate, as it appeared upon the face, was issued. On October 28, 1881, the plaintiff having on the previous day called for the deposit of a margin, the certificates for said stock were, in conformity with a rule of the Exchange, deposited in the hands of American Loan and Trust Company; the trust company at the same time issuing a receipt for the certificates of stock containing an agreement for their delivery upon the return of the receipt, indorsed by both the plaintiff and the defendants, which receipt was left in possession of the plaintiff. The defendants, at the same time, paid to the plaintiff the sum of \$71.40, on account of the purchase-money, being twenty per cent of the contract price of said stock. On December 15, 1881, and before the expiration of the sixty days, the stock having fallen largely in price, the plaintiff called on the defendants, who were under many contracts similar to the one in this case, and the defendant Simmons said to the plaintiff, that his firm was trying to arrange a compromise with the holders of such contracts, and that "when he had them all in line, he would see what his firm would do, and that they were ready to do by the plaintiff as by the others," but the plaintiff declined to consider any compromise and said he must have his money. On January 17, 1882, and after the expiration of sixty days, the plaintiff again called on the defendant Simmons, who offered to compromise by payment of a portion of the amount due, but the plaintiff declined to compromise and insisted on having the whole amount, but the defendants did not pay. The plaintiff thereupon brought this suit, and at the trial produced said receipt, and was ready and willing and offered to surrender the same upon payment of the balance of the purchase-money and interest. Upon the uncontradicted facts in

the case the superior court ordered a verdict for the plaintiff for the full contract price of the stock, less the amount (\$71.40) paid October 28, and upon request of defendants, reported to the supreme judicial court.

J. J. Myers, for plaintiff. *P. Cummings* and *C. F. Hall*, for defendants.

C. ALLEN, J. There may be a bargain and sale of goods, sufficient to transfer the title and, thus, to support an action for goods, bargained and sold, without any such delivery, as will amount to a transfer of possession. *Morse v. Sherman*, 106 Mass. 432, 433; *Haskins v. Warren*, 115 id. 533; *Safford v. McDonough*, 120 id. 290; *Arnold v. Delano*, 4 Cush. 38; *Simmons v. Swift*, 5 B. & C. 857; 2 Kent's Com. 492.

In the present case, it may be assumed that the title to the shares did not pass at once, after the completion of the contract of October 25. The words "we have purchased" do not necessarily import a present transfer of property to the purchaser, if it appears that the intention of the parties was otherwise. *Sherwin v. Mudge*, 127 Mass. 547. The words "payable and deliverable, buyer's option, sixty days," go to show that the parties did not intend a present transfer. But, according to the rules of the Mining and Stock Exchange to which both parties belonged, on all contracts for stocks or bonds sold on time, either party might require deposits to be made at any time during the existence of the contract, and when such deposit should be called for, after the next session of the board, on buyer contracts where the cash price is, at the time a deposit is called, below the contract price, the buyer shall deposit an amount equal to the difference between the contract price and the cash price at the time the deposit is called and ten per cent of said cash price additional, and the seller shall deposit ten per cent of the cash price at the time said deposit is called; and the seller shall always have the privilege of depositing the whole amount of the stock, sold in lieu of the cash, in which case the margins shall be paid to him by the buyer and the amount credited on the contract.

On October 27 the plaintiff called for a margin of twenty per cent of the contract price, and on October 28, in pursuance of the above rules, he deposited with the American Loan and Trust Company the certificates of the shares, with powers of attorney for their transfer executed in blank; and on the same day the defendants paid to the plaintiff twenty per cent of the contract price. This was a part payment of the price. The trust company thereafter held the shares and the plaintiff could not withdraw them without the defendant's concurrence. Nothing more was to be done by the plaintiff to effect a complete delivery of them, except to indorse, and surrender the receipt taken from the trust company. The specific shares were appropriated to the defendants, the price was ascertained, the defendants were entitled to obtain possession of them at any time upon payment of the balance of the price, the receipt was merely in the nature of a vendor's lien for the price, the whole transaction was assented to by the defendants, and we are of opinion that this amounted to a transfer of the title subject simply to the right of the plaintiff to require the trust company to obtain the price before surrendering the possession of the certificates. The plaintiff was bound to indorse the receipt as soon as payment should be made. The deposit of the stock in lieu of the cash, and the payment of the margin by the defendants to the plaintiff, to be credited to the contract under the twenty-fifth rule, show a change in the condition of the parties after that transaction and amount to a transfer of the title, and entitle the plaintiff, after the expiration of the sixty days, to maintain an action for the price. *Turner v. Langdon* 112 Mass. 265; *Mid-dlesex Co. v. Osgood*, 4 Gray, 447. The defendants further contended that it was necessary for the plaintiff, in order to make out a *prima facie* case, to show that he was authorized by the owner to sell the shares at the time when the contract was made. But this objection is covered by the statement in the report that, at the time of the execution of the paper, the plaintiff had in his possession certificates for three hundred shares of the stock which he was only authorized by his principal to sell for him. This takes the case out of the statute. Gen. Stats., chap. 105, § 6.

Judgment on the verdict.

CARTER v. BOSTON AND PROVIDENCE RAILROAD CO.

June 24, 1885.

HIGHWAY — APPROACHES TO BRIDGE — DUTY TO KEEP IN REPAIR.

The defendant was bound to keep in repair a bridge and its approaches over its railroad. Both the bridge and the highway were subsequently widened, the former by the defendant, the latter by the town authorities. In an action to recover damages alleged to have been caused by a defect in the approach to the bridge, but (as claimed by defendant) outside of the approach as it was when the bridge was originally built.

Held, that whatever constituted, at any time, the approaches to the bridge, the defendant was bound to keep in repair.

Tort to recover damages for personal injuries alleged to have been received in consequence of a defect in a portion of a highway, which was alleged to be an approach to a bridge over defendant's railroad, and which defendant was bound to keep in repair. At the trial in the superior court, the defendant offered evidence tending to show that the place in Hyde Park where the defect existed and the accident happened, was not within the highway, as it existed when the railroad was built, but that it became a part of the highway, and thus of the approaches of the bridge, only by subsequent widening, and asked a ruling that if this was the fact, the town and not the railroad would be responsible for the defect. The court, however, declined to rule as requested by the defendant, but ruled that the duty of the defendant company to maintain the approaches to the bridge applied, not merely to the approaches as originally built, but to any widening thereof that might be made in course of widening the highway. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. E. Cotter and C. F. Jenney, for plaintiff. *G. Putnam and T. Russell, 2d*, for defendant.

W. ALLEN, J. The bridge belonged to the defendant, and was one which it was "authorized, or required to construct." The defendant was, therefore, required to keep the approaches of the bridge in repair. The defect of which the plaintiff complains was in the approach to the bridge, but outside of the approach, as it was when the bridge was originally constructed. Both the bridge and the road had been widened; the former by the defendant, the latter by the public authorities. The defendant contends that its obligation to keep the approaches in repair is limited to the approaches as they were at the time of the construction of the bridge, and does not attach to an extension of them, caused by the widening of the road. It does not appear what the connection was, if any, between the widening of the bridge and of the road.

For aught that appears the road was widened in order to give an approach to the added part of defendant's bridge. Whatever constituted at any time the approaches of the bridge, the defendant was bound to keep in repair. The defendant relies upon the provision of the statute that, if a highway is laid out across a railroad after it is constructed, the expense of constructing and maintaining the highway at such crossing shall be borne as in the case of ordinary highways. But that obviously refers to the laying out of a new highway and does not apply to the widening of an existing way. If there could be any doubt upon the construction of the provisions as compiled in the act of 1874, chap. 372, § 95, and Pub. Stats., chap. 112, § 128, an examination of the earlier statutes would remove it. Rev. Stats., chap. 39, §§ 72, 69; Stats. 1846, chap. 271, Stats. 1857, chap. 287, §§ 1, 4; Gen. Stats., chap. 68, §§ 47, 57, 61; Pub. Stats., chap. 112, §§ 119, 120.

Exceptions overruled.

SUPREME COURT OF NEW HAMPSHIRE.

LANGLEY v. BARNSTEAD.

March 18, 1885.

TOWNS — ADJOINING "VICINITY."

Towns may be "situate in the vicinity" of each other within the meaning of that phrase as used in General Laws, chap. 68, § 10, although not adjoining. The question being one of fact, the decision of the board of commissioners will not be reviewed by this court.*

Petition for a new highway in the towns of Barnstead and Alton. Upon the petition of Alton, under General Laws, chap. 68, § 10, and notice thereof, the town of Farmington appeared at the hearing before the commissioners, who, in their report, assigned \$500 of the expense of making the highway to be paid by that town. Farmington objected at the hearing that the commissioners had no authority to make such assignment, because Farmington is not in the vicinity of the proposed highway and of the town of Alton, and now moves to set aside their report for that cause. The court overruled the objection and denied the motion, and Farmington excepted.

E. A. Hubbard and E. H. Shannon, for plaintiffs. *George N. Eastman, Jewell & Stone, J. W. Carrier and Thomas Cogswell*, for defendants.

ALLEN, J. "Words and phrases shall be construed according to the common and approved usage of the language." Gen. Laws, chap. 1, § 2. Etymologically and by common understanding, the phrase "in the vicinity" means in the neighborhood, and neighborhood, as applied to place, signifies nearness, as opposed to remoteness. Whether a place is in the vicinity or in the neighborhood of another place depends upon no arbitrary rule of distance or topography. One village may be said to be in the vicinity of another village without being joined or incorporated with it, and one house may be said to be near, "in the vicinity" of, or in the neighborhood of, another house and not structurally adjoin it. Vicinity admits of a more indefinite and wider latitude in place, than proximity or contiguity, and, as applied to territory, may embrace a more extended space than that lying contiguous to the place in question, and, as applied to towns and other territorial divisions, may embrace those not adjacent.

The chief object of the statute is to distribute with greater equality and uniformity the public burdens, and relieve those towns where the burdens are excessive and disproportionate to the benefits derived, by placing them in part, upon other towns more largely benefited by the improvement. Actual proximity of towns is not the statute test of a right to relief, but an "excessively burdensome" expense upon one town for a public improvement, by which another town or other towns in the vicinity are "greatly benefited." Gen. Laws, chap. 68, § 10. A town separated by the territory of another town from that where the new highway is established might be benefited by it immensely more than the adjacent town lying between, and a reasonable construction of the statute, as well as the requirements of justice, demands that the expense should be apportioned upon the towns in the vicinity "greatly benefited" disregarding contiguity of boundary lines of towns. Giving to the term "vicinity" its natural meaning, and that lying in the common understanding and approved by common usage, and considering the leading object of the statute, the intent of the legislature must have been to apply the act to towns in the neighborhood of that in which the highway is established, and not to confine it to towns adjoining. The question of vicinity being one not fixed by technical and arbitrary rules, but depending upon reasonable nearness, as contrasted with remoteness, and upon excess of burden upon one town contrasted with enlarged benefits to the neighboring town, is a question of fact, and the finding of the board of commissioners upon that subject upon competent evidence will not be revised here. *Haley v. Insurance Co.*, 12 Gray, 545.

Exception overruled.

CARPENTER, J., did not sit; the others concurred.

* See *ante*, p. 288.

LANG v. LYNCH.

March 18, 1885.

REMOVAL OF CAUSE — U. S. R. S. § 639 — REPEAL — ACT OF 1875.

The third clause of section 639 of the United States Revised Statutes, which relates to the removal of causes to the Federal courts on account of prejudice or local influence, was not repealed by the act of congress of March 3, 1875, and is still in force.

Petition by the plaintiffs, who are citizens of Pennsylvania, for the removal of the cause to the circuit court of the United States on the ground of prejudice and local influence. The petition, with a bond, and the affidavit of one of the plaintiffs in due form, stating the facts necessary to bring the case within the terms of the third clause of section 639, United States Revised Statutes, were filed at the April term, 1884. The cause was entered at the October term, 1883, and has been pending in court since that time without any trial being had. The defendant objected that the petition was too late, and that the third clause of section 639, United States Revised Statutes, was repealed by the act of congress of March 3, 1875.

John Hatch, for plaintiffs. *Frink & Batchelder*, for defendant.

CLARK, J. The right to remove a cause in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, from a State court to the circuit court of the United States, on the ground of prejudice or local influence, is given to the non-resident party by the third clause of section 639, United States Revised Statutes, which is a reproduction of the act of congress of March 2, 1867. Under this act, the petition for removal, accompanied with an affidavit that the petitioner has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in the State court, may be filed at any time before the final hearing or trial of the cause, unless the provision of the statute of 1867 is repealed by the act of congress of March 3, 1875. This question is settled by the decision of the supreme court of the United States in the recent case of *Hess v. Reynolds*, 118 U. S. 73. It is there held that the act of March 3, 1875, to determine the jurisdiction of the circuit courts and regulate the removal of causes from State courts, does not repeal or supersede all other statutes on those subjects, but only such as are in conflict with it; that the third clause of section 639 of the Revised Statutes is not abrogated or repealed, and that an application for removal under that clause, may be made at any time before the trial or final hearing of the cause in the State court.

Petition granted.

ALLEN, J., did not sit; the others concurred.

STATE v. LANCASTER.

March 18, 1885.

CONSTITUTIONAL LAW — CITIZENS OF OTHER STATES — REQUIRING LICENSE — DISCRIMINATION.

A State statute requiring citizens of other States to procure a license to sell trees, shrubs, or vines, that may be sold by its own citizens unlicensed, is in conflict with article 4, section 2, of the Constitution of the United States.

Information, filed by the attorney-general, alleging that the respondent on the 22d day of May, 1883, at Goffstown, not being licensed to sell trees, shrubs, and vines not grown in the State of New Hampshire, did unlawfully sell certain trees and vines, to-wit, etc., not grown in said State, and not grown one year or more in lands or nurseries owned by him in said State, on which taxes had been paid, to one Andrew J. Hazen, contrary to the form of the statute, etc. This information is filed under chapter 44 of the Laws of 1879, and chapter 73 of the Laws of 1881. The respondent moved to quash the information on the ground that said acts are in violation of section 2, article 4 of the Constitution of the United States. The court *pro forma* denied the motion, and the defendant excepted.

Bainbridge Wadleigh, for defendant. *Mason W. Tappan*, attorney-general, for State.

BINGHAM, J. The respondent claims that so much of chapter 44, Laws of 1879, as amended by chapter 72, Laws of 1881, as the information is based upon, is in conflict with article 4, section 2, of the Constitution of the United States, giving the citizens of each State all the privileges and immunities of citizens in the several States.

Section 1 of chapter 44, as amended, enacts, among other things, that no party shall sell, or act as the agent, or receive subscriptions for the sale of trees, shrubs, or vines not grown in this State, unless he shall first obtain a license for that purpose, under a penalty of \$100 for each offense, with the proviso that any citizen of this State may sell trees, shrubs, and vines grown one year or more in lands or nurseries owned by him in this State, on which taxes have been paid, without procuring the license or incurring the penalty. The information is for selling trees, shrubs, and vines in New Hampshire not grown there, or grown one year or more in lands or nurseries owned by the respondent in the State, on which taxes have been paid.

These statutes do not give the citizens of other States the right to sell trees, shrubs, and vines grown one year or more in lands or nurseries owned by them in this State on which taxes have been paid, without a license, and they are not, in this respect, given the privileges and immunities of citizens of this State. This conflict avoids the statutory provisions on which the State asks to maintain this information. Laws of 1879, chap. 44; Laws of 1881, chap. 72; *Ward v. Maryland*, 12 Wall. 418.

The case does not state the residence of the respondent, but it is assumed that it was in one of the other States of the Union. Still if he was a citizen of this State, and the statute did not create a legal disability on citizens of other States, its effect being to discriminate against citizens of this State, a serious question arises, whether the legislature intended such a result, and if it did not, whether this provision of the statute has any legal effect. *Bliss's Petition*, 61 N. H. 185.

Information quashed.

CLARK, J., did not sit; the others concurred.

[See *Brown v. Houston*, 39 Am. Rep. 284; *City of Marshalltown v. Blum*, 43 id. 116.—Ed.]

OSGOOD v. CONCORD RAILROAD.

March 13, 1885.

CARRIER — ILLEGAL CHARGES — PENALTY.

If a railroad charges and receives, for transporting a car-load of merchandise to the station on its road where it delivers the goods, and they are accepted by the consignee, more than it charges for transporting the same a greater distance, it is liable to the penalty imposed by chapter 55, Laws of 1859, although by the original contract the merchandise was to be transported to a more distant station.

Debt for a penalty alleged to have been incurred by the defendants June 20, 1881, under chapter 55, Laws of 1879, by charging a greater sum for transporting a car-load of corn from Concord to Suncook than was charged for transporting the same from Concord to Hooksett, a greater distance. Facts found by the court.

June 20, 1881, the defendants owned and operated a railroad from Concord to Nashua, located on the west bank of Merrimack river, between Concord and Hooksett. They also operated a railroad on the east side of the river between Concord and Hooksett, having a station at Suncook for the delivery of freight; on that day they hauled from Concord to Suncook, and delivered to the plaintiffs, a car-load of corn bought by the plaintiff through Barrow & Co., of Concord, in Ogdensburg, N. Y., and forwarded over several other roads to Concord, where the defendants received it. The roads between Ogdensburg and Boston, the defendants' being one, formed a continuous line for the transportation of merchandise to billing points on the line, called the "National Dispatch Line," having a common agent at Ogdensburg, with authority from each road to make contracts for the transportation of merchandise from Ogdensburg to the several billing stations on the whole line and to fix the rate therefor to be divided between the roads doing the service; also with authority to fix or establish billing stations on

the line. In 1881, Hooksett was, and Suncook was not, a billing point on the defendants' road for grain forwarded from Ogdensburg by this through line. Hooksett was made a billing point by the agent who represented the whole line from Ogdensburg to Boston, and the rate for transportation from Ogdensburg to Hooksett was fixed by him. Full car-loads of corn were forwarded from Ogdensburg through to billing points only on the line. When these trains reached Concord, cars for billing stations on the defendants' road were detached and forwarded by a way train *via* Suncook, while the through trains were forwarded by the main line on the west side of the river. The agent of the Dispatch Line at Ogdensburg refused to bill cars to Suncook, and a person having grain to be forwarded from Ogdensburg to Suncook was compelled to accept a contract for delivery at Concord or Hooksett. The distance from Concord to Hooksett *via* Suncook is nine and a half miles, and about the same over the main line. The distance from Concord to Suncook is seven miles. In June, 1881, the tariff on corn was four cents per one hundred pounds from Concord to Suncook and the same from Concord to Hooksett, and from Hooksett to Suncook two cents per one hundred pounds.

The car in question was detached from the through train at Concord, and forwarded by the way freight train to Suncook, where it was left, and was not taken to Hooksett at all.

The charges for the carriage of the corn from Ogdensburg to Hooksett were \$32.35, as fixed by the common agent of all the roads, which sum included the defendants' share for the carriage of the corn from Concord to Hooksett. The freight bill forwarded from Hooksett to Suncook contained a charge of \$5.60 for transportation of the same car-load of corn from Hooksett to Suncook, and \$32.25 charged as expense, making a total of \$37.95 charged for the transportation of the car-load of corn from Ogdensburg to Suncook, which sum the plaintiffs were required to pay and did pay to the defendants' station agent at Suncook. The charge was the same that the plaintiffs would have been required to pay, according to the tariff rates, if the corn had been carried to Hooksett (to which place it was billed), and had then been forwarded to Suncook. The court held upon the foregoing facts that the plaintiffs were entitled to recover, and the defendants excepted.

Chase & Streeter, for defendants. *Copeland & Jones*, for plaintiffs.

CARPENTER, J. The statute provides that "no railroad owned or operated in this State shall charge a higher tariff on like classes of freight by the car-load, when delivered at any station on its line, than is charged to deliver the same at any station on the road where the transportation is for a greater distance," or, more briefly expressed, no railroad shall charge more for transporting freight by the car-load any distance than it charges for transporting the same a greater distance, and imposes a fine for violating its provisions, to be recovered in an action for debt. Laws of 1879, chap. 55. This, excluding the provision for a penalty, is substantially a re-enactment of the common law. *McDuffee v. Railroad*, 52 N. H. 430, 457; S. C., 18 Am. Rep. 72; *Railroad v. Forsaith*, 59 id. 122; S. C., 47 Am. Rep. 181. The railroad on the west bank of the river to Hooksett, and the railroad to Hooksett by way of Suncook, are both operated by the defendants, and for the purposes of this question are to be treated as parts of the same road. Gen. Laws, chap. 159, § 1; *Pierce v. Concord Railroad*, 51 N. H. 590. The distance from Concord to Suncook is seven miles, and to Hooksett nine and one-half miles. The defendants charged for transporting the car-load of corn from Ogdensburg to Hooksett \$32.35, and to Suncook \$37.95. Whatever part of the whole sum charged was appropriated for the freight over other roads, the defendants charged and received for transporting the car-load upon their own road from Concord to Suncook \$5.60 more than they charged for transporting the same the greater distance from Concord to Hooksett. A more striking instance of the mischief the statute was intended to remedy could hardly be presented. The defendants were not a party to and have no concern with the agreement of the vendors to deliver the corn to the plaintiffs free of expense at Hooksett. Their own contract to transport the corn to Hooksett

does not relieve them from liability. If they had performed that contract and insisted upon the plaintiffs' taking a delivery of the corn at Hooksett, it may be that there would have been no just ground of complaint. But they did not do so. By their transportation of the corn to Suncook, and the plaintiffs' acceptance of it there instead of at Hooksett, the original contract was abandoned, and in its place a new one to haul it to Suncook, was substituted, under which the service was rendered and the right to freight accrued. The defendants cannot treat the contract as rescinded so far as it relates to the service to be rendered, and in force for the purpose of measuring their compensation. Whether, upon a contract to haul a car-load of merchandise from Concord to Suncook by way of Hooksett, the defendants can or cannot, under the statute, properly charge a greater sum than their rate to Hooksett, either in case they literally perform the contract or in case they in fact haul it by the direct and shorter route to Suncook, are questions which need not be determined, because the case shows no such contract.

In *Commonwealth v. Worcester & Nashua Railroad*, 124 Mass. 561, the question arose upon demurrer, and the declaration did not show that the defendants charged or received a greater sum than the statute allowed. The ruling in regard to the statute of limitations was correct.

Exceptions overruled.

SMITH, J., did not sit; the others concurred.

STATE v. BEAN.

March 13, 1885.

OFFICE AND OFFICER—SUPERVISORS OF CHECK-LIST—ELECTION.

If no supervisors of the check-list are chosen at a biennial election, they may be elected at a town meeting specially called for the purpose.

Information, in the nature of a *quo warranto*, filed by the attorney-general, at the relation of Edmund C. Cole, and two others. The opinion states the case.

Mason W. Tappan, Attorney-General, for State. *John H. Albin* and *Davis & Paige*, for defendants.

CARPENTER, J. The relators were elected supervisors of the check-list for the town of Warner at the November election, 1882. In the warrant for the biennial meeting of November, 1884, the business of choosing supervisors was not mentioned, and no supervisors were elected at that meeting. At a special meeting called for the purpose, and held on the 6th of December, 1884, at, and before which the relators performed the duties of supervisors, the defendants were chosen supervisors, if they lawfully could be; and the question is, whether those officers can be elected at a special meeting, when none have been chosen at the biennial meeting.

Whether particular officers are State, county, or town officers, is determined by the nature and extent of their jurisdiction, and by the functions which they have to perform, rather than by the time and manner of their election or appointment. If justices of the peace were elected by each town, as they are in some States, they would not, therefore, be town officers; and if county commissioners were appointed by the governor and council, they would be none the less county officers. Supervisors of the check-list are town officers. They must be legal voters of the town in which they are elected, and have no authority beyond the limits of that town. It is the duty of the board to make out and post up, at two or more of the most public places in town, a full and complete alphabetical list of all the legal voters in the town, fourteen days before the meeting, at which the list is required to be used; to hold sessions for its correction, at times and places to be stated upon the posted list; to hear all applications for putting on new names, or for striking off names already on, and all evidence offered in support of such applications, and to correct the list accordingly; to lodge an attested copy of the check-list, as corrected, with the town-clerk, before the opening of the meeting; to be present at the opening of the meeting, to remain in attendance during its continuance, and to have with them the corrected list. It is the duty of the chair-

man of the board to call the meeting to order, and to preside until a moderator is chosen. Gen. Laws, chaps. 30, 39, §§ 1, 5; Laws of 1879, chap. 57, §§ 6, 7. No other powers are conferred, or duties imposed upon them.

"All persons whose names are entered upon said list shall be deemed legal voters, and no person whose name is not upon said list shall be allowed to vote, unless his name was left off by mistake, and his right clearly known to the supervisors before the list was made out." Gen. Laws, chap. 30, § 5. "The check-list shall be used at all times in the election of moderator and supervisors, at annual and biennial elections." Gen. Laws, chap. 30, § 10; Laws of 1879, chap. 57, § 7; Gen. Laws, chap. 39, § 8; Laws of 1881, chap. 69, § 1.

One purpose of these provisions is to preserve the purity of elections, to secure to all legal voters their right to vote, and to prevent all others from voting. Whatever may be the effect of the failure to have or use a check-list at an annual or biennial election, or at any town meeting, upon the validity of such elections, or of the action taken at such meeting, the intention of the legislature, that upon all those occasions there shall be a corrected check-list, is explicitly and unmistakably declared. Without supervisors there can be no check-list. Town officers, with exceptions not here material, continue in office till others are chosen and sworn in their stead. Gen. Laws, chap. 40, § 14. If supervisors are not town officers, their authority ceases at the end of the term for which they are elected. In the case of a failure to elect a new board, or of the disability at any time of the whole board, by reason of sickness or otherwise, there is no provision for filling the vacancy, and there can be no check-list. Such a result was not intended by the legislature, and cannot be brought about by the legal construction of indecisive language. Upon this ground, as well as by reason of the nature of the office, it must be held that supervisors are town officers.

The act of August 16, 1878 — Laws of 1878, chap. 60 — creating the office of supervisors of the check-list, appears in the General Laws as chapter 30, and provides that "A board of supervisors, consisting of three legal voters in each town, shall be elected at the biennial election, to be holden in November next, by major vote, and at each biennial election thereafter;" that "in case of death, resignation or removal of a supervisor of the check-list of any town, it shall be the duty of the remaining supervisors to fill the vacancy by an appointment in writing, which shall be recorded by the town clerk." Gen. Laws, chap. 30, §§ 1, 3. The power of the remaining supervisors to fill vacancies in the board is confined to those caused by death, resignation or removal. By removal is intended, removal from the town, referring to the requirement that the board shall consist of "three legal voters in each town." The statutes make no provision for the removal of a supervisor from office for cause. The cases of a refusal to accept the office (unless that is equivalent to a resignation), of a supervisor's being disabled by sickness, or convicted of crime and imprisoned, or becoming insane, of the simultaneous death, resignation, or removal from town of the whole board, and of a failure to elect at a biennial election, are not provided for in the act creating the office, and in all these cases there can be no check-list unless provision is made elsewhere for filling vacancies so caused. The only other statutes relating to the subject are Gen. Laws, chap. 42, § 6, which provides that "Whenever a vacancy shall occur in any town office other than that of selectmen, the selectmen may in writing appoint some suitable person to the office;" and Gen. Laws, chap. 42, § 1, which provides that "When any person elected to any town office shall not accept the same, or shall die, resign, remove from town, or become insane, in the judgment of the town, or shall be removed from office, or convicted of any crime, or when no annual meeting shall have been holden for the choice of town officers, or no choice has been made, or when there shall be a vacancy in any other way, the town may choose such officer, at any legal meeting holden for that purpose, or at the adjournment of the annual meeting."

The latter section is identical with chapter 36, section 1, of the Revised Statutes, except that the words "or convicted of any crime" were added by the amendatory act of July 4, 1868. Laws of 1868, chap. 1, § 7. It is true, that when originally enacted it was not intended to apply to supervisors, for no such officers then existed, and that it related exclusively to officers elected at the annual meeting,

because there were then no other town officers. But when, together with the act creating the office of supervisors, it was re-enacted in the body of the General Laws—Laws of 1878, chap. 56, § 1; Laws of 1879, chap. 57, § 38—no reason is perceived for supposing that the legislature did not intend it to apply to those officers, so far as its provisions are in their nature applicable to them. Newly-created offices are in general, subject to all the laws relating to the class of offices to which they belong. Should the legislature establish a new county office, the incumbent would be removable for official misconduct, under General Laws, chap. 24, § 7, and a person elected to a new town office would be bound to take the oath of office required by Gen. Laws, chap. 41, § 6, for neglecting to do so. The mere fact that this section, when enacted, related to annual offices only, because no others existed, is no reason for not applying it to biennial offices when they are created. An act making the selectmen's term of office two years instead of one, and changing the time of their election, would not render the existing provisions for filling vacancies inapplicable to that office. Statutes are to be construed in view of the law existing at the time of their enactment. It must be presumed that the legislature, in adopting the supervisor act, had in mind the general law relating to vacancies in town offices, and that it was because of the existence of the general law and its supposed sufficiency for the purpose, that further provision was not made for filling vacancies in the board.

The provision of the section under consideration, relating to vacancies caused by death, resignation, or removal from town, can have no application to supervisors, because it is inconsistent with the requirement that vacancies happening from those causes shall be filled by the remaining supervisors, and the special enactment must prevail over the general one; nor can that respecting vacancies caused by removal from office, because there is no law authorizing the removal of a supervisor; nor that relating to vacancies arising from a failure to hold the annual meeting, for none can happen in the board of supervisors from that cause. But vacancies may happen by the refusal of a person elected supervisor to accept the office, by a supervisor being convicted of crime or becoming insane, by a failure to elect, and in various other ways, to all of which the statute is in terms applicable. The fact that some of its provisions do not apply to the office of supervisors has no tendency to show that other provisions may not apply, or that they were not intended to apply. The statute is a general one, relating in terms to all town offices, but it has no application to the office of town clerk, because the selectmen must "without delay," appoint a town clerk whenever a vacancy occurs in that office. Gen. Laws, chap. 42, § 6. Aside from the case of supervisors, it provides for filling vacancies in some offices which cannot happen in others. A vacancy by removal from office cannot happen in the board of selectmen, because they are not removable. The statute must be read distributively, applying to each office the provisions applicable to that office.

The relators continued in office until the defendants were chosen and sworn in their stead. Gen. Laws, chap. 40, § 14. They performed all the duties of supervisors for the special meeting, and the check-list made and corrected by them was used in the election of the defendants. What effect a failure to use the check-list in the election of supervisors at a special meeting (if its use is required by Gen. Laws, chap. 30, § 10; Laws of 1879, chap. 57, § 7), might have upon the validity of the election; whether the proceedings of a meeting, in the organization of which the check-list is required to be used, but organized and held without a check-list, would be valid or invalid, and whether the selectmen can appoint under Gen. Laws, chap. 42, § 6, in case the supervisors should all simultaneously die, resign, or remove from town, or in case one or more of them should be convicted of crime, or become insane, or a vacancy should otherwise happen which the remaining supervisors are not authorized to fill, at a time so near the annual meeting or biennial election that no special meeting to fill the vacancy could be seasonably called or held, are questions not necessary to be now determined.

At the November election in 1878, the town of Haverhill failed to elect supervisors, and as that was the first election under the law creating the office, and as there was consequently no old board holding over, the town was placed in the

same situation as if now the existing supervisors should all simultaneously die or resign. In that case the selectmen, acting under the advice of counsel, appointed a board of supervisors, and no question was ever moved against the validity of their action.

The defendants were lawfully elected, and are entitled to the office.

Information dismissed.

All concurred.

WHITTREDGE v. EDMUNDS.

March 13, 1885.

FRAUD — MORTGAGE TO SECURE MORE THAN DUE — GOOD FAITH.

A mortgage given to secure a note made for a larger sum than the amount actually due from the mortgagor is not invalid as against creditors of the mortgagor, if it appears that it was not made to hinder, delay or defraud those creditors.

Bill in equity to set aside a mortgage from the defendant, Susan H. Edmunds, to the other defendant, George H. Edmunds, as constituting a cloud on the plaintiff's title under the levy of an execution on a portion of the mortgaged premises, as the estate of the defendant Susan. Facts found by the court.

January 26, 1881, the defendant Susan, gave the defendant George, a note for \$1,225, and secured it by a mortgage upon the real estate described in the bill. The court found the note and mortgage were a valid debt and security to the amount of \$925.75, and interest from September 15, 1880, and that the same were not made to hinder, delay or defraud the plaintiff. The court ordered the bill dismissed, and the plaintiff excepted.

Harry G. Sargent, for plaintiff. *Ray & Walker* and *Wm. L. Foster*, for defendants.

ALLEN, J. The finding of no fraud in the execution of the note and mortgage necessarily included the finding that the transaction was in good faith, and that the making of the note and mortgage to secure a larger sum than was actually due was an unintentional error and innocent mistake. *Noyes v. Patrick*, 58 N. H. 618. The mortgage being made in good faith, though describing the debt secured as larger than that actually existing at the time, cannot, in the absence of fraud, be defeated by the mortgagor's creditors by reason of an innocent mistake. *Putnam v. Osgood*, 52 N. H. 148, 158; *Gordon v. Preston*, 1 Watts (Penn.), 385; *Jones on Mort.*, § 848.

Exceptions overruled.

SMITH, J., did not sit; the others concurred.

JENKINS v. FOWLER.

March 13, 1885.

WILL — "MONEYS" — WHAT INCLUDED IN.

If a will contains no residuary clause, and it is manifestly the testator's intention to dispose of all of his property, the words "all my moneys after paying all my just debts" may pass deposits in a savings bank and railroad stock not specifically devised.*

Bill in equity for the construction of the will of Joseph Fowler, late of Durham, in this county. The will gives:

1. The income of the testator's homestead in Durham to his brother, George Fowler, for life; then to his nephew, Clarence Fowler, for life; then to his nephew, Harry Fowler, for life; then the homestead to the Congregational church in Durham.

2. A granite monument and headstones to the graves in his family lot in the cemetery in Dover, not to exceed \$225.

3. The interest of \$50 to Dover, to keep the lot in the cemetery and the monument and headstones in repair.

4. "I give and devise to the Congregational church of the town of Durham all

* Authorities collated, 32 Eng. Rep. 631; see also *Smith v. Burch*, 92 N. Y. 228; *Bork v. People*, 91 id. 5; *Theobald on Constr. of Wills*, 58-62; 6 Eng. Rep. 818.—Ed.

my moneys, after paying all my just debts. The interest only to be used for the support of the preached gospel, and for no other purpose."

5. His pew in the Congregational meeting-house to his brother George and nephews Clarence and Harry for life, and then to the Congregational church.

The property of the deceased, as returned in the inventory to the probate court, is \$7,816.32, of which \$400 is real estate, and the remainder is:

Cash on hand.....	\$53 22
Farming and mechanics' tools.....	59 25
Household furniture.....	48 45
Books and maps.....	1 50
Wearing apparel.....	50 00
Miscellaneous articles.....	48 50
Deposits in Rollinsford Savings Bank.....	446 40
Deposits in the Savings Bank for the county of Strafford.....	2, 027 00
Thirty-three shares of the capital stock of the Boston and Maine Railroad.....	5, 082 00

Joseph Fowler died unmarried, leaving no issue. The defendants are his brothers and sister and his sole heirs at law; and they claim that the thirty-three shares of stock are not included in the bequest of "all my moneys," as made in the fourth clause of the will, nor in any clause of the will, and that the same should be paid to them as heirs at law of the deceased, in equal shares. The Congregational church claims the thirty-three shares as part of the bequest of "all my moneys" in the fourth clause of the will. The executor asks the advice of the court as to the proper construction of the fourth clause, and whether or not the thirty-three shares of stock are included in the bequest of all the testator's moneys.

J. G. Hall, for plaintiffs. *Marston & Eastman*, for defendants.

BINGHAM, J. The interpretation of a will is the ascertainment of the testator's intention, and the question of intention is ordinarily determined, as a question of fact, by the natural weight of competent evidence. *Rice v. Society*, 56 N. H. 191, 197, 203; *Brown v. Bartlett*, 58 id. 511; *Kimball v. Lancaster*, 60 id. 264, 273.

It is claimed by the heirs, that Joseph Fowler died intestate as to the deposits in the savings banks, and the railroad stock. When a person makes a will, he usually intends to dispose of all of his property. This will does not contain, in form, the usual residuary clause; but items one, four and five, considered in connection with the property of the testator, and the fact that all of it, except what is specifically devised, is not enough to satisfy the bequests in items two and three without taking a part of the savings bank deposits or of the railroad stock, quite clearly indicate that the testator understood and intended that item four with the remainder clauses in items one and five disposed of the residue of his property, and no occasion existed for inserting the ordinary residuary item to make the church, in fact, his residuary legatee; and we think it manifest, upon the examination of the will itself, that it was the intention of the testator to give the bank deposits and railroad stock to the church. 2 Redf. on Wills, 111 n.; 2 Jarm. on Wills, 375; *In re Miller*, 48 Cal. 165; S. C., 17 Am. Rep. 422; *Hall v. Hall*, 27 N. H. 275, 286; *Clark v. Atkins*, 90 N. C. 629; S. C., 47 Am. Rep. 538; *Morton v. Perry*, 1 Metc. 446, 448.

It is true that the case of *Mann v. Mann*, 1 Johns. Ch. 281, is a strong case favoring the defendants' view of this will, but the will in that case differs from this, in at least two essential particulars;—first, it contained a general residuary clause; and second, the testator in it repeatedly used the word "moneys" in a way indicating that he understood its strict technical sense, and nothing in the will shows that he intended to use it in a more extended sense, while the contrary is true of the will in this case.

This conclusion renders it unnecessary to consider the admissibility of the evidence offered by the parties.

Case discharged.

ALLEN, J., did not sit; the others concurred.

MERRILL v. BOSTON AND LOWELL RAILROAD.

March, 1885.

RAILROAD — COMMISSIONER FIXING MAXIMUM CHARGES — NO EXTRA-TERRITORIAL EFFECT.

The statute of 1883, requiring the railroad commissioners to fix tables of maximum charges for the transportation of passengers and freights upon the several railroads operated within this State, does not authorize the commissioners to fix such charges beyond the line of the State.*

Case, for refusing the plaintiffs reasonable and equal facilities as expressmen over the defendants' road. The declaration contained six counts. To the first five the defendants pleaded the general issue. The sixth count set forth in detail facts showing an alleged discrimination against the plaintiffs in the matter of rates and facilities for the transaction of their business over the defendants' lines in this State and Massachusetts. In the same count it was also alleged, that upon due notice and proceedings had before the railroad commissioners of this State and of Massachusetts, the commissioners of this State made an order that the plaintiffs pay the maximum sum of \$7,020 to the defendants as an annual rental for space not exceeding eight by ten feet to the car on the two passenger trains each way daily between Keene and Boston, and two additional trains each way daily between Nashua and Boston, and in addition thereto furnish the defendants with a good and sufficient bond in the sum of \$15,000 for the payment of said rental monthly, and to save said railroad harmless from the loss of money transported by said express company, and from the loss of, or damage to any articles of merchandise, arising from the negligence or malfeasance of the express company, its agents or messengers; that the plaintiffs tendered due performance of all the conditions imposed upon them by said order, and that upon request and offer of merchandise and express matter to be carried according to the terms of said order from several stations on the defendants' lines in this State to Boston, the defendants refused to obey said order, and refused to receive and carry said merchandise and express matter from places in this State over their lines to Boston, according to their duty in that behalf.

To this count the defendants filed a general demurrer, and the questions thereon arising, were reserved for the opinion of the court.

Jeremiah Smith, John H. George and John H. Alvin, for defendants. *C. H. Burns and C. W. Hoitt*, for plaintiffs.

BLODGETT, J. The primary question raised by the demurrer is, whether New Hampshire has conferred upon its board of railroad commissioners authority to regulate charges for transportation on railroads without its territorial limits; for, if it has not, no other question arises in this case. The answer turns upon the construction of section 4, chapter 101, Laws of 1883, because the authority of the commissioners is derived from the last clause in that section, which reads as follows: "It shall be the duty of said board to fix tables of maximum charges for the transportation of passengers and freights upon the several railroads operating within this State, and shall change the same from time to time, as in the judgment of said board the public good may require." That is to say, in the apparent exercise of the legislative power of requiring the reasonable compensation of persons engaged in the public service to be established in judicial proceedings — *State v. Express Co.*, 60 N. H. 219, 261 — it is made the duty of the commissioners to fix a tariff of fares and freights upon the several railroads which are in operation within this State, and to this extent power is conferred upon them. But there is no rule of statutory construction by which it can fairly be inferred that the legislative purpose was to invest the commissioners with power to establish rates of transportation beyond the territorial boundaries of this State.

The intention of the legislature, which is the object to be attained, is to be ascertained by their language, unless it is ambiguous. Where there is no ambiguity there is no room for construction. The plain meaning of words cannot be departed

* *Carlton v. Illinois Cent. R. Co.*, 44 Am. Rep. 672; 28 Eng. Rep. 141; 30 id. 676; 4 Woods, 370; 2 Am. Rep. 81; 14 Bradw. 141.—Ed.

from in search of an unexpressed and unimplied intention; therefore, in order to find that the legislature intended to authorize the commissioners to fix prices beyond the State line, their language must say so, either directly, or by distinct implication. But here it does neither, for there is no obscurity whatever in the terms of the statute, and so the legislative intent must be taken as expressed in the words the legislature have used, the fair and natural import of which is, that the statute was intended to have a local operation merely. Such, too, is the legal presumption, and such, also, it would be, even though the language were susceptible of a different meaning, because, as a consequence of the equality and sovereignty of States in respect to each other, the laws of a State must presumptively be taken as intended for the government only of persons and things within its territory; and consequently the operation of a law is limited to the State by which it was enacted, unless the intent to give it a more extended operation is clearly indicated.

If, therefore, the statute in question is construed according to the legislative intent, as expressed in the enactment itself, or according to the general presumption that statutes are not intended to have any extra-territorial effect, the reasonable and legitimate conclusion is, that the legislature intended to authorize the commissioners to regulate the rates of transportation upon the railroads within this State only. And if the obvious consequences of giving the statute extra-territorial force are considered, as they properly may be on the question of legislative purpose, the conclusion would seem to be irresistible.

The result of these views is, that the demurrer must be sustained as to so much of the sixth count in the plaintiff's declaration as is based on the commissioners' decision fixing the price of service to be rendered in Massachusetts. If there are any averments in the count aside from such decision which constitute a good cause of action, they cannot be joined with the averment of the decision, and the whole count should be rejected. The issues should not be confused by so extended and prejudicial a statement of irrelevant matter.

Demurrer sustained.

All concurred.

BARTLETT v. YOUNG.

March, 1886.

BOUNDARY — AGREED LOCATION — GRANTEES BOUND BY.

An agreement fixing the location of a disputed boundary line between two adjoining land-owners is binding upon their respective grantees.

Writ of Entry. The plaintiff claimed under a deed describing the granted premises as part of lot 101. The defendant owned a part of lot 92 adjoining that part of lot 101 conveyed to the plaintiff by the above deed, and claimed the disputed tract by virtue of a written agreement establishing the divisional line made by him with the plaintiff's grantor, Elias E. Dickey, May 20, 1874. The line thus agreed to was not the true line between lots 92 and 101, but departed therefrom, at one end about thirty-six rods; and it was for the land lying between the lot line, as rightly located on the ground, and the agreed line, that this suit was brought. After the agreement, the defendant cleared and cultivated the land up to the agreed line, and there was no further controversy about the line until after Dickey conveyed to the plaintiff in 1875. The plaintiff had no notice, actual or constructive, of the agreement when he purchased of Dickey.

The court ruled that the written agreement between the defendant and Dickey, the plaintiff's grantor, was binding upon the plaintiff, and conclusive as to the location of the division line between them; and the plaintiff excepted.

J. P. Bartlett and Cross & Taggart, for plaintiff. *Sanborn & Cochrane and N. H. Wilson*, for defendant.

BLODGETT, J. It has long been settled in this State that an executed parol agreement between adjoining owners of land, establishing the dividing line between them, is conclusive against the parties and all persons claiming under them. *Sauyer v. Fellows*, 6 N. H. 107, 108; *Eaton v. Rice*, 8 id. 378, 381; *Gray v. Berry*, 9 id. 473; *Prescott v. Hawkins*, 12 id. 27; *Orr v. Hadley*, 36 id. 575; *Dudley v.*

* See 16 Hun, 50.

Elkins, 39 id. 78, 84, 87. These decisions go upon the ground that the effect of such an agreement is, not to change the titles to a portion of the respective estates, but only to define and limit their extent; in short, that the agreement simply fixes the location where the estate of each owner is supposed to exist under his deed. It is for this reason that the rule thus established must be confined in its operation to cases of disputed or uncertain boundary, because otherwise it would be necessary to give a parol agreement between adjacent owners fixing their common boundary, the effect of a grant of real estate, in direct contravention of the statute of frauds.

There is no ground for claiming that the facts, as reported, do not bring this case within the rule. On the contrary, it plainly appears that at the time the agreement in question was made and executed by the plaintiff's grantor and the defendant, all the elements existed which were necessary to enable them to establish the divisional line between their lands in the manner they did and thus conclusively determine the limits of their respective ownerships. Whether the boundary, as located by the agreement, was, in point of fact, the true one is entirely immaterial; and it is equally immaterial that the plaintiff did not have notice of the agreement at the time of his purchase in 1875. Even if he was entitled to notice, he is precluded from showing that his land extends beyond the agreed boundary, for possession is evidence of title, and the visible occupation and cultivation of the land in controversy by the defendant was at least enough to put him upon inquiry, and especially in view of the indefinite and ambiguous terms of his conveyance.

Exceptions overruled.

CLARK, J., did not sit; the others concurred.

WENTWORTH v. ROCHESTER.

March 18, 1885.

HIGHWAY — TOWN DENYING EXISTENCE — ESTOPPEL.

In an action upon the statute of highways, a town is not estopped to deny the existence of a highway not established in a statutory method.

Case, on the statute, for damage happening to a traveler. The alleged highway was not laid out in the mode prescribed by statute and has not been used twenty years for public travel. For several months prior to the accident the town was engaged in erecting a bridge over the Cocheco river on the main road, and during all that time caused guide-boards to be erected and maintained along the main road, directing the travel over the way in question. The plaintiff traveled over the way by reason of said directions.

G. N. Eastman, for plaintiff. *Worcester & Gafney*, for defendants.

CARPENTER, J. *Tilton v. Pittsfield*, 58 N. H. 327. is affirmed.

Nonsuit.

ALLEN, J., did not sit; the others concurred.

NEW YORK COURT OF APPEALS.

CROSBY v. HOTALING.

June 23, 1885.

EVIDENCE—PAROL, OF CONTENTS OF PAPER.

The contents of a paper cannot be proved by parol, where the paper itself is produced. The trial court may properly exclude evidence, which in itself is immaterial, when counsel does not propose to follow it up with other evidence material to the issue.

, for appellant. *S. W. Rosendale*, for respondents.

MILLER, J. The principal questions raised upon the trial relate to the decision of the referee in the exclusion of evidence.

One of the defendants was sworn as a witness, and upon his cross-examination an inquiry was made in regard to a bill for towage, and he testified that he knew what it was; that he thought he had seen the bill; that he did not know the exact amount of it; that he supposed the plaintiff had paid it, and that he thought the amount of it was \$85. The question was then put to him, "That was for extra towing, was it not?" This was objected to on the ground that the bill shows for itself, and the objection sustained and an exception taken.

Upon the trial the plaintiff claimed to recover for payments made for extra towage of vessels, which payments were disallowed by the referee upon the grounds that they were unauthorized, not within the scope of his authority, and that the defendant had no notice or knowledge of their character, but promptly rejected them upon learning it, and the general term sustained the conclusion of the referee. The plaintiff had testified that these payments were incurred in accordance with the instructions of the defendant Hotaling, the witness to whom the question was put. This was denied by the witness. The witness, after having testified in regard to the bill as to which the question was put, was called upon to answer as to the contents, and the objection made was that the bill itself showed for itself. The plaintiff was not entitled to show what the bill contained when that would be apparent by its being produced, and the objection made was a valid one. The contents of a paper cannot be proved when the paper itself shows what it is. It is claimed that the inquiry was not as to what was written in the paper, but as to what the transaction was. This position is, we think, not well founded. The inquiry as it stood was directed to the contents of the paper. The distinct objection was made that the paper would show for itself, thus indicating the nature of the objection to the testimony. It was not controverted as to what the objection related, and the plaintiff, after the objection was made, did not say that he intended to prove the transaction outside of the bill. If the testimony was independent of the bill, the counsel should have so stated, and he is not in a position now to claim that such was the fact. The objection might thus have been obviated and the testimony made admissible, but it is too late, after being advised of the nature of the objection, and remaining silent as to the same, for the appellant to claim that the testimony related to something beyond the bill itself, and was independent of it. Nor can it be said that the question put was in the nature of a proposition to vary the bill by parol. No such offer was made, and as the question stood it did not embrace any such testimony. Standing by itself it was a simple inquiry as to the contents of the bill. It may also be remarked that if the question had been answered in the affirmative, it would not have proved that the charge for extra towage was authorized. There was proof on the trial that the defendant had rejected the charge for extra towage, and refused to pay any thing on that account. There was no proof of ratification by the defendants of any such charge, and mere knowledge of this fact without proof of ratification would not bind defendants. The referee found that all the items for extra towing were unauthorized, and the additional proof offered could not have changed the finding. Even if the defendants had knowledge that this charge was

for extra towage, it would not have availed the plaintiff without evidence that he ratified the same.

Upon the trial the following question was put to the witness Hotailing: "Did Mr. Crosby ever tell you that Chase was trusting too much?" This was objected to on the ground that as Mr. Chase was not witness' agent, except for the purpose of keeping books, the question was entirely immaterial. The objection was sustained and an exception taken.

It is claimed that one of the issues in the case was whether Chase was plaintiffs' or defendants' agent; that it was competent to prove the fact by the defendants, and it was material as it tended to establish the issue. It is said that the proof would be some evidence of Chase's relation to the parties, and that it called for proof upon that subject which was a matter of dispute throughout the case.

Evidence of Crosby's declaration that Chase was trusting too much would not, we think, tend to show the relationship of Chase to the parties. It would only be an expression of opinion by Crosby as to the act of Chase in the transacting of the business in which he was engaged, without in any way establishing the relation which Chase occupied. A mere statement, therefore, of what Crosby said on this subject would seem to have no weight upon the question referred to. Suppose Crosby had told the witness that Chase was trusting too much, it would prove nothing except Crosby's version of Chase's conduct. This would clearly be immaterial and entitled to no weight. The plaintiff did not propose to follow up the question propounded, if answered, by other evidence of a conversation in regard to Chase, which would establish his relation to the parties, and thus have a bearing upon that question. As an isolated question by itself, it would seem to be without pertinency and immaterial.

The question proposed to the witness was upon a cross-examination which had covered a large field of inquiry, and it was, to some extent, for the judge on the trial to determine how far the plaintiff should be permitted to go beyond the examination already had. It cannot be said, we think, that in excluding the question, such discretion was abused, or that the judge erred in his decision.

It may also be remarked that if the question put had been answered in the affirmative it would have been of no benefit to the plaintiff, for it did not tend to establish the agency of Chase. What the plaintiff said to the defendant in regard to Chase trusting too much would not, of itself, create the relation of principal and agent between the defendant and Chase, and would have no direct bearing upon that subject.

The exception to the fifth finding of fact is not well taken. The plaintiff excepts to this and several other findings and to every part thereof, but does not expressly except to this finding alone. The exception is too general and not sufficiently specific. A matter of account being the subject of the controversy, the exception should have pointed out the particular error insisted upon. *Jagger v. Littlefield*, 81 N. Y. 626.

But aside from the exception stated, the finding, we think, is sufficiently supported by the evidence.

The judgment should be affirmed.

All concur.

WOERISHOFFER v. NORTH RIVER CONSTRUCTION Co.

June 23, 1885.

RECEIVER—INJUNCTION—POWER OF SUPREME COURT—DISCRETIONARY ORDER NOT REVIEWABLE.

In one sense, every order of a court which commands or forbids is an injunction. But an injunction proper is a recognized provisional remedy, and the rules of the Code apply to it as such.

The supreme court as a court of equity has power, outside of the provisions of the Code, to grant an order to protect the possession and authority of a receiver appointed by the court. Such a power, existing and resting in the discretion of the supreme court, is not reviewable here.

The defendant was in the hands of a receiver, appointed by the supreme court,

and this is an appeal from an order made by that court, restraining the appellant, The A. & R. Iron and Steel Co., from enforcing a judgment against any property of the defendant, except such as had been levied upon by virtue of an attachment before the appointment of the receiver. The appellant claimed that the injunction order, and the service thereof, were irregular, and did not conform to the provisions of the Code; and that there was no authority for the order independent of the Code.

Benj. F. Bristow, for appellant. *C. B. Alexander*, for respondent.

ERICH, J. The order here assailed, in its amended form permits the Albany and Rensselaer Iron and Steel Company to prosecute its action against the construction company to final judgment, and to enforce that judgment upon any property attached before the appointment of the receiver in this State, and forbids only any other interference with the assets of the construction company. Its sole effect, as against the appellant, is to prevent a seizure under process issued in its action, of assets already seized by the court, and held as well for the appellant's benefit as for that of the other creditors. It operates to prevent the iron and steel company from attaching or levying upon, for its own sole benefit, property already attached and levied upon by an equitable process for the benefit of all the creditors alike. It preserves every right and lien acquired before the appointment of the receiver by the attachment creditor, and the privilege and power of enforcing them; and so raises merely the question whether the tribunal which appoints a receiver may, in aid of that appointment, forbid any after interference, by way of levy or seizure, with the property in his possession. Both parties concede that the possession of the court must not be invaded; that its officer cannot be sued without its permission; and that he cannot be dispossessed except at the peril of a contempt. What then must needs be the effect of the order in this case? It commands nothing which was not already commanded; it forbids nothing which otherwise was permissible; it takes away no right or remedy which the appointment of the receiver had not already taken away. Its sole practical effect was to give notice of that appointment and the rights secured by it, and charge the specific creditor with a conscious and willful contempt if he assailed the possession of the court. The order served was but a brief transcript of the order entered in the action appointing the ancillary receiver, for that vested in him the assets of the construction company and forbade not only the officers and agents of the defendant but "all other persons" from interfering with his possession of the assets. The power of the court to make that order, in a case where it had jurisdiction to appoint the receiver as a necessary incident of that appointment, cannot be successfully disputed; and, certainly, it would seem strange if the power should be lost in the process of bringing that order to the notice of a specific creditor so as to insure his obedience to it.

The provisions of the Code in respect to injunctions do not apply to the case. In one sense every order of a court which commands or forbids is an injunction. But an injunction proper is a recognized provisional remedy, and the rules of the Code apply to it as such. The order here is not of that character. It is like the one discussed in *Attorney-General v. Guardian Mutual Insurance Company*, 77 N. Y. 272, in the respect now under consideration. There the suit of Carlisle was restrained by an order in the action in which the receiver was appointed and was justified upon the ground that, as the receiver represented both stockholders and creditors, Carlisle, through that representation, was so far a party to the action that his proceedings, in another suit might be stayed by an order aiming to protect the possession and authority of the receiver. The order was not granted or defended as an injunction order, but as one within the jurisdiction of a court of equity in an action pending before it and essential to the complete remedy which it was authorized by law to give. While the facts upon which the court acted were not identical with those here presented, the ground on which the order rested, and the relation of the party restrained by it to the pending action were substantially the same as in this case, and the decision is an authority for the existence, outside of the provisions of the Code as to injunctions, of power in the court to make the order complained of.

The power existing, its exercise rested in the discretion of the court, and so can-

not be reviewed here; and the further objection that, upon the complaint in the action for a receiver, no ultimate relief can be granted, is one which ought not to be disposed of upon this motion. The courts below have sustained the sufficiency of the complaint, and it is not at all certain that they are in error. If they are, the question may more wisely be reserved to an occasion which involves it directly and necessarily.

The order should be affirmed, with costs.

All concur.

RICE v. BARRETT.

June 23, 1885.

PARTITION — JUDICIAL SALE — DELAY IN FURNISHING TITLE — PURCHASER RELEASED BY.

Under ordinary circumstances, a purchaser at a partition sale is entitled to a conveyance by a good title at the time fixed, and an unreasonable delay in furnishing the same is a sufficient answer to an application to compel him to take a conveyance and fulfill the terms of the sale. In such case it matters not that the purchaser has sustained no injury by the delay.

Jno. H. Bergen & Edward C. Boardman, for appellants. *Joshua M. Van Cott*, for respondent.

MILLER, J. The sale under the decree in partition in this case was made on the 22d day of January, 1884. The appellants, Murray, Phelan and Mander, who were severally purchasers upon the sale, objected to taking a deed of the premises, upon the ground that the referee could not give a good title thereto for the reason that the infant defendants had not been brought before the court by a proper service although they had appeared by *guardians ad litem*.

The plaintiff applied to the court and obtained leave to file a supplemental complaint and bring the defendants in by a proper service, and such proceedings were had that a judgment was rendered on the 21st of April, 1884, making the interlocutory judgment and the sale binding upon all the parties. In the mean time no action was taken by the appellants to be relieved from the sale. It will be seen that a delay was made in furnishing a good title for a period of about three months after the sale had been made, and on the 17th of May, 1884, a motion was made to compel the purchasers to complete the sale. The appellants claim that, by the delay in obtaining a decree which would perfect the title, they were exonerated from completing the sale. It appears from the appeal papers that the purchasers were to have possession in the month of February, and that in reference to two of them, by reason of the delay the premises were not rented for the succeeding year and they were thus deprived of the benefit to be derived from the occupation of tenants and the payment of rent. We think that the delay thus made discharged the purchasers from any obligation to take title. The terms of the sale were not complied with by the respondent, and the delay was not occasioned by any fault on the part of the purchasers. For aught that appears they were ready and willing to fulfill according to their agreement, and it was only the failure of title that prevented a compliance by them with its terms.

Under ordinary circumstances a purchaser at a partition sale is entitled to a conveyance by a good title at the time fixed for that purpose, and an unreasonable delay in furnishing the same is a sufficient answer to an application to compel him to take a conveyance and fulfill the terms of sale. His right to such a conveyance is fixed by the agreement, and when there is a failure within a reasonable time to fulfill the same by a proper and valid deed, he is discharged from liability. The delay of the seller for three months to perform the contract was a sufficient excuse for refusing to comply with its terms after the expiration of that time. The purchasers were not bound to wait so long, and it matters not whether they sustained the injury by the delay or otherwise. The seller was bound to furnish a good title, and when he failed to do that it did not rest with him to say that he would supply the defect thereafter as might suit his convenience.

Under the circumstances presented by the record before us the question does not arise whether time was of the essence of the contract. The delay here is for too great a period to authorize the application of this principle.

There is no proof that the purchasers acquiesced in waiting to allow the respondent to perfect the title. They had no connection with the proceedings instituted and prosecuted for that purpose. They were not parties in the action and had nothing to do with the steps which were taken, after the sale was had, to remedy the difficulty. It does not appear that they had any knowledge of what was done and they were not in a position to object to or take part in the proceedings. They could not be regarded as acquiescing in a proceeding to which they were not parties and of which they had no notice. Their silence cannot, in any sense, be considered as acquiescence in what was done.

For the reasons stated, without considering the other questions, we think the order of the general term should be reversed, and that of the special term affirmed, with costs.

All concur, except EARL, J., not voting, and FINCH, J., dissenting.

POND, Assignee, v. STARKWEATHER.*

June 23, 1885.

CONTRACT—PROMISE OF PARTNER—GOODS FURNISHED FIRM.

Plaintiff's assignor B., sold a bill of goods to a firm of which defendants were partners. A dispute arising during the negotiation between B. and a member of the firm as to whether a certain lot of seeds should be included, the defendants, as individuals, agreed that if B. would let the seeds go in under the contract, they would pay for the same.

Held, in action to recover the value thereof, that defendants were liable.†

Appeal from judgment general term, fifth department, affirming a judgment for plaintiff, at circuit, and an order denying new trial. The opinion states the facts.

Mr. Woodward, for appellant. *Mr. Van Voorhees*, for respondent.

DANFORTH, J. The pleadings state a variety of facts, but only a single point, viz.: a promise by defendants to pay B., plaintiff's assignor, the value of a certain lot of eleven hundred boxes of seeds, upon condition that he would transfer and deliver them to the firm of H. S. & Co.,—performance by him, and on their part a breach. After evidence by the plaintiff, the defendants' counsel moved for a nonsuit upon the ground, in substance, that the alleged cause of action was unproven. Evidence had been given by B. (the assignor) that upon the occasion of negotiation between himself, of one part, as vendor, and the firm of H. S. & Co., of the other, as vendees, respecting the sale of a large quantity of seeds and other property at a lump price of \$30,000, a member of the firm insisted that the seeds referred to in the complaint, should be included, that he, B., refused to put them in; that thereupon, these defendants, being the other two members of the firm of H. S. & Co., consulted privately and then "asked" him, B. "to come to them;" he adds: "They then told me if I would allow the eleven or twelve hundred boxes of seeds to go in under that \$30,000 that they would pay for them, and I said, 'then with that agreement on your part that you will pay for those seeds, I will sign a contract covering that.' They said they would pay for them at the same rate the other seeds were to go in at under the contract, and he, 'relying upon that agreement only,' included them in the bill of sale to H. S. & Co., and they took possession of them, that they were worth at the prices mentioned in the contract, between four or five dollars a box, and had not been paid for." Clearly this testimony sustained the complaint in every material point. No particular variance was pointed out upon the motion for a nonsuit, and that now suggested is quite unimportant.

It is also said for the appellant that the contract testified to by B., was without consideration, and this is upon the idea that as the defendants were members of the firm of H. S. & Co., the benefit accrued to them in that relation, and not as individuals. That may be so, but B. would not have transferred or delivered the seeds to the firm, except the defendants as individuals requested him to do so, and as individuals promised to pay him therefor, and an inquiry is not to be made

* 20 W. Dig. 265, affirmed.

† *Avery v. Rowell*, 59 Wis. 82.

into their motive, or the advantage derived by them. If B. had been under a prior legal obligation to make such transfer, his doing so would not support a new promise by the firm, but that is not this case. The promise relied upon is not the promise of the firm, nor was the contract with the firm signed until after the defendants' agreement had been made. But suppose a liability had been first incurred by B. to the firm in reference to the property, his engagement with the defendants would still form a sufficient consideration to support their promise. A partner cannot make a valid legal contract with a firm of which he is a member, but this is because the same person cannot be a party on both sides, and the principle in no way prevents one who as member of a firm has already contracted with another for the performance of a certain thing, to make as an individual a valid promise concerning the same matter. His capacity as a person is not merged in the partnership. Hence the defendants were competent to contract, and whether they did or not was upon the evidence a fair question for the jury. Their verdict might well have been the other way, but it did establish the alleged agreement and its consideration, and we agree with the learned court at general term that no error was committed by the trial judge, either in receiving evidence, or submitting it to the jury for determination.

The judgment appealed from should therefore be affirmed.

All concur.

ALMY v. THURBER.*

June 23, 1885.

ATTACHMENT — CERTIFICATE OF FUND ATTACHED — CODE CIV. PRO., §§ 650, 651, 677.

A certificate of the amount of money in their hands, given by third person, under section 650 of the Code of Civil Procedure, to a sheriff or attaching creditor, is not conclusive in an action brought pursuant to section 677 of the Code, and mistakes therein may be corrected.

The doctrine of equitable estoppel does not apply in such a case.

Appeal by plaintiffs from judgment of general term New York common pleas, affirming a judgment in their favor, and order denying motion for new trial. This action was brought by Almy & Co., joined with Bowe, sheriff of the city and county of New York, as plaintiffs, pursuant to section 677 of the Code of Civil Procedure, to recover from Thurber & Co., property in their possession attached by the sheriff in an action by his co-plaintiffs against John Gourard & Co., of Curacao. The attachment against the latter, as non-residents, was served upon the said defendants Thurber & Co., on May 10, 1881, and a certificate as to property or moneys in their hands belonging to the debtors, J. Gourard & Co., was demanded from them pursuant to section 650 of the Code. On May 28, 1881, they delivered to the sheriff the following statement:

NEW YORK, May 28, 1881.

Messrs. JOHN GOURARD & Co., Curacao, to H. K. & F. B. THURBER & Co., Dr., importers and wholesale grocers, West Broadway, Read and Hudson streets, P. O. box 3895:

Cr., April 16, by cash.....	\$2,008 68
Dr., May 10, to cash.....	\$0 20
Dr., May 18, to mdse.....	1,882 48
	<hr/>
	1,882 68
	<hr/>
	\$120 95
	<hr/>

(Signed)

H. K. & F. B. THURBER & CO.

Plaintiffs sought to recover \$2,008.68, as the cash certified to be on hand to the credit of the debtors, John Gourard & Co., on May 10, 1881, when the attachment was levied. It was shown on the trial that on May 10, 1881, there was but

*18 Abb. N. C., 459; 65 How. Pr. 481, affirmed.

\$120.95 in the hands of defendants Thurber & Co. to the credit of the debtors J. Gourard & Co., the merchandise charged at \$1,882.48, having been sold and delivered to the debtors by defendants, some time prior to that date. The plaintiffs claimed that defendants were estopped from showing those facts by their statement delivered to the sheriff in which the merchandise was charged on May 13, 1881, because, on receipt of such statement, the sheriff, relying thereon, made no further effort to find property subject to the attachment. The defendants contended that the statement alleged a balance of \$120.95, only to be subject to the attachment. The court left it to the jury to say if the certificate was given for the purpose of certifying they had \$120.95 in their hands at the time of the levy. The jury found for the plaintiffs \$120.95; plaintiffs appealed; the general term affirmed the judgment, and plaintiffs appealed to this court.

Mr. Hand, for appellant. *Mr. More*, for respondent.

DANFORTH, J. The defendants were asked for "a certificate of the property or credits of John Gourard & Co. in their hands on the 10th of May. They responded on the 28th of May by an account current, showing a credit balance of \$120.95. It showed also the steps by which this balance was reached. These were not called for, and might have been omitted. But still the only essential part of the account was that showing the balance, certifying, that so much only belonged to or was the property of the debtors. The other items were admissions, and no doubt could in a proper case be used as evidence. They were, however, open to explanation, and the court went quite far enough in submitting to the jury the one given instead of directing as matter of law that if there was any doubt upon the face of the paper, it was removed by the facts proven. They were not controverted, and could lead to no other conclusion. The appellant relies chiefly on the doctrine of estoppel. There is no room for its application. The thing certified to, was the sum due the debtor. The dates and items of the statement might suggest error in that amount, and so lay the foundation for an examination of the parties giving it (Code section 651), but nothing more.

The judgment appealed from should be affirmed.

All concur.

SUPREME COURT OF NEW HAMPSHIRE.

FARWELL v. METCALF and another.

March 13, 1885.

PARTNERSHIP — PAYMENT OF INDIVIDUAL DEBTS.

The appropriation of partnership property to the payment of the individual debts of a partner is valid against subsequent creditors of the firm.*

Facts found by a referee.

E. D. Baker and H. W. Parker, for plaintiff. *Ira Colby and Batchelder & Faulkner*, for defendants.

CARPENTER, J. The action is brought to recover the amount of the defendants' promissory note for \$200, dated April 11, 1882, payable on demand to H. L. Barker & Co., a copartnership composed of H. L. Barker and M. P. Stone, and given for partnership property sold to the defendants. When it was given, Barker agreed that the defendants might, if they chose to do so, pay to one F. \$81.84 due to him from the firm, and deduct that amount from the note in case they should pay it. Ten days afterward Barker sold, and in the name of the firm indorsed the note to the plaintiff, in payment of his pre-existing individual debt. It is not found that this was done with fraudulent intent. Stone was informed of the transaction, and made no objection. May 1, 1882, the defendants, without notice of the transfer, paid the \$81.84 to F. The plea is the general issue.

*20 Eng. R. 757; 30 Am. Rep. 530; 28 id. 751; 49 id. 148. — Ed.

The only ground of defense suggested is, that Barker could not lawfully appropriate the property of the partnership to the payment of his private debts. This he could not do with or without the consent of his copartner, as against the then existing creditors of the firm. *Ferson v. Monroe*, 21 N. H. 462; *Kidder v. Page*, 48 id. 380.

But at the time of the transfer the defendants were not creditors; they had neither paid nor obligated themselves to pay the debt of the firm to F. In the absence of fraud, creditors of a copartnership cannot question an application made before they become creditors of partnership property, to the payment of the individual debts of the partners. *Miles v. Pennock*, 50 N. H. 564; *Parker v. Bowles*, 57 id. 491; *Chase v. Bean*, 58 id. 183.

Judgment for the plaintiff.

CLARK J., did not sit; the others concurred.

SCHOOL DISTRICT v. SELECTMEN.

March 13, 1885.

SCHOOL-DISTRICT TAX — ASSESSMENT — ABATEMENT.

The proper remedy for an assessment of a school district tax upon persons not taxable in the district is an application made by them for an abatement.*

Petition, entered at the law term by School District No. 6, in Oxford, against the Selectmen of Oxford, for a re-assessment of a school district tax, the assessment of which was ordered by a writ of *mandamus* in *School District v. Carr*.* The complaint is that some of the persons on whom the defendants made the assessment are not taxable in the district.

Bingham, Mitchells & Batchellor, for plaintiffs.

DOR, C. J. The appropriate remedy for an assessment of the tax upon persons not taxable in the district is an application made by them for an abatement. *Locke v. Pittsfield*; *School District v. Carr*.*

Petition dismissed.

All concurred.

POWERS v. COUNTY OF SULLIVAN and TOWN OF GRANTHAM.

March 13, 1885.

The county is not liable for costs incurred in prosecuting offenses against the police of towns on the complaint of selectmen.

This agreed case presented the question whether the town of Grantham or the county of Sullivan is liable to pay justice, sheriff, and witness fees in the prosecution of persons for being common drunkards, on complaint of the selectmen of Grantham. The respondents were found guilty, and served out their sentences in the house of correction and jail respectively, but were discharged without paying the costs.

Ira Colby, Solicitor, for the county.

SMITH, J. "All legal costs attending the arrest, examination or conveyance of any offender, except when the same is directed or approved in writing by the counsel of the State, or county commissioners, shall be paid by the complainant." Gen. Laws, chap. 268, § 13. "No such bills of costs [in criminal proceedings before magistrates] shall be allowed unless an indictment be found in the case, or the prosecution be instituted by the authority and under the direction of the attorney-general or the solicitor for the county." Rule 92. Hall and Thornton were convicted of an offense against the police of towns. Gen. Laws, chap. 269, § 17. A person convicted of such an offense may, upon petition and proof of inability to pay his fine or costs, be discharged by the selectmen, and the town is liable for his prison charge in case of his inability. Gen. Laws, chap. 268, § 11; *County of*

* Not yet published.

Merrimack v. City of Concord, 30 N. H. 299; *County of Strafford v. Somersworth*, 38 id. 21; *County of Strafford v. City of Dover*, 61 id. —. Fines for the violation of police offenses or of the by-laws of towns are for the use of the towns. *County of Hillsborough v. City of Manchester*, 49 N. H. 57, 61. The fines being for the use of the town, the town being liable for the prison charges, and the selectmen having authority to discharge the prisoner, the legislature have not undertaken to impose the expense of such prosecutions upon the county unless they were directed or approved by some other authority than that of the town. In this case the complaints were made by the selectmen of Grantham, acting in their official capacity. The complaints not having been authorized or approved by the counsel of the State, or the county commissioners, the county is not liable. Whether the selectmen had power to bind the town is a question we do not consider.

Case adjourned.

CLARK, J., did not sit; the others concurred.

HERRICK, Ex'r, v. WRIGHT.

March 13, 1885.

WILL — ABSOLUTE GIFT OF NOTE.

Under a clause in a will giving "to my sister the promissory note I hold signed by her and by M., also the sum of my deposit with interest," in a savings bank, and "three hundred dollars of the sum of my deposit in" another savings bank "for her support for life, the residue from and after her decease to be equally divided between my nephews and nieces," the legatee takes an absolute title to the note.

Assumpsit, by the executrix of the will of Eliza Wilson, to recover the amount of defendants' joint and several promissory note, payable to the testatrix. The second clause of the will is as follows: "I give and bequeath to my sister Fidelia Wright, the promissory note signed by her and Moses Wright; also the sum of my deposit with interest, in the Five Cents Savings Bank in Keene, and three hundred dollars of the sum of my deposit in the Cheshire Provident Institution in Keene, for her support for life, the residue from and after her decease to be divided equally between my nephews and nieces hereinafter named."

Lane & Dole, for plaintiff. *Batchelder & Faulkner*, for defendants.

CARPENTER, J. The bequest of the note is absolute. That such was the intention of the testatrix is indicated by the nature of the property as well as by the language of the will. A bequest of the legatee's own note could not form a provision for her support, directly nor indirectly, unless she was possessed of property out of which payment could be enforced. If she had no property except such as is by law exempt from attachment, as are bid to her support, it would be entirely worthless; so that the more she stood in need of assistance, the less could she obtain from such a gift.

The clause respecting the note is to be construed as if it were a separate and distinct item in the will, and the next clause as if the words "for her support for life" immediately followed the word "also," and the ellipsis of the words "I give and bequeath" were supplied so as to read, "also I give and bequeath for her support for life the sum," etc.

Judgment for the defendants.

BLODGETT, J., did not sit; the others concurred.

LEWIS v. LONGEE and TRUSTEES and HUGHES.

March 13, 1885.

ASSIGNMENT — WAGES TO BE EARNED — ACCEPTANCE — CREDITORS.

An assignment of wages to be earned, with the acceptance of the employer written upon the face instead of upon the back of the instrument, being duly filed with the town clerk, is good against a creditor of the laborer who seeks to reach the fund by trustee process. *

W. B. Fellows, for plaintiffs. *J. L. Wilson*, for claimants.

SMITH, J. No assignment of, or order for wages to be earned in the future is valid against any creditor of the person making the assignment or order, until a copy of the assignment or order, duly accepted in writing upon the back thereof, is filed with the clerk of the town or city where the party making the assignment or order lives, and the town or city clerk is required to keep for public inspection an alphabetical list of the orders and assignments filed with him. Gen. Laws, chap. 249, § 48. The object of the statute is the protection of creditors against secret and fraudulent assignments. An assignment of wages to be earned is valid between the parties, although no notice is given to creditors, and although there is no acceptance of the assignment by the employer of the assignor. *Garland v. Harrington*, 51 N. H. 409; *Conway v. Cutting*, id. 407. The protection afforded to creditors consists in the publicity given to the assignment when filed with the town clerk. They are afforded a convenient method of informing themselves as to the future pecuniary ability of the assignor. Whether the employer's acceptance is upon the face or back of the assignment would seem to be of no consequence. If notice of the acceptance is material it would seem to be quite as likely to attract attention if written upon the face of the assignment as on the back.

The statute provides that no deed shall be valid against "any person but the grantor and his heirs only," unless recorded. Gen. Laws, chap. 185, § 4. The object of the enrollment of a deed is to give public notice of the sale and transfer of the property conveyed. *Brown v. Manter*, 22 N. H. 468. And actual or constructive notice of the existence of a prior unrecorded deed has the same operation as a record. *Rogers v. Jones*, 8 N. H. 264; *Clarke v. Merrill*, 51 id. 415; *Janerin v. Janerin*, 60 id. 172. The statute requires the posting up of a copy of the warrant for a town meeting. But the posting up of the original warrant instead of a copy is no legal objection to the meeting, because the original gives at least as good a notice as could be given by posting up a copy. *Brewster v. Hyde*, 7 N. H. 206. The statute of 1829 directed that, upon the application of a prisoner to take the poor debtor's oath, the creditor should be served with a copy of the application and order thereon. Laws of 1880, page 476. But it has been held sufficient if he was served with the original application and order, upon the ground "that if the delivery of copies is due notice, *a fortiori*, a delivery of the original must be so." *Eaton v. Miner*, 5 N. H. 542. So, too, it has been held that a negotiable promissory note may be transferred by the holder's indorsing his name upon the face of the note, and that the transferee may maintain a suit thereon. *Folger v. Chase*, 18 Pick. 63; Big. Bills and Notes, 135. Doubtless other analogous cases might be instanced where it has been held that there was a substantial compliance with requirements of statutory provisions, although the strict letter of the statute was not observed.

In *Farnum v. Bell*, 3 N. H. 72, the question was upon the sufficiency of the indorsement of a writ. No question as to the sufficiency of notice to third persons was involved, and that case differs from the present and from those above cited in this respect. If that case is inconsistent with the grounds on which we have placed the decision in this case we are unable to follow it. We cannot see that the fact that the acceptance was written upon the face of the order gave the plaintiffs any less notice or any less protection than it would if written upon the back; and we regard the statute in this particular as directory merely.

Exceptions overruled.

ALLEN, J., did not sit; the others concurred.

* See 27 Eng. R. 491; 24 Am. Rep. 599. — Ed.

COX v. LEVISTON.

March 18, 1885.

INJUNCTION — PAROL LICENSE FOR USE OF WAY — GRANTOR CONVEYED LAND.

A parol license by the grantor to the grantee of land for the use of a way along the margin thereof over other land of the grantor, does not create a right in the grantee which will fix a servitude upon the adjoining land after it has passed to a purchaser who had no notice of the supposed right.*

A defendant in equity may have affirmative relief upon an answer in the nature of a cross-bill, setting out facts which show that he is entitled to the relief sought.

Bill in equity, for an injunction to restrain the defendants from obstructing the plaintiff's way. Facts found by the court.

The plaintiff and the defendants own adjoining house-lots in Lebanon, the title of both being derived through mesne conveyances from Daniel Taylor, trustee of the Church Family of Shakers. The controversy is as to their respective rights in a passage-way over the defendant's land along the division line. There was evidence tending to show that the original grantors of the plaintiff, by their trustee and agent, Caleb M. Dyer, assented by parol to the existence of the way, and the right claimed by the plaintiff, and of a use of the way by the plaintiff and his grantors for more than twenty years under such license. The defendants in their answer denied the plaintiff's right of way, alleged that the plaintiff was encroaching upon their premises, and prayed for a decree establishing the line between the plaintiff's premises and theirs; and for an order that the obstructions on their land, caused by the plaintiff, be removed.

W. L. Foster, J. M. Shirley and F. D. Currier, for plaintiff. Bingham, Mitchells & Batchellor and J. H. Alvin, for defendants.

SMITH, J. The plaintiff has no easement in the premises in dispute by express grant. No mention is made of any way in the deed from Taylor to Huse, or from Taylor to Houston. Neither did a way pass as appurtenant to the premises conveyed by Taylor to Huse, for there was no way appurtenant to the premises, and only existing easements pass as appurtenant to the land conveyed.

In neither deed is the plaintiff bounded on a road or pass-way. The westerly boundary is a line running from one stake to another. No question, therefore, arises as to the plaintiff's right to a way in the premises in question by reason of their having been described as bounded on a way.

Nor has the plaintiff a way by prescription. The fact has been found by the trial court, and we cannot say as matter of law that this finding is incorrect. Nor has the way in question become a public highway by prescription. This fact the trial court has also found, and the finding is not seriously questioned.

Godfrey and Conant, by their deed from Taylor, acquired a right of way over the premises in question by express grant, and the easement thus acquired became appurtenant to the tannery lot. The trial court has found "that the way in controversy was left by Dyer and Taylor for the purpose of affording means of access to the tract of land on which the scythe snath shop was located," and that it was "not left by Dyer for the accommodation of the plaintiff or those under whom he claims." By subsequent conveyances the tannery lot and scythe snath shop came to the defendants with the easement of a right of way over the premises in dispute as appurtenant to those tracts, and when, on July 13, 1883, Bradford conveyed to them the tract in dispute, the easement became merged in the fee. It is objected that this deed was ineffectual to convey the premises, because executed without the previous approbation of the ministry and elders of the Shaker church, as required by article three of their church covenant. But the *cestuis que trust* do not complain, and the conveyance cannot be questioned by a stranger. It is immaterial that Bradford did not know or suppose that the Shakers had any title which he could convey. Upon the facts reported, the title was in the Shakers, subject to whatever easements they had created.

It is claimed that Dyer, acting as trustee for the Shakers, subjected the defendants' premises to the servitude of a right of way in favor of the plaintiff's premises by reason of certain representations and promises made by him to Huse,

* See 94 N. Y. 823; 35 Hun. 57; 83 Ind. 391; Moak's Underhill on Torts, page 442, et seq; 38 Am. Rep. 479; 43 id. 192, Ed.

Houston and the plaintiff, by which the defendants are bound. If any equity attached to the plaintiff's premises by reason of the promises and representations of Dyer, it rested wholly in parol and cannot affect the rights of subsequent grantees of the Shakers without notice. *Trustees v. Lynch*, 70 N. Y. 440, 449; S. C., 26 Am. Rep. 615; *Tallmadge v. Bank*, 26 id. 105; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 id. 400; *Story v. N. Y. E. Railroad*, 90 id. 122; S. C., 43 Am. Rep. 146; 7 Am. & Eng. R. Cas. 569, note; 1 Story's Eq. Jur., § 897.

Whatever information Godfrey may have had of the matter, it is not found that the defendants ever had notice of it; nor is it found that they were put upon inquiry, nor whether the situation of the premises was notice to them of any secret equity attached to the plaintiff's premises; and we cannot say as matter of law that they ought to have inquired, or that the situation was notice to them. This claim of the plaintiff, however, rests upon the assumption that certain facts have been found by the trial court from evidence introduced by the plaintiff and excepted to by the defendants. The case finds that this evidence was considered by the trial court in connection with the other evidence in the case, and his findings that the passage-way in dispute was not left for the accommodation of the plaintiff, or of those under whom he claims, must be understood to mean that the claim of the plaintiff in this respect is unsupported by the evidence.

Since the argument and since the death of the judge by whom the case was tried, the plaintiff has moved to amend the case so as to turn the evidence upon the point last mentioned into findings of fact, and he has furnished affidavits in support of his motion. The ground assigned for the motion is that the evidence being uncontradicted (which the defendants deny), it is a fair and necessary inference that the trial court gave full credit to the testimony, and intended to find the facts to be such as the evidence tended to show." But the case shows that this assumption of the plaintiff is not well founded. The amendments requested are in direct conflict with the main finding in the case, and with the conclusion drawn from all the evidence in the case, including that excepted to. The evidence excepted to was received and considered. Presumptively, all the credit was given to it which it deserved. From the nature of the case it is impossible for us to say how much that was. One witness testified to a conversation in 1847 with Dyer, long since deceased. Another conversation was with Dyer in 1854; a third between 1854 and 1868; and all were many years since. Doubtless the appearance of the witnesses for intelligence and truthfulness, the long period of time which had elapsed since the conversations testified to took place, the liability of the witnesses to misunderstand or misrecollect what was said, the fact that they may have been supported or contradicted by other testimony more or less reliable, with perhaps other considerations, had much influence with the trial court, on the question of their credibility. Without a hearing involving an examination of all the testimony, the granting of the proposed amendments would involve the rejection of all the other evidence on the same points, without knowing what it was, or how much there was of it, or how much weight it deserved. The plaintiff's affidavits show that the trial closed March 3, 1884, that the judge drew a case in which the evidence excepted to and his findings were incorporated, and that counsel for both parties were before him on May 28 for the purpose of being heard upon requests for amendments. Included in the requests then made by the plaintiff were the amendments now requested, counsel being fully heard. Some of the amendments were allowed and some refused. As the case was subsequently printed and distributed without the amendments now requested being made, the inference is conclusive that they were denied, and the present application cannot be entertained.

The defendants may have a decree for the removal of the obstructions placed upon their land by the plaintiff. *Clark v. Clark*, 61 N. H. ; *Thielman v. Carr*, 75 Ill. 889.

The defendants' answer may be treated both as an answer and as in the nature of a cross-bill, and there is no occasion to compel the defendants to resort to a separate suit to accomplish the same result, which may be reached in this case without further hearing or expense. *Eastman v. Bank*, 58 N. H. 421, 422.

Decree for defendants.

All concurred.

GILMAN v. CATE.

March 13, 1885.

BANKRUPTCY — "DEBT" — ASSESSMENT OF DAMAGES NOT.

The report and assessment of damages, by a referee appointed under the statute of 1876, and made during the pendency of bankruptcy proceedings in an action for a tort, do not constitute a debt which may be proved against the defendant's estate in bankruptcy.*

Trespass quare clausum. Facts found by the court. At the September term, 1876, the cause was sent to a referee with a commission instructing him that his report was to be final. At a hearing begun January 29, 1877, the referee found and reported that the defendants were guilty, and assessed the plaintiff's damages at \$40. At the March term, 1878, upon suggestion that Calvin F. Cate, one of the defendants, was in bankruptcy, the action was entered dismissed as to him.

At the March term, 1884, on the plaintiff's motion the action was brought forward and the entry of "dismissed" stricken off. Calvin F. Cate then pleaded his discharge in bankruptcy, and the plaintiff replied that the causes of action alleged were not provable in bankruptcy, and were in no way affected or barred by the discharge in bankruptcy. The defendant rejoined, traversing the allegations of the replication.

Cate filed his petition in bankruptcy August 29, 1877, and was duly adjudicated a bankrupt thereon, and received his discharge April 10, 1878. The hearing before the referee was completed and the damages assessed before the filing of the petition in bankruptcy, but there was no order for judgment on the report before that time.

Aldrich & Remick, for plaintiff. *Bingham, Mitchells & Batchellor*, for C. F. Cate.

SMITH, J. No debts other than those specified in U. S. Rev. Stats., §§ 5067-5071, are provable against the estate of the bankrupt. *Id.*, § 5072. The plaintiff's claim or demand set forth in the declaration is not a debt. It is not created by and does not spring out of any judgment, award, specialty, contract or promise. A demand for a trespass *quare clausum*, is not a debt provable in bankruptcy or insolvency. *Hapgood v. Blood*, 11 Gray, 400; *Crosby v. Wentworth*, 7 Metc. 10; *Strong v. White*, 9 Johns. 161; *In re Schuchardt*, 15 Bank. Reg. 161; *In re Sutherland*, 8 id. 314; *Black v. McClelland*, 12 id. 481.

In *In re Hennocksburg*, 7 B. R. 37, it was held that an action for assault and battery and false imprisonment being tort for a personal injury, may be prosecuted to final judgment after the petition in bankruptcy is filed, and a judgment recovered may be prosecuted against the bankrupt's estate, for the reason that a claim of this nature is not a provable debt until final judgment, and hence does not come within the language of the second clause of section 21 of the act of March 2, 1867. § 5106, U. S. Rev. Stat. That case is a direct authority that a claim for a tort is not provable in bankruptcy. The holding that a judgment recovered upon such claim during the pendency of bankruptcy proceedings may be proved against the estate of the bankrupt seems opposed to the great weight of authority. In the more recent case of *Black v. McClelland*, *supra*, it was decided that a judgment entered in an action for a personal tort after the commencement of the proceedings in bankruptcy upon a verdict rendered before that time is not a provable debt.

The plaintiff's claim is not a demand "for or on account of any goods or chattels wrongfully taken, converted or withheld by the bankrupt." These provisions are limited to demands for personal property wrongfully taken, and do not include a demand for a trespass *quare clausum* where damages are claimed for cutting and carrying away wood and timber trees, part of the real estate trespassed upon, and which only become personal property by the trespass itself. *Hapgood v. Blood*, *supra*. The gist of the action is the breaking and entering, and the value of the wood and timber is only a part of the damages. *Brown v. Manter*, 22 N. H. 468. Nor is the plaintiff's demand one for unliquidated

* See Bish. Insolv. Debtors (2nd ed.), § 357; *Talbot v. Hazard*, 30 Alb. L. J. 88; S. C., 15 Abb. N. C. 61, 71, note; 79 Mo. 105; 31 How. 116.

damages arising out of a contract or promise, where the court may order the damages assessed in such mode as it may deem best, and permit the sum so assessed to be proved against the estate of the bankrupt, as was the case in *Monroe v. Upton*, 50 N. Y. 598, cited by the defendant.

These views, as the pleadings stand, would seem to dispose of this case. The issue tendered by the rejoinder is, whether the cause of action alleged in the declaration was provable in bankruptcy, or was barred by the defendants' discharge. But the position has been taken in argument that the report created a debt provable against the defendants' estate. The question thus presented is, whether the report of the referee assessing the plaintiff's damages, not as yet accepted by the court, and on which no judgment has been rendered, became a debt which the plaintiff could prove against the estate of the defendant in bankruptcy. It is claimed that the report has all the force of a judgment in which the original claim for damages has merged. When a judgment has been rendered in an action upon a contract or obligation, the original debt is merged and extinguished in the judgment, and no second action can be brought upon the contract or obligation so long as the judgment remains unreversed. So a claim for damages on account of a tort is extinguished by a judgment recovered by the wrong. There cannot be a second action for the same injury. So where a creditor obtains security of a higher nature than he had before, it is an extinguishment of the first debt or security, except where a second security is collateral to the first. *Higgins' Case*, 6 Co. 44; *Goodwyn v. Goodwyn*, Yelv. 89; Vin. Abr., Debt (J); Bac. Abr., Extinguishment (D); *Andrews v. Smith*, 9 Wend. 53; *Davis v. Anable*, 2 Hill, 339; *Clark v. Rowling*, 3 N. Y. 216, 227; *Varney v. Brewster*, 14 N. H. 49; *Elliot v. Quimby*, 13 id. 181.

Hence, when a debt provable in bankruptcy has passed into a judgment after the commencement of proceedings in bankruptcy, it is held that a new debt is thereby created which cannot be proved in bankruptcy, because the judgment is a merger, and creates a new debt which did not exist at the time of the commencement of the bankruptcy proceedings; nor can the original debt be proved because it has become extinguished. *In re Gallison*, 5 B. R. 353; *Bradford v. Rice*, 102 Mass. 472; *Sampson v. Clark*, 2 Cush. 173; *Woodbury v. Perkins*, 5 id. 86; *Faxon v. Baxter*, 11 id. 85; *Wolcott v. Hodge*, 15 Gray, 547; *Holbrook v. Foss*, 27 Me. 441; *Fisher v. Foss*, 30 id. 459; *Pike v. McDonald*, 32 id. 418; *Wheeler, etc., Company v. Taft*, 61 N. H. 1. If, then, a debt provable in bankruptcy is merged in a judgment recovered during the pendency of bankruptcy proceedings, so that neither the original debt nor the judgment can be proved against the bankrupt's estate, *a fortiori* a judgment so recovered upon a non-provable claim cannot be proved against his estate. *In re Schuchardt*, *supra*; *In re Sutherland*, *supra*. *Mann v. Houghton*, 7 Cush. 592, is a case very much in point. The action was referred to arbitrators by a rule of court, who awarded costs to the defendant. Before the award was accepted by the court the plaintiff took the benefit of the insolvent law and obtained his discharge. It was held that his discharge did not bar the defendants' claim for the costs awarded, because the defendants' claim was not provable against the plaintiffs' estate in insolvency, not being due or payable until after the award was accepted, which was subsequent to the commencement of the insolvency proceedings.

There are cases which hold that the judgment may be looked into, and if it is found that the debt was one that would be discharged, the judgment would be barred. *Harrington v. McNaughton*, 20 Vt. 293; *Downer v. Rowell*, 26 id. 397; *Dresser v. Brooks*, 3 Barb. 429; *Fox v. Woodruff*, 9 id. 498; *Clark v. Rowling*, 3 N. Y. 216; *Robinson v. Vale*, 4 D. & R. 480; *Ex parte Birch*, 7 id. 436; *Ex parte Lloyd*, 17 Ves. 245; *Owen on Bankruptcy*, chap. 11. But it is said, in the well-considered opinion in *In re Gallison*, 5 B. R. 353, that the source of the conflict is, that in some jurisdictions there is no provision for a stay of proceedings until the bankrupt can obtain and plead his discharge. Accordingly it was enacted in England in 1730—Stat. 5 Geo. II, chap. 30, § 13—that when a creditor obtains a judgment and takes his debtor on execution, he shall be discharged on motion. "This," Judge LOWELL says, "is the foundation of all the English decisions, and they have given rise to an impression that in bankruptcy a judgment obtained

during the pendency of the bankruptcy proceedings will be discharged, and these decisions have had an undue weight in some of the decisions in this country." See, also, *Woodbury v. Perkins*, 5 Cush. 86, 89, and *Sampson v. Clark*, 2 id. 175.

The report of the referee was not a judgment, nor did it have the force of a judgment. The reference was not an arbitration at common law, nor the report of a common-law award, binding like a judgment upon the parties when published, until accepted by the court, and judgment rendered upon it, it was subject to recommittal or rejection for cause shown. Like the verdict of a jury, or the report of an auditor or master, it is not a judgment in and of itself, but merely the foundation for a judgment, if the court shall so adjudge. Neither a verdict nor a report before judgment is a debt due and payable either presently or at a future day. "The judgment, when rendered, establishes the indebtedness and impresses the obligation of payment, and so may be said to create the debt. Not until it has passed is there a debt due and payable." *Black v. McClelland*, *supra*. The defendant has cited *Ex parte Harding*, in *re Pickering*, 27 E. L. & E. 267, as authority that the amount of an award may be proved as a liquidated sum against the bankrupt's estate. That was an action of *assumpsit* to recover the balance of an account, in which the plaintiff had a verdict by consent, subject to a reference to an arbitrator, who subsequently made an award in favor of the plaintiff. The defendant then committed an act of bankruptcy, after which judgment was signed for the plaintiff for the amount of the award. The plaintiff having proved his judgment against the estate of the defendant in bankruptcy, his assignee moved to expunge the proof, upon the ground that the judgment was not signed until after the creditor had notice of the act of bankruptcy. It was held that the creditor was entitled to prove for the debt awarded, interest and costs as a liquidated sum, on the ground that the award was more than a verdict rendering the sum provable as a debt, until it could be shown that the award could be set aside at law. TURNER, L. J., said: "It is argued that the arbitrator was in the place of a jury; if he was, so he was in the place of a jury whose decision both parties had agreed should be conclusive on them." Without a fuller knowledge of the provisions of the English Bankrupt Act than the case discloses, it is not easy to measure the value of that decision as an authority under our statute. Stress was laid upon the fact that the creditor had knowledge of the act of bankruptcy when the judgment was signed. The judgment was signed before the petition for adjudication was filed, which, under our statute, is the commencement of the bankruptcy proceedings. The reference seems to have been regarded as equivalent to a common-law arbitration. The referee is called the arbitrator, and his report an award. By the agreement for reference the arbitrator had power to direct a verdict for either party, with costs of suit and costs of reference. The course pursued resembles closely the course under our statute, where a suit, pending at the commencement of bankruptcy proceedings, to recover a claim specified in the sections before cited, the damages being unliquidated, may be prosecuted so far as to ascertain by a trial the amount of the debtor's indebtedness to enable the creditor to prove his claim against the bankrupt's estate.

Whether the amount of the verdict is a provable debt against the bankrupt was for a long time a disputed question in England, and the English decisions on this point are in conflict with each other. In *Ex parte Hill*, 11 Ves. 646, the cases are discussed, and Lord ELDON expressed strong doubt of the soundness of those cases which held that a verdict in an action for damages for a tort was a provable debt in bankruptcy. *Ex parte Charles*, 16 Ves. 256 (14 East, 198), was a petition to set aside a commission of bankruptcy which had issued upon a creditor's petition, whose debt consisted of a verdict for damages in an action of breach of promise of marriage rendered before the act of bankruptcy, and upon which judgment was entered before the allowance of the commission. The judges of the king's bench "unanimously certified their opinion that the debt of the petitioning creditor was not sufficient in law to support the commission. Since then (1811) the law has been settled accordingly in England." MCKENNA, J., in *Black v. McClelland*, *supra*.

Our conclusion is, that, both upon principle and authority, the report and assessment of damages by a referee appointed under the statute of 1876, and made

during the pendency of bankruptcy proceedings in an action for a tort, do not constitute a debt which may be proved against the defendant's estate in bankruptcy.

It is objected that the order made at the March term, 1878, dismissing the action as to Calvin F. Cate was a final disposition of the action as to him which cannot be revoked. Whether the order of dismissal was so far final as to become a judgment, or was in the nature of a final judgment, the court had power to vacate it upon notice and a hearing, and to reinstate the action upon the docket. *Aldrich v. Wright*, 57 N. H. 104; *Adams v. Adams*, 51 id. 388; *Russell v. Dyer*, 89 id. 528; *Johnson v. Railroad*, 43 id. 410; *Judge of Probate v. Webster*, 46 id. 518; *McIntire v. Carr*, 59 id. 207; *Moore v. Carpenter*, 63 id. 65; *Clough v. Moore*, id. 111. Whether proper cause was shown for the course pursued was a question of fact to be determined at the trial term. The plaintiff is entitled to judgment on the report.

Case discharged.

CARPENTER and BINGHAM, JJ., did not sit; the others concurred.

KEEFE v. SULLIVAN COUNTY RAILROAD.

March 13, 1885.

RAILROAD — DUTY TO KEEP CROSSING IN REPAIR.

A provision in the charter of a railroad corporation, that the road shall be so constructed as not to obstruct the safe and convenient use of any private way which it crosses, imposes upon the corporation the duty of maintaining a safe and convenient crossing for such private way.

Petition for a crossing over the defendants' railroad, under Gen. Laws, chap. 161, § 16. The petition was presented to the commissioners, who, after due notice and a hearing, reported that there was a legally established crossing from the plaintiff's premises over the tracks of the company to the highway; that said crossing was built by the defendants in 1848, and has been at all times since kept, repaired and maintained by them until October, 1882, when they put in an additional track and removed the plank from the crossing, and have since neglected and refused to replace them, or build and maintain a new crossing for the plaintiff's use; that there has been at all times since the construction of the railroad, and now is, a reasonable and just demand for a crossing for the convenient use and accommodation of the premises now owned and occupied by the plaintiff; and that the road leading from the plaintiff's premises over the tracks of the railroad to the highway heretofore mentioned has been used ever since and for a long time prior to the construction of the railroad. They, therefore, report that the legal right to a crossing exists; that the crossing has been established, but that the neglect and refusal of the railroad to re-lay, build, keep, and maintain a crossing for the plaintiff's use is a matter over which the commissioners have no jurisdiction.

At this term the plaintiff entered his petition upon the docket, and filed the foregoing report and moved that it be recommitted to the commissioners, with instructions to establish a crossing agreeably to the statute. The court granted the motion, and the defendant excepted.

Lane & Dole, for defendants. *Josiah G. Bellows*, for plaintiff.

SMITH, J. The defendants contend that the court has no jurisdiction of this petition, and excepted to the order committing the report to the commissioners. Chapter 953, section 5 of Laws of 1850, imposed upon every railroad corporation the duty of constructing cattle-guards, cattle-passes and farm crossings for the convenience and safety of the land-owners along the line of their road, the place and number to be determined by three justices of the peace in case of disagreement between the corporation and the land-owners. The justices were required to make a report of their doings in writing, and file a copy with the town clerk of the town where the land was situated. In the revision of the statutes in 1867, the county commissioners are substituted for justices of the peace, as the tribunal to which application may be made for establishing cattle-guards, cattle-

passes and farm crossings, in case the owner of the land and the proprietors of the railroad do not agree upon the place, number and kind of cattle-guards, passes and crossings to be constructed. Either party may apply to the commissioners, who, after notice, hearing and examination, are to determine the number, places, time and manner of construction of the same. The commissioners are required to file their report with the clerk of the supreme court for the county—Gen. Stats., chap. 147, §§ 1, 16; Gen. Laws, chap. 161, §§ 1, 16, and their report is made conclusive. If the proprietors of the railroad do not construct the cattle-guards, passes and crossings within the times limited by the commissioners, and pay the costs adjudged to be paid by them upon request, they forfeit \$25 for each month's neglect. Id. § 17. Unlike the proceedings on a petition for partition or for a new highway, the petition is not addressed to the court, nor entered in court. It is addressed to the commissioners, who proceed to the discharge of their duties without any order or direction from the court. Their report is filed with the clerk, who becomes its custodian, as the town clerk was the custodian of the report of the justices prior to 1867. The statute does not expressly require the report to be made to the court, and does not expressly provide for a hearing or judgment upon it, or a recommittal of it. As it is made conclusive by statute, a judgment upon it seems to be unnecessary. Like the award of arbitrators upon a common-law submission it is practically a judgment with the substantial qualities and incidents of a judgment. The penalty of \$25 per month, imposed upon the proprietors of the railroad for their neglect to construct the crossing within the time and in the manner fixed by the commissioners, is security to the owner of the land that the report will be complied with. It is not necessary to determine whether in any case a report of the commissioners on such a subject can be recommitted. If the power of recommittal is vested in the court, there appears to be no reason why either party should desire its exercise in this case.

The commissioners have reported that a farm crossing from the plaintiff's premises across the defendants' railroad to the highway is necessary for the convenient use and accommodation of his premises. They declined to lay out a crossing, because, in their opinion, a legal crossing was established in 1848, when the railroad was built, which crossing the defendants constructed, maintained and kept in repair from 1848 until 1882. Whether prior to the passage of the act of 1850 a railroad corporation was required to construct farm crossings was left unsettled in *March v. Railroad*, 19 N. H. 372, 378, decided in 1849. The legal duty of constructing farm crossings, imposed by the statute of 1850, undoubtedly includes the duty of maintaining and keeping them in repair so long as needed. But the defendants claim that, inasmuch as there was no statute requiring railroad corporations to maintain farm crossings when the plaintiff's damages were assessed in 1848, the presumption is that the expense of a crossing, to be borne by the plaintiff, was considered in the assessment; and it is claimed that the act of 1850 does not apply to railroads as constructed prior to its passage, and if applied to the defendants in this case, a duty would be imposed upon the defendants which the plaintiff has been paid to perform, and that the statute, so far as it imposes this duty upon railroads constructed before its passage, is unconstitutional. The established crossing mentioned in the commissioner's report is upon a "road leading from the plaintiff's premises over the tracks of the railroad to the highway." This "road" the defendants in their brief say was "an old farm driveway." The defendants' charter provides: "If the said railroad in the course thereof shall intersect or cross any private way, the said corporation shall so construct said railroad as not to obstruct the safe and convenient use of such private way; and if said railroad shall not be so constructed, the party aggrieved shall be entitled to his action on the case, and shall recover reasonable damages for his injury; but no action shall be commenced after the expiration of two years from the obstruction aforesaid." Laws of 1846, chap. 395, § 7. In *March v. Railroad*, *supra*, it was said: "Technically, there is some difficulty in having a 'private way' over one's own land. . . . There is, however, room for question whether the term 'private way,' in railroad charters. . . . does not apply to all cases where the road interrupts the communication between the different parts of one's

land, so that the corporation would be obliged to construct suitable crossings at proper places for the use of the land-owner." In this case the term "private way," as used in the defendants' charter, includes the plaintiffs' drive-way; and the defendants so constructed their road in 1848 as not to obstruct that way. At that time they performed the duty accepted with their charter by building a crossing for him; and their duty of maintaining it and keeping it in repair for his use they performed until October, 1882, when they gave him his first cause of complaint by removing the planks of which the crossing was constructed. There is no presumption that the assessment of land damages in 1848 included damages for the obstruction of this private way which the defendants could not lawfully obstruct, and did not obstruct when they built their road, and which they continued to maintain for thirty-four years afterward. The conclusion of the commissioners, that the plaintiff has a legally established crossing which the defendants are bound to maintain, is, for the practical purposes of these parties, substantially correct.

The case has been argued as though a petition for a *mandamus* to the commissioners to establish a crossing had been filed; and we have, therefore, considered the case upon the facts stated in the report. The defendants have used the existence of the plaintiffs' path or way as a defense against this petition before the commissioners. *Wilbur v. Abbott*, 60 N. H. 40, 53. There is no lack of remedies for enforcing the plaintiff's rights. If the parties need a decision of the question whether the commissioners can lay a way where the plaintiff's old way was, and still is, it will be considered; but this question may not be material in view of the plaintiff's ancient path preserved by the defendants' charter. The case may be continued to await the settlement of the controversy by agreement, or by such legal proceedings as the plaintiff may see fit to institute.

All concurred.

UNION BRIDGE CO. v. SPAULDING.

March 13, 1885.

CORPORATION — BRIDGE — EXCLUSIVE RIGHT.

A charter giving the right to erect a bridge across Connecticut river within certain limits, and collect tolls, but which contains no words making the granted rights exclusive within the limits named, does not give to the corporation a cause of action against land-owners on opposite sides of the river who open a winter road across their own lands and across the river, within the charter limits, and invite the public to pass thereon, with intent to divert travel from the bridge, to the injury of the plaintiffs.

Case for making and opening a winter road by the defendants over their own land and across the Connecticut river from a highway in Lancaster to a highway in Lunenburg, Vt., within the limits of the plaintiff's charter, and putting up a sign whereby the public were invited to pass over the road so opened instead of passing over the plaintiffs' toll bridge; with the intent to injure the plaintiffs by diverting travel from their bridge and so depriving them of their just toll. The plaintiffs are a corporation organized under a charter granted in 1870 which gives them authority to build a bridge across Connecticut river between the northerly line of Dalton and a point in Lancaster above where the road complained of was opened. Facts agreed for the opinion of the court.

W. & H. Heywood, for plaintiffs. *Drew, Jordan & Carpenter*, for defendants.

BINGHAM, J. The act of incorporation authorized the plaintiff to construct a bridge over the Connecticut river between two given points, and gave it the right to take tolls to reimburse it for expenditures in building, and keeping the bridge in repair. Laws of 1870, chap. 86.

The plaintiff organized in 1870, and built a bridge within the limits named in the charter. The defendants owned farms on opposite sides of the river within the limits, about a mile above the bridge, and in the winter opened a road from the highway in Vermont to the highway in New Hampshire, across their farms and the river, and invited public travel.

The charter being recent and no prior right of public passing existing, either by

grant or prescription, the rights of the plaintiff are only those conferred by the charter, and the plaintiff claims that one is the exclusive right to the ordinary travel across the river within the chartered limits, and that the defendants are liable in damages for diverting it. Does the charter give this right, or is the exclusive right of the plaintiff limited to the space that the bridge and its suitable connections occupy, and to the right to take toll of those who pass across the bridge?

The charter gives no exclusive right in terms, and it becomes important to ascertain what the intention of the legislature was in granting it, that its language may be correctly interpreted. The general rule is that in governmental grants nothing passes by implication. This was so in England, and the reason of the rule is much stronger in a republican government of legislative grants, as they actually come from the people in their sovereign capacity. Private charters may be a limitation of legislative power, and often are so, if they give exclusive privileges in such form as to bind succeeding legislatures. Let this be as it may, there is little doubt that public grants are construed less favorably to the grantee than private ones.

If the legislature intends to give an exclusive right it has the power to grant it expressly, and if the grantee desires such a right he may require it to be expressly granted, and if denied, he need not accept the grant.

In this State the exclusive right to build and repair between given points has been given in toll-bridge charters, and the absence of such a provision is the exception rather than the rule, and indicates an intentional omission on the part of the legislature. It seems to have been the understanding that if a party intended to secure himself against competition like that complained of by the plaintiff, he must obtain a provision in his charter giving him the exclusive use, and if no such provision is found in it, it may well be held that it was intentionally omitted. *Bridge v. Bridge*, 7 N. H. 35, 59, 61, 67.

In this case the exclusive right was granted between given points, but the court recognize the doctrine that charters, like the one in the case at bar, give an exclusive right only to so much in width as the bridge and its connections may occupy. *Bridge v. Smith*, 30 N. Y. 44.

In Massachusetts, in a case involving the meaning of a legislative charter, in which there was no express exclusive right, it was held by a majority of the court, in substance, that such a charter gives no exclusive right, either express or implied, beyond the limits of the bridge itself, with the right to take tolls of such persons as may choose to pass over it. *Bridge v. Bridge*, 7 Pick. 344, 346, 459, 470, 476; *Charles River Bridge v. Warren Bridge*, 11 Peters, 420; S. C., U. S. Book 9, 773, is an affirmation of the views of the majority of the court in 7 Pick., before cited, and this opinion of the supreme court of the United States has since been followed as a leading case. U. S. Book 9, 774, note.

Our conclusion is that the facts claimed by the plaintiff show no violation of its legal rights by the defendant. The fact that a new way was opened that caused a diminution of the plaintiff's profits is not sufficient. It must go further and prove that the new way was established within the range of its exclusive right.

Case discharged.

CARPENTER, J., did not sit; the others concurred.

[See 29 Alb. L. J. 338; In *Chenango Bridge Co. v. Putge*, 83 N. Y. 178; S. C., 38 Am. Rep. 407, it was held that, "any person owning land on both sides of a river, may without legislative authority, and even in defiance of legislative prohibition, maintain a ferry or bridge for his own use, providing he does not interfere with the public easement. Such owner, however, cannot without legislative authority maintain a toll-bridge or ferry for public use." A party is not liable for the consequences of an act done upon his own land, lawful in itself, and which does not infringe upon any lawful rights of another, simply because he was influenced in the doing of it by wrong and malicious motives; the courts will not inquire into the motives actuating a person in the enforcement of a legal right. *Phelps v. Newlen*, 72 N. Y. 39; 28 Am. Rep. 93, 101 n.; 8 Eng. Rep. 312 note; *Glendon v. Uhler*, 75 Penn. St. R. 487; *Osborne v. Warren*, 44 Conn. 857; *Pickard v. Collins*, 28 Barb. 445; *Bartlett v. Kinsley*, 15 Conn. 837; *Chatfield v. Wilson*, 28 Vt. 49; *Jenkins v. Fowler*, 24 Penn. St. Rep. 308; *Heald v. Carey*, 11 Com. Bench, 993; *Auburn, etc. v. Douglass*, 9 N. Y. 444; *Machan v. Brown*, 18 Wend. 261; *Occum Co. v. Sprague, etc.*, 34 Conn. 580. Moak's Underhill on Torts, p. 455. — Ed.]

WEBSTER v. BRIDGEWATER.

March 18, 1885.

HIGHWAY — PETITIONERS WITHDRAWING.

It is ordinarily the right of petitioners for a highway, before a hearing of the petition, to withdraw upon payment of costs; and the petition may be amended by striking their names therefrom.

Motion, by N. H. Weeks and one hundred and eighty other petitioners for a new highway in Bridgewater and New Hampton, for leave to withdraw and amend the petition by striking out their names, on the payment of costs. The other petitioners seventy-three in number, oppose the motion. After the filing and reference of the petition, the towns of Bridgewater and New Hampton made application to the commissioners for an apportionment of the expense of any highway that might be established upon Plymouth, Ashland and Bristol. The petitioners making this motion nearly all reside in the three last-named towns. There has been no hearing before the commissioners. The court allowed the motion, and the seventy-three petitioners who opposed it excepted.

Pike & Parsons, Bingham, Aldrich & Remick, for the seventy-three petitioners who oppose the motion. *Fling & Chase*, for defendants. *Burleigh & Adams*, for Plymouth and Ashland.

BLODGETT, J. The granting of the motion was not erroneous. The rule in this State is, that a plaintiff, before opening his case to the jury, may become nonsuit as a matter of right — *Farr v. Cate*, 58 N. H. 367; and the rule also applies to any other tribunal which is equivalent to a jury. *Fulford v. Converse*, 54 N. H. 548, 544. Such being its extent, it cannot be fairly held that the rule does not include highway petitions to the court, in which the petitioners stand in the light of joint plaintiffs — PARKER, J., in *Burnham v. Steele*, 8 N. H. 184 — and the commissioners fill the ordinary place of the jury. And in principle, also, there is nothing to distinguish a petition for a highway from other petitions, or actions, in which several unite in a common object, for there is no legal ground for the position that the relation of highway petitioners to each other is different from that of co-plaintiffs generally.

In this view, it was the right of the dissatisfied majority of the petitioners, unless estopped by some act or agreement beyond what appears, to become nonsuit at any term of the court after the entry of the petition and before the commencement of its hearing by the commissioners, and thereby bar its further prosecution; and therefore it is not a meritorious cause of complaint by the minority that the majority were permitted to withdraw, without affecting the petition, and on the payment of costs.

Whether the amendment was authorized by section 17, chapter 226, General Laws, allowing the name of a plaintiff or defendant to be struck out before the evidence is closed, or the case submitted on paying his costs to that time, is immaterial. Justice required that the majority of the petitioners should not longer be compelled to share the burden and expense of the litigation against their will; and this, of itself, was amply sufficient to authorize the amendment. *Stebbins v. Ins. Co.*, 59 N. H. 148.

Exceptions overruled.

ALLEN, J., did not sit; the others concurred.

BENTON v. BENTON.

March 18, 1885.

WILL — "USE AND INCOME" — LIFE ESTATE.

B. by will gave his wife the use and income of his homestead for life; also "every article of household furniture in or on said premises, including piano, books, minerals, shells and curiosities, and every article of personal property in and about said homestead, or wherever found belonging to my estate; also, "the dividends and income on all my railroad shares I may own at the time of my decease, and also the interest and income on all my government and other bonds which I may possess at the time of my decease;" and

after making sundry bequests to other persons added a residuary clause as follows: "Lastly, after the decease of my said wife Susan A. and in the final disposition of property, I hereby give and bequeath the rest, residue and remainder of my estate, wherever found or however situated," to certain legatees named.

Held, that neither the railroad shares and government bonds, nor cash on hand and promissory notes of which the testator died possessed, passed by the will to the wife, and that an inventory thereof should be returned to the probate court.

Bill in equity, by William P. Benton, one of the executors of the will of Colbee C. Benton, deceased, for the advice and direction of the court in regard to the following clauses in the will:

"3. I also give and bequeath to my said wife, Susan A., every article of household furniture in and on said premises [the testator's homestead] including piano, books, minerals, shells and curiosities, and every other article of personal property in and about said homestead, or wherever found belonging to my estate, meaning to convey said personal property to my said wife, Susan A., to be held by her in her own right undisturbed and without an invoice, so that she can dispose of any portion of it at any time, either by gift or will, or otherwise, as she may desire."

"4. I give and bequeath to my said wife, Susan A., the dividends and income on all my railroad shares I may own at the time of my decease, and also the interest and income on all my government and other bonds which I may possess at the time of my decease, said dividends, interest and income to be collected and appropriated by my said wife, Susan A., for her own use and benefit during her natural life. Provided, said dividends, interest and income shall not produce generous return, or said bonds and shares shall decrease in value, then I hereby direct my executors to dispose of such portions of said property as they may think judicious and invest in other securities, or use such parts of the principal as may be necessary or desirable."

The will was holographic and was written March 5, 1877. The testator died February 22, 1880. The will was presented for probate and allowed March 10, 1880, and the plaintiff and Susan A. Benton appointed executors thereof. The testator had no issue living at the date of the will or afterward. In the first clause he directs his executors to pay his debts and personal charges. By the second clause the widow takes a life estate in the homestead, and by the eleventh clause the remainder is devised to the First Unitarian Society in Lebanon. By the fifteenth clause the testator's real estate in Huron, Michigan (being all his other real estate), is devised to the plaintiff. By the other clauses of the will, except the third, fourth and last, legacies amounting to \$7,850 are bequeathed to various legatees payable upon the decease of the widow of the testator, and legacies amounting to \$1,700 are given to various legatees payable during her life. The residuary clause is as follows: "Lastly, after the decease of my said wife, Susan A., and in the final disposition of property, I hereby give and bequeath the rest, residue and remainder of my estate, wherever found or however situated, or any property reverting to my estate in consequence of a non-compliance with the conditions of some of my bequests, to my brothers, nephews, nieces and their wives hereinbefore named, and I hereby direct my surviving executor, after paying all debts, costs and expenses of administration, to distribute all my estate found and remaining in his, said executor's, hands, to my said relations above referred to, in a proportion corresponding with the sums already bequeathed under the sixth paragraph.

The testator owed no debts to any considerable amount at his decease. His personal estate besides household furniture, etc., mentioned in the third clause, consisted of two hundred and two shares of railroad stock, worth more than their par value, one United States bond for \$1,000, and one share of bank stock worth more than its par value, promissory notes to the amount of \$1,720, and cash on hand or on deposit to the amount of \$3,518.14.

The widow claims the income of the railroad shares and bond under the fourth clause, and the principal or so much as may be necessary in the contingency named in that clause. As to this claim there is no contention. Under the third clause she claims the bank share, notes and cash, and the residuary legatees the same under the last clause in the will.

The foregoing facts are admitted. The plaintiff asks the court to determine, 1, what interest said Susuan A. takes in the estate under the third clause of the will, and under the whole instrument; and, 2, of what portion of the estate should an inventory be filed.

SMITH, J. Mrs. Benton takes a life estate in the homestead under the second clause of the will, and the income for life of the bond and railroad shares under the fourth clause; and in the contingency named in the fourth clause, the principal or so much as may be necessary for her use. As to thus much there is no controversy.

Neither the language of the fourth clause, nor any thing in the testator's circumstances shows that he intended to include the bank share, notes or money in that clause. The mention of railroad shares tends to exclude bank shares. There is no evidence that he intended to include the bank share under the term "bond." If he had intended to include the bank share in the fourth clause he would naturally have mentioned it in connection with the railroad shares. Neither notes nor money are bonds or shares within the meaning of the will. The question then is: Are the notes, money and bank share included in the third clause? They are personal property and might pass as such under this part of the will if such was the intention of the testator. He bequeaths "every article of household furniture in or on said premises, including piano, books, minerals, shells and curiosities." Whether a piano is household furniture is a question of fact. *Sumner v. Blakslee*, 59 N. H. 242. Hence, to remove any doubt as to his intention the testator mentioned it, and he probably mentioned books, minerals, shells and curiosities because he thought they might not pass as furniture. But the testator added, "and every other article of personal property in and about said homestead, or wherever found belonging to my estate." This language would include family stores, carriages, live stock, farming tools and other chattels, in addition to those previously mentioned. The rule *ejusdem generis*, so far as it aids in the construction of this will, forbids the construction contended for by Mrs. Benton. Ordinarily it limits the meaning of general words to things of the same class as those enumerated under them. 1 Jarman on Wills, 716; *Sumner v. Blakslee*, 59 N. H. 242. The testator's careful use of language in the disposition of his household goods and other chattels, probably of much less value than the money, bank share and notes, is strong evidence that he would not have left his intention as to this portion of his estate (of the value of more than \$5,000), to be inferred from such terms as "every other article of personal property in and about said homestead or wherever found." No satisfactory reason appears why he should mention books, minerals, shells and curiosities, which would pass under the general description used, and omit to mention the bank share, money and notes.

The construction contended for by the residuary legatees is strengthened by the fact that legacies to the amount of \$1,700 are payable during the life of Mrs. Benton. If the construction contended for by her is correct, there is no estate undisposed of by the will from which those legacies, or the debts, expenses of administration, or personal charges, can be paid during her life. Our conclusion is that she does not take the bank share, money or notes under the third or fourth clauses of the will. This part of the estate goes to the residuary legatees upon the final settlement of the estate, after the death of Mrs. Benton, subject to the payment of the specific legacies, debts, etc. Under the third clause she takes only the household furniture, piano, books, minerals, shells, curiosities and other chattels not otherwise disposed of by the will. She should join with her co-executor in returning an inventory of all the estate except what she takes under the third clause.

Case discharged.

BLODGETT, J., did not sit; the others concurred.

SUPREME COURT OF VERMONT.

BROCK v. TOWN OF BARNET.

October, 1884.

HIGHWAY — PENT ROAD — WAIVER — MORTGAGE — R. L., § 2932.

Selectmen can lay out a pent road for winter use over one man's land to another man's wood lot, although it is laid for the special convenience of the owner of such lot. The road may terminate at the farm line of such owner, instead of being extended to his buildings.

The fact that one of the petitioners was not a freeholder does not affect the action of the selectmen in establishing the road.

When notice has been given, and a party appears before selectmen on a question of laying a highway, and makes no objection to the sufficiency of the notice, he waives the objection.

When a road is established over mortgaged premises, the statute—R. L., § 2932—affords ample remedy to the mortgagees.

Petition for the discontinuance of a highway. Heard on commissioner's report. Report accepted, and petition dismissed.

It appeared that in March, 1877, William Carrick and three others petitioned the selectmen to lay out the way in question, and that in a short time it was laid out.

The following is a description, in part, of the way established:

"Said right of way is to be one rod wide, eight feet three inches on each side of the above-described course, subject to bars at both ends; and not to be used as a right of way in spring after the ground is in suitable condition to receive a crop, and to remain inaccessible as such until after the crop is harvested."

On December 27, 1879, the said Carrick and two others petitioned the selectmen to change the survey and location of the said way. On the 29th of the same month there was a hearing by the selectmen as to this petition, and the request of the petitioners was granted; and the way was ordered to be opened on the 30th day of the same month; and said Brock was notified to remove his obstruction on that day. There were two petitions,—one signed by said Brock, and one by said Brock and three others,—praying for the discontinuance of the said way. The commissioners reported, in part:

"That the road in question extends from the south-west corner of Carrick's farm, across Brock's field to a barway upon the highway leading past Brock's house; that the said road in controversy does not extend easterly beyond the division line between said farms, and does not at its easterly terminus connect with any public highway; and said easterly terminus is fifty-four rods from Carrick's farm buildings; that Carrick in going from his house to his wood lot and pasture by public highway, and not over the road in controversy, goes to the Centre meeting-house, and thence past Brock's house and said barway; and by this route the distance from said Carrick's house to said barway is four hundred and forty-seven and one-third rods, over a hilly road; that Carrick in going to his wood lot and pasture by the road in controversy, goes fifty-four rods across his own field and then thirty-one rods over said road in controversy to said barway, and the surface is comparatively smooth, and there is not much hill or grade, thus by this route saving one mile forty-two and one-third rods in distance, and getting a better road; that Carrick hauls his wood from and makes his sugar upon said wood lot; that Carrick is the only person who travels and uses said road in controversy to any extent, and he uses it only in going to and from said wood lot and pasture; that he has purchased said wood lot and pasture, since he has resided on his said farm and before said road in controversy was laid out; that said road in controversy was laid out for his individual convenience, and he advanced to the town of Barnet the sum awarded Brock for land damages, which sum was tendered to, but has never been received by, said Brock.

"We find that Gilman, who signed the original petition upon which the selectmen altered the road in controversy, was not, when he signed the petition and

when the alteration was made, a freeholder in the town of Barnet; that the written notice upon the hearing of that petition on December 29, 1879, was delivered to Lucius Brock on December 27, 1879, and a verbal notice was given to him by one of the selectmen on December 28, 1879; that he received no other notice of said hearing; that at the time of hearing, Brock forbade any action about said road in controversy, but took no other part in that hearing; that when said road was altered, the time fixed for vacating the land was not fixed with Brock's consent. The only obstruction was a single length of fence across a culvert.

"We further find, that in 1878 the petitioner brought a petition for the discontinuance of this same road; that the selectmen refused to discontinue it; that he then petitioned the county court for the appointment of commissioners, who were appointed, examined the road, heard the parties, and reported to the court that the road ought not to be discontinued; the report was accepted, the petition dismissed, the cause passed to supreme court, and judgment there affirmed, but without any hearing."

It also appeared that the land, over which the way was laid, was mortgaged; that the mortgage had been assigned, and no record of the assignment had been made, but one of the selectmen who made the alteration knew that the assignee was the owner of the mortgage, and that no notice was given to the assignee.

Pitkin & Huss, for petitioners. *Belden & Ide* and *Safford*, for defendants.

ROWELL, J. If the selectmen had authority to lay this road in the first instance for the convenience of a single individual, the commissioners think it ought not to be discontinued.

We shall not enter into an extended discussion of this question, for upon the facts reported we think we cannot say that this was a taking of private property for private use without the consent of the owner, as is contended.

Though the way was laid out for Carrick's special convenience, yet it is a public way, and Carrick has no right in it nor control over it except in common with the rest of the public, and the easement therein is exactly the same that it is in all other ways laid out by public authority.

It is objected that the public can have no beneficial use of this way because it leads to nowhere from the highway with which it intersects, but stops at Carrick's farm line, fifty-four rods from his farm buildings. But pent roads are frequently laid only to the land of the persons to be specially accommodated thereby, while they construct connecting ways across their own land, and thus secure the needed outlets; and we think that the laid-out portions of such ways are a part that towns may lawfully supply without supplying the whole way.

The petitioners rely on *Waddell's Appeal*, 84 Penn. St. 90. But that was a case of a mere private way, not connected with any public way, laid under a statute purporting to authorize the laying of private ways; and the court held the act unconstitutional. There are such cases in many of the States, arising under similar statutes; but they are not in point. *Denham v. County Commissioners*, 108 Mass. 202; *Paine v. Leicester*, 22 Vt. 44; *Loveland v. Berlin*, 27 id. 718.

That one of the three petitioners for the alteration of said highway was not a freeholder does not vitiate such alteration. The statute that three or more freeholders may petition to have a highway laid out, altered, or discontinued, was designed to afford a mode of *compelling* action by the selectmen; but they *may* act without a petition, or upon an improper one, and have their action good, for their *action* is the vital thing, however induced.

That Brock did not have sufficient notice in the respect complained of, was dilatory matter; and when he appeared before the selectmen and objected to any action by them, but did not object for want of sufficient notice, he must be deemed to have waived that objection.

The holder of the mortgage has ample remedy for the enforcement of whatever rights he has under section 2982, R. L. *Slicer v. Hyde Park*, 55 Vt. 481.

Judgments affirmed.

QUINN v. HALBERT.

October, 1884.

PRACTICE—DISCRETION OF COURT IN ORGANIZING JURY—ATTACHING CREDITOR—FRAUD—DECLARATIONS OF CONFEDERATE—EVIDENCE—R. L., § 816.

When the court adjourned the first day eleven jurors had been accepted, but five of these were talesmen; on the next day, another panel being present, the court discharged the eleven, commenced *de novo*, and formed a panel from those regularly in attendance. *Held*, that there was no error; that the discretion of the court was reasonably exercised.

A stenographer's transcript of testimony given on a former trial of the same case by a deceased witness is admissible, although the witness was dumb, and the signs made by him were described by the stenographer in words. It was for the jury to determine how much the manner of the reproduction of such evidence lessened its weight.

The goods in question had been owned by D., the execution debtor, and were attached in his possession by the defendant as sheriff. The plaintiff's intestate replevied them, and claimed that he purchased them of D.'s assignee in bankruptcy, and that he employed D. to sell them as his agent. The defendant claimed that the intestate and D. had collusively combined to defraud his creditors, and had given evidence that they strongly supported this claim. *Held*, that the acts and declarations of D. while they were carrying out the scheme; what D. said when in possession and selling the goods, namely, that he was the owner; what he admitted was a fact, on an attempt to compromise this suit, that he was the owner of a claim held by the intestate against his estate, and entitled to the dividends; a receipt for \$2,000 given by the intestate to D.'s wife just before the bankruptcy proceeding; the fact that D. made unusually large purchases of goods immediately preceding his failure; his letter to a creditor announcing his inability to pay, were admissible in favor of the defendant; and this is so, although the parties represented by the defendant became creditors of D. subsequently to his bankruptcy. But, a letter written by D. to a third party after the consummation of the fraud would not be admissible. The facts, that the intestate procured the goods to be insured, that he frequently visited the store, that the word "agent" was on the sign, were admissible in favor of the plaintiff. The court should have instructed the jury, that the fact that D. deposited \$500 to secure the intestate against costs of this suit was evidence of fraud, and that they should weigh it with the other evidence, and determine whether fraud was proven. It was for the court to say what the fact tended to prove, and the jury, what it did prove.

Replevin for a quantity of clothing. Trial by jury, Sept. term, Franklin county, 1883. Judgment for plaintiff.

See this case, reported in 52 Vt. 353, and 55 id. 224, where the facts with those in the opinion are chiefly stated. Doran's bankruptcy occurred in December, 1877, and he was adjudged a bankrupt soon after. The goods in question were attached in October, 1878.

The defendant offered to prove by the witness, Peat, that in the winter of 1880-1, when a suit had been brought to recover the pay for some of the goods which had been sold, Doran told him that he had to bring the suit "in the name of Quinn, although the goods were his,—Doran's." The defendant also offered to prove that "between the 1st of September, 1877, and December 17, 1877, that he [Doran] purchased \$7,500 of goods, and put them into the store; that he purchased more than double—nearly treble—of what he had in any other three months of any other year he had been in business." The receipt for \$2,000 given by Quinn to Mrs. Doran was dated December 25, 1877. The letter, exhibit E, announcing Doran's insolvency, was dated December 27, 1877. The receipt and letter were offered in evidence; but all of said offers were rejected by the court. The letter to Hawley, Folsom & Martin was dated at Canton, Ohio, September 7, 1881.

Mr. Farrington said to the court in offering the receipt and the testimony in connection with it:

"We offer to show in connection with the receipt that Mr. and Mrs. Doran stated in the winter or spring of 1878, after he was adjudged a bankrupt, that they had no property, had no money, no notes, had nothing due them other than stated in their schedules, or what they had turned over"....."That this receipt was taken up by Mr. Albert Sowles but a short time—two or three days—before Mr. Doran left; that Doran came to Mr. Sowles with the receipt; talked with him about it; and that Mr. Sowles paid over \$1,000 upon that receipt, and gave his due bill for the balance; and that subsequently that amount has been

paid by Mr. Sowles, and he holds it to-day, and has proved it against the estate of James Quinn."

The defendant's thirteenth request was: "That there is no testimony tending to show but that Quinn had been paid the full amount that he paid for the goods, and hence the title of the goods is in William Doran."

Farrington & Post, H. R. Start, Wilson & Hall, and G. A. Ballard, for defendant. *H. S. Royce, F. W. McGettrick, and Noble & Smith*, for plaintiffs.

TAFT, J. The first question in this cause arose upon impaneling the jury. When court adjourned the first day of the trial, eleven jurors had been accepted, six of the regular panel, and five talesmen. When it commenced the second day, a panel who were out on the first were present, and the eleven accepted jurors were discharged, and a panel selected from those regularly in attendance. The defendant excepted to the order of the court discharging the eleven jurors; and the question presented is, was such order error?

It is a settled rule of practice, that some prejudice to the excepting party resulting from rulings of the court below in organizing the jury, or, at least, some infringement of the statutory provisions relating thereto, must be shown before this court will revise the proceedings of the trial court. It is within the discretion of the court to direct the clerk in calling a panel to omit the names of such jurors as are presumably disqualified or unable to serve; for example, such as have been present and listened to a former trial of the same cause, or a trial involving the same questions; those ill or whose family are; and many other instances that might be named. A wide discretion is allowed the court in such cases; and until a panel is complete, we think a party has no vested right in any particular juror that may not be taken from him should the exigencies of the discretion of the court require it. Thompson and Merriam on Juries, § 271, say: "So far as the formation of the jury is concerned, the litigant parties have a constitutional right to demand that it shall be impartial; but this right is not impaired by the exclusion of jurors, though never so impartial, so long as impartial ones remain and try the case. And it has been pertinently asked, what advantage would accrue to a party, should a new trial be awarded, because of the exclusion of competent jurors in his case? Obviously the only effect of granting the motion would be to take the verdict of another impartial jury. Upon the new trial he could not demand that the jurors of whose exclusion he complains should sit in the case. He has therefore suffered no injury, nor, in the eye of the law could he be possibly benefited by another trial. This view of the law does not permit a trial judge to exclude competent jurors arbitrarily and unreasonably from participating in the trial of a cause, civil or criminal. Whenever it shall appear that the court has thus abused its discretion, a new trial will doubtless be granted." In *Phelps v. Hall*, 2 Tyler, 401, the court say that: "No occasion can occur to render it necessary for one juror to sit on the panel in preference to another." We think the discretion of the court below, in the case at bar, reasonably exercised. An unusual number of talesmen were upon the panel, the regular jurors were in attendance, the trial was to occupy several days; and it was much better that the regular jurors should try the case and the expense of talesmen avoided, than to retain the latter upon the panel; and as some question might arise as to the challenges, and in fact did, it was not unwise to discharge the six regular jurors and begin *de novo*. It does not appear but that the six, who were so discharged, were subsequently drawn. It is likely some of them were; and as the defendant has already had all that he is now seeking—a trial by an impartial jury—his exception to the ruling upon this question should not be sustained.

II. Was the transcript of Quinn's testimony admissible? While there is force in the suggestions of the defendant's counsel, we think that section 816 of the Revised Laws makes it evidence, although the stenographer described in words signs made by the witness. What his testimony was upon the former trial could have been shown by witnesses who have heard it. See cases cited in Roberts' Digest, 285. And the signs made by the witness are no doubt as well described by the stenographer, in his transcript, as they would have been by witnesses on the stand.

I take this occasion to note the dissent which I expressed in consultation at the former hearing, from the conclusion of the court, that Quinn was a competent witness. The fact appeared that he was not and could not have been cross-examined. Thus the defendant was deprived of one of the two great tests of the truth of a witness, viz.: a cross-examination. I should, therefore, have excluded his whole testimony, but the court held otherwise, and the statute makes a transcript made by the stenographer evidence.

The defendant was not entitled to a compliance with his request that the manner of its reproduction *materially* lessened the weight to be given his testimony. It would have been proper for the court to have told the jury that it should have been considered by them in determining that question. How much it lessened its weight was a question for them, not for the court.

III. Doran became a bankrupt in December, 1877. In March afterward his assignee sold a stock of ready-made clothing, belonging to the estate, to the plaintiff's intestate, Quinn. It is claimed by the defendant that the goods in question were a part of said stock; that the sale to Quinn was a mere sham or cover; that it was really made to Doran; that he and Quinn confederated in causing it to be made in the name of Quinn to prevent their attachment by Doran's creditors. And there was strong evidence in the case tending to support such claims, *i. e.*, tending to show that Doran was the active, and substantially the sole, participant in the purchase, control, management and disposition of the goods. No books were kept, no account of the sales made, Doran borrowed of Quinn, money to replenish the stock, no settlement was ever made between them; the goods remaining unsold were taken off by Doran in the spring of 1881, and some other facts of like tendency.

If the defendant could satisfy the jury that Quinn and Doran had conspired in the matter, and that the sale to Quinn was a sham and cover, then the acts and declarations of Doran while they were engaged in carrying out their scheme were admissible against Quinn. Having given testimony tending to establish the conspiracy, it was error to reject the testimony of the witness, Peat, of the declarations of Doran, while engaged in selling the goods. *State v. Thibault*, 30 Vt. 100; *Jenne v. Joslyn*, 41 id. 478; *Lincoln v. Clafin*, 7 Wall. 182. The letter to Hawley, Folsom & Martin, written after the consummation of the scheme, was not admissible against Quinn. Only those declarations are admissible against other co-conspirators that are made while the common design is being carried out.

Quinn held a claim against Doran's estate based on two notes given for \$2,200, and the defendant offered to show the declarations of Doran that he was the owner of the claim and entitled to the dividends. The declarations were made upon an occasion when a compromise of this suit was attempted. If material it was admissible notwithstanding the attempted compromise, it being a fact admitted because it *was* a fact. *Doon v. Ravey*, 49 Vt. 298. This testimony was excluded, together with that offered in connection with exhibit F, the receipt for \$2,000 given by Quinn to Mrs. Doran at the time of the bankrupt proceedings in December, 1877; the testimony as to the purchases and sales just prior to the bankruptcy in 1877, and exhibit E, the letter announcing Doran's insolvency. These acts and declarations of Doran are admissible in any suit against him. Whether they were admissible upon the trial below against Quinn depended upon whether there was evidence in the case of a conspiracy between Quinn and Doran at the time the acts were done and the declarations made. We think the evidence did tend to show a combination between them as early as the fall of 1877 to prevent Doran's creditors receiving their pay, and that it existed until the goods unsold were carried off by Doran in the year 1881.

There can be no doubt as to the evidence tending to show an intent on the part of Doran to defraud his creditors; and the fact, if established, that Quinn presented large claims against the estate and at the same time held \$2,000 of the money of Doran, which was not offset against his claims and its existence kept concealed, we think had a strong tendency to show a like intent on the part of Quinn, and a confederacy between them; in fact, there was evidence tending to show an intent on the part of both to defraud Doran's creditors at the time of the bankruptcy, and those who became creditors subsequently; so the acts and

declarations of one became admissible against the other. In *Bigelow on Fraud*, 484, it is said: "Slight evidence of collusion or concert is sufficient to let in the declarations of one of the parties as evidence against all, though not made in the presence of each other; but there must be some evidence of the combination. Such may be inferred, for example, from the relation and conduct of the parties, and the circumstances surrounding them." Although the parties represented by the defendant were not creditors of the estate, but became creditors of Doran subsequently, we think the proceedings of Quinn and Doran may be regarded as one continuous act, they having one common design and one object, viz.: the defrauding of Doran's creditors, his then creditors as well as subsequent ones. It is true the receipt of Quinn was given to Mrs. Doran; but the claim and offer of the defendant was to show that it was in fact Mr. Doran's. The testimony tending to show the collusion of the parties to defraud the creditors in the fall of 1877, and until the goods were carried away became material, and should have been admitted, and consequently the acts and declarations of Doran during the same time.

The testimony as to the insurance policies, Quinn's frequent visit to the store, and the word "agent" being on the sign, was properly admitted under the opinion in this case, as reported in 55 Vt. 224.

IV. The defendant requested the court to charge the jury, *first*, that if Doran deposited \$500 to secure Quinn against damages or costs in this suit, and there was evidence tending to show that he did, that it was evidence to be weighed by them as tending to show collusion in respect to the goods in question. Quinn claimed the goods and brought this suit to recover them; and the fact that indemnity was given him by Doran to secure him against an adverse result of the suit had a tendency to show that the goods were Doran's, not Quinn's, and, as we understand, the evidence was admitted for that purpose. At the same time it might have been consistent with Quinn's having but a limited interest in the goods, that he held them as security for a sum less than their value, and Doran under an obligation to protect Quinn against loss, the latter having taken the goods as security for the amount he had advanced to buy them of the assignee; or consistent with Quinn's having sold them conditionally to Doran.

The court should not have told the jury that it was for them "to say what it (Doran's depositing the \$500 to secure Quinn) tends to show," and to weigh it upon the question of fraud, if they thought it had any tendency to show it. The court said: "Whether it is any evidence of fraud in the original transaction or not is a question for the jury to consider." Whether it was *any* evidence was for the court; what weight should be given it was for the jury. The jury should have been told that it *was* evidence of fraud, and that they should weigh it with all the other evidence in the case, and determine whether fraud was proven, or whether Quinn still had an interest in the goods, either an absolute or conditional one.

The fourth, fifth, and seventh requests were fully complied with; and the defendant was not entitled to a compliance with the thirteenth, as Quinn's own testimony and exhibits in the case tended to show that he had not been paid in full for the goods. No other questions have been made in the case.

The judgment is reversed, and cause remanded for a new trial.

FRENCH v. HOLT.

October, 1884.

JUSTICE OF PEACE — JURISDICTION OF TRESPASS ON FREEHOLD — CASE — PLEADING — WAIVER — AMENDMENT — R. L., §§ 821, 912.

Under the statute — §§ 821, 912 — a justice of the peace has not jurisdiction in an action on the case, where the title to land is concerned, although the count be joined with one in trespass on the freehold, and the sum in demand does not exceed \$20. When a justice has jurisdiction of only the count in trespass, he cannot amend himself into jurisdiction by striking out the count in case.

A jurisdictional question can be raised at any time. Nor does a party waive his right to raise it in the county court by pleading to issue in the justice court after his motion to dismiss had been overruled.

Trespass and case. Heard on motion to dismiss, May term, 1880, Windsor county. Motion sustained.

The case is an appeal from a justice court. The substance of the motion was, that the justice had not jurisdiction, because the title to land was concerned. The first count was in trespass, alleging "that the said defendant, etc., broke and entered the plaintiff's close, and tore down and left open the plaintiff's gate, and with cattle and horses trampled down, etc., the grass, crops, and herbage of the said plaintiff," etc. The second count was in case, alleging that there was a pent road "running through the farm and lands leased and occupied by the plaintiff, across which road there had been gates erected in accordance with the provisions of the General Statutes of the State of Vermont in such case made and provided, and the plaintiff avers that the defendant willfully left said gate open, so that the beasts of the plaintiff passed through into the tilled fields of the plaintiff, and damaged, eat up, and destroyed his said crops, then and there growing, of great value, to-wit, \$10, and the plaintiff was put to great expense, to-wit, \$10, in running after said beasts, and shutting said gate, and was subjected to great loss of time in and by reason of the willful acts of the defendant."

The case was set for trial on the 14th day of September, 1878, but was continued to the 21st day of the same month, when the defendant's counsel before trial filed a written motion to dismiss the suit for the reason that the justice had not jurisdiction. Against the defendant's objection, the plaintiff was allowed to withdraw the second count, and a trial by jury was had on the first count. The jury returned a verdict for the plaintiff.

Norman Paul, for plaintiff. *Gilbert A. Davis*, for defendant.

ROWELL, J. A majority of the court think this judgment should be affirmed.

The second count is in case both in form and substance. The thing complained of is, that defendant "willfully left said gate open." It is not alleged that he opened it, and no such inference can properly be drawn from the allegation that he left it open. It may as well be inferred that in traveling the way he found and left it open, or lawfully opened it to pass through and omitted to shut it. In any view he is charged with a mere nonfeasance, and a mere nonfeasance is not a trespass, and will not make one a trespasser *ab initio* even though it consists in the abuse of an authority given by law. *Stoughton v. Mott*, 25 Vt. 668; *REDFIELD C. J.*, in *Stone v. Knapp*, 29 id. 501. Trespass lies only for immediate injuries committed with force, actual or implied; and an injury is considered immediate when the act complained of, and not merely its consequences, occasions it. 1 Chit. Pl. 126. But here the injury complained of, was not the immediate but the mediate result of the omission complained of.

The count goes for damage to crops growing on plaintiff's land, and on the general issue pleaded to it, plaintiff would be put to the proof of title to land in order to make a case; and although proof of a possessory title might be sufficient, even that would oust the justice of jurisdiction were this the only count in the declaration; for it is not left to be determined by the pleadings subsequent to the declaration whether the justice has jurisdiction, but whenever the declaration is of such a character that, under the general issue or any other plea that puts the plaintiff to the necessity of proving the declaration, he is bound either to prove or disprove a title to land, the justice has no jurisdiction. *POLAND, C. J.*, in *Ike-way v. Barrett*, 88 Vt. 316; *French v. Holt*, 51 id. 544. This last case was between these same parties for the statutory penalty for leaving this gate open, thereby exposing plaintiff's lands and crops to damage, and it was held that the justice had no jurisdiction, as the title to land was concerned. The case before us is not distinguishable from that in this respect.

But it is said that although this count may be in case and the title to land concerned, yet it may be joined with the first count, as both are for the same cause of action, and section 912, R. L., provides for the joinder of trespass and case when for the same cause of action. Conceding that both counts are for the same cause of action, which is not decided, then they cannot be joined, for section 821 expressly excepts from the jurisdiction of justices all actions in which the title to land is concerned except trespass on the freehold in which the sum demanded does not

exceed \$20; and to warrant a joinder under section 912, the court must otherwise have jurisdiction of both forms of action in the concrete case. To hold differently would be to partly repeal by implication said exception in section 821, a kind of repeal that is not favored in law, and is never held unless the subsequent statute is so inconsistent with the former that both cannot stand together. But here both may stand together, and the view here taken leaves both operative. Hence, the justice had no jurisdiction, and he could not amend himself into jurisdiction by striking out the count in case. *Chadwick v. Batchelder*, 46 Vt. 724. Nor by pleading to issue in the justice court after his motion to dismiss was overruled did the defendant waive his right to object in the county court for want of jurisdiction. That the court has no jurisdiction of the action may be objected at any time; it is not dilatory matter, which is waived if not objected at the first opportunity. Cases *passim*.

Judgment affirmed.

ROSS, J., *dissenting*. I am unable to concur in the decision by the majority of the court. I think an inspection of the two counts renders it manifest that the subject-matter in controversy is the same in both counts,— the wrongful allowing the plaintiff's cattle to enter his tilled fields and do damage there, either by willfully opening and leaving open the gate across the pent road, when the defendant had no lawful occasion to pass through the gate, as alleged in substance in the first count; or having lawful occasion to pass through the gate, and so lawfully opening and then willfully and wrongfully leaving said gate open. In either case the plaintiff's tilled fields were exposed to, and damaged by, his cattle from the adjoining pasture. That more special damages are set forth in the second count than in the first does not make the cause of action counted upon different. The pleader being in doubt in regard to his proof, whether it would show a wrongful opening of the gate, or only a willful and unlawful leaving of the gate open, used the two counts, that his declaration might be adapted to and be supported by his proof. The Justice Jurisdiction Act — § 821, R. L. — in force, when in 1856 the act — § 912, R. L. — allowing counts in case to be joined with counts in trespass, when for the same cause of action, was passed, gives a justice jurisdiction of actions of trespass upon the freehold when the damages demanded do not exceed \$20. To the extent that the title to land might be involved in actions of trespass on the freehold where the sum demanded does not exceed \$20, the act confers jurisdiction upon a justice of the peace to try actions involving the title to land. The act of 1856 is not restricted by its language to actions in the county court, but is broad enough to authorize the joining of such counts in whatever jurisdiction the cause might be pending. It is of a highly remedial nature, intended to avoid the difficulty, often experienced by expert pleaders, in adapting the count or form of action to the proof, and so to avoid a failure of justice through a technicality in pleading. I think the act of 1856 was intended, and should apply as broadly to causes over which section 821 confers jurisdiction upon a justice of the peace, as to actions in the county court. In my judgment this construction of the act of 1856 does not enlarge the jurisdiction of the justice of the peace, but simply gives him the right to try in a count on the case if his proof should fail to show a direct injury or trespass, what he could before try in a count in trespass if the proof showed the injury to be direct, instead of consequential; that is, to try a case that might involve the title to land in a count in case, wherever he could try it in a count in trespass. In my judgment, the decision unwarrantably limits the beneficial scope of the act of 1856. I should reverse the judgment of the county court, and hold that the counts were properly joined.

HAMMOND v. NOBLE.

October, 1884.

BANKRUPTCY — DEBT CREATED BY FRAUD — U. S. R. S., § 5117 — CONSTRUCTIVE FRAUD — JUROR PRESUMED COMPETENT.

The plaintiffs, as an accommodation to themselves, gave an order to the defendant directing their debtor to pay him what was due them. He collected and used the money by mingling it with his own; and in a few days afterward was adjudged a bankrupt. After his discharge, in an action to recover the money, the court below found that there was no evidence tending to show actual fraud or fraudulent intent. The plaintiffs testified that when the order was given they told him "to keep the money until they called for it." The defendant testified that they told him "to keep and use the money until they called for it." The jury found that the plaintiffs were right as to the instructions given.

Held, that the defendant's duty was that of a bailee without hire; that his use of the money was a conversion of it, and a fraudulent act; that the debt was "created by fraud," within the meaning of the Bankrupt Act — U. S. R. S., § 5117 — and not discharged.

Evidence was not admissible to show the cause and manner of the defendant's failure, for the purpose of proving that there was no fraud.

It is presumed that a juror is competent until the contrary is proved.

General assumption. Plea, the general issue, and notice of special matter. Trial by jury, April term, 1880, Franklin county. Verdict for the plaintiffs. The head-note states the case.

Noble & Smith and *A. P. Cross* for defendant. *H. C. Adams* and *R. H. Start* for plaintiffs.

Ross, J. The plaintiffs testified that they told the defendant, upon the occasion when they gave him the order on the railroad company, "to keep the money until they called for it." The defendant testified that they told him "to keep and use the money until they called for it." The jury found that the plaintiffs were right in regard to the instruction given by them to the defendant on that occasion. In view of these claims and the verdict, it must be held as settled by the verdict that, under the instructions, the defendant had no right to use the money; but that he was to keep the identical money received from the railroad company on the order for the plaintiffs; that he was to hold the money collected as the property of the plaintiffs. Instead of obeying the instructions, he used the money, by mingling it with his own, and depositing it in his own name, and to his credit in the bank. He thereby converted the plaintiff's property to his own use. By the conversion, and the unexpected revulsion in his business, the money was lost to the plaintiffs. The contention is, whether the indebtedness thus created was discharged by the defendant's composition in bankruptcy. The composition in this respect was just as effectual, and no more so, than a regular discharge in bankruptcy would have been. *Scott v. Olmstead*, 52 Vt. 211.

It is enacted by section 5117, U. S. R. S.: "No debt created by fraud, or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy." To avoid the effect of the composition proceedings, it is incumbent upon the plaintiffs to show that the debt which they are seeking to enforce was created in one of the ways named in the above-quoted section. It is not contended that it was created by embezzlement, or by the defendant's defalcation as a public officer. The construction placed upon the last clause of this section, "or while acting in any fiduciary character," by the United States supreme court, in *Hennequin v. Clews*, 111 U. S. 676, is that this clause relates back to the preceding clause, and includes only debts created by defalcation while acting in a fiduciary character; in other words, that there must be a trust relation established independent of the transaction out of which the indebtedness arose. Being an United States statute, the construction placed upon it by the United States supreme court is binding upon this court. The learned judge who delivered the opinion admitted that the construction was contrary to a majority of the decisions of other courts in regard to this clause of the section, as well as to the decisions of the English court in regard to a similar provision in the English Bankrupt Act. But the decision finds support from the decision of the United States supreme court in regard to a similar provision in the Bankrupt Act of 1841. *Chapman v. Forsyth*,

2 How. 202. The county court, in its charge to the jury, placed the case on the ground that it came within the fiduciary clause of the above quoted section. Although this was technical error, it was harmless, if the verdict of the jury brings it within the first, or fraud, clause of the section. On the verdict, it is within this clause under the decisions of this court in *Johnson v. Worden*, 47 Vt. 457, and *Darling v. Woodward*, 54 id. 101.

In each of these cases the defendant had converted to his own use, without the consent of the plaintiff, property which was in his possession, but which he held under the contract between him and the plaintiff, as collateral security for a debt which he owed the plaintiff. In *Johnson v. Worden*, the property, thus held and converted, was a yoke of oxen conditionally sold by the plaintiff to the defendant; and, in *Darling v. Woodward*, the property was twenty-nine sheep, of which the defendant had given the plaintiff a bill of sale as collateral security for signing a bank note. Before the note was paid, the defendant, who had always retained possession of the sheep, sold them. The court held that the debts, thus created, were debts created by fraud, and not discharged by the respective discharges of the defendants in bankruptcy. From the circumstances attending the transactions in both cases, it may well be inferred that the defendants intended no wrong to the plaintiffs by such sales, further than what arises from the sales, but supposed they should be able to meet the indebtedness for the payment of which the property was pledged, when it became due. But each was guilty of converting or using property, which, as between him and the plaintiff, he had no right to use in that way; and such use operated to deprive the plaintiff of his right thereto. No debt, in regard to such sheep or oxen, existed between the respective parties to the suits until such sale and conversion of the property by the defendant. The debts thereby created were held to have been created by active fraud. In the case at bar, the money collected was the money of the plaintiffs. The defendant, under the instruction found to have been given by the plaintiffs by the verdict of the jury, had no moral nor legal right to use the money. His duty was that of a bailee, without hire, to keep it. While he discharged this duty, he was not the debtor of the plaintiffs in respect to the money. He only became their debtor when he wrongfully used the money. By using it, although he then intended to repay it to the plaintiffs, and felt that he was fully able to do so, he wrongfully deprived the plaintiffs of their property, and subjected them, by his voluntary, intentional act, to the liability of losing the same. He substituted his individual ability to respond in damages for property which belonged to the plaintiffs. Standing in the same relation to the money which the defendants in *Johnson v. Worden*, and in *Darling v. Woodward*, *supra*, did to the oxen and sheep; he, like them, wrongfully and intentionally used the property intrusted to him to the detriment and loss of the plaintiffs. In principle, the case at bar cannot be distinguished from the cases just cited. The decisions in those cases control the decision in this case. It is contended that inasmuch as the exceptions state "there was no evidence tending to show any actual fraud or any fraudulent intent in the defendant's mingling the money with his own and using it," that no actual fraud can be found in the transaction. But this statement follows the statement that the defendant, on collecting the money, immediately mingled it with his own and used it. This of itself, as we have seen, was a wrongful and fraudulent act, which changed the relation of the defendant to the money from that of a bailee to that of a debtor. On the verdict, the debt thus created was not different in moral quality from that created by a clerk who, without consent or authority, uses his employer's money, or of a treasurer of a corporation who, in like manner, uses the money of the corporation,—each, at the time, intending and honestly supposing they were, and should be, able shortly to return the same, but who by losses, perhaps arising in the use of the money, find themselves bankrupts, and so defaulters. On this construction of the exceptions it is not contended that the case of *Neal v. Clark*, 95 U. S. 704, in which it is held, that the fraud, to avoid the effect of a discharge in bankruptcy, must be *actual fraud*, in distinction from constructive fraud, is in conflict with the decisions of this court on that subject. The facts in *Neal v. Clark* show a clear case of constructive or implied fraud, involving no imputation of bad faith, moral turpitude, or intentional wrong. In

the case at bar there was bad faith, a betrayal by the defendant of the trust the plaintiffs had reposed in him, and an intentional act that was legally wrong. The debt thus created was not discharged by the defendant's composition with his creditors under the provisions of the Bankrupt Act of 1867.

The court properly excluded the offered evidence. The scope of that testimony was to show that, at the time the defendant committed the wrong, and thereby created the debt, he honestly supposed that he was amply able financially to repair the wrong, but unexpectedly found that he could not do so. It did not tend to change, in law, the character of the act out of which the debt arose.

The result is no error working injury is found in the trial and judgment of the county court, and that judgment is affirmed.

The defendant has preferred a petition for a new trial, on the ground that one of the jurors who tried the case was an alien, incompetent to act in that capacity, and that such incompetency was unknown to him, or his counsel, until after the rendition of the judgment in the county court. It is incumbent on the defendant to establish such alienage. The incompetency of the juror will be presumed until the contrary is shown. *Keenan v. Stata*, 8 Wis. 132. To establish the incompetency, the petitioner has introduced as witnesses the juror and his uncle. The uncle testifies that he judges from the time at which he was told by his grandmother that his grandfather came to Canada, that the juror's father was born in Canada. The juror testifies that he has understood that he was born in Canada, but never was told so by his father or mother, or any near relative that he can name, but was told by his father that he (the father) was born in Dutchess county, New York. It is contended by the plaintiffs, the petitioners, that hearsay, or common reputation among family connections who may be supposed to know, while admissible to establish pedigree, legitimacy and marriage, is not admissible to establish particular facts like the time or place of one's birth. Such is the holding in the cases cited by the plaintiffs' counsel. *King v. Erith*, 8 East, 539; *Wilmington v. Burlington*, 4 Pick. 173; *Union v. Plainfield*, 39 Conn. 563; *Carter v. Montgomery*, 2 Tenn. Ch. 216; *Mima Queen v. Hepburn*, 7 Cranch, 290. In the latter case Chief Justice MARSHALL states the doctrine contended for.

In Wharton on the Law of Evidence, § 208, the law on this subject appears to be carefully stated as follows: "Pedigree includes not merely the relationships of a family, but the dates of the births, deaths and marriages of its members, when the object of such evidence is to trace relationship. Legitimacy is necessarily involved in the scope of such declarations. It has been doubted whether the place of birth can be proved by such declarations. But the better opinion now is, that declarations are admissible to show such place when genealogical questions only are concerned. It is conceded, however, in settlement cases, hearsay proof of this class is inadmissible."

But whatever view is held in regard to the admissibility of such testimony in this proceeding, the testimony fails to establish the incompetency of the juror. All the testimony is to the effect that the grandfather was an American citizen. If the hearsay testimony is excluded, there is no evidence to show that the juror or his father was born in Canada. If the hearsay testimony is admitted, it shows that the juror's father was born and lived most of the time in the States, and if the juror was born in Canada, it was under such circumstances that it was decided, on the testimony of his uncles, that he was a voter in this State without naturalization; in other words, that he was not born an alien. In either view of the law relative to the admissibility of this class of testimony, it fails to establish the alienage of the juror.

The petition is dismissed, with costs.

[See 33 Am. Rep. 641; 46 id. 234; 20 W. Dig. 180; 14 Phila. 208.—Ed.]

STEVENS v. PILLSBURY.

October, 1884.

DEED, CONDITIONAL, BREACH OF — FORFEITURE — DAMAGES — PENALTY — GOOD-WILL — APPURTENANCE — WAIVER.

B. owned two hotels — the Trotter House and the Bliss Hotel — in the same village, and sold the Trotter House to the orator for \$4,250, and at the same time, and as part of the same contract, for the consideration of \$2,500, paid him by the orator, agreed that the Bliss Hotel should never be used for hotel and boarding-house purposes; and as security for this inhibition, conveyed the Bliss Hotel to the orator by deed with covenants of warranty, conditioned that the deed was to be void if the restraint was observed, otherwise in force. After several years the orator went out of the hotel business, and conveyed his hotel, but not his interest under the conditional deed. B., observing the condition so long as he was the owner of the Bliss Hotel, after a few years sold it in parcels; and the several defendants became the owners thereof. Large improvements had been made on the property. There was a clear breach of the condition; but some of the defendants were innocent as to this, and some not. A bill having been brought for a forfeiture of the premises, —

Held, that equity did not require an enforcement of the conditional deed; but that the orator ought to be made whole, and so should recover the \$2,500 — what he paid for the immunity — and interest from the time he demanded the premises.*

He waived the right to recover interest prior to the time of the demand, by not making a demand sooner, although the breaches were of a much earlier date.

The immunity secured by the conditional deed was not an appurtenance to the Trotter House.

Keeping boarders by one occupying a portion of the inhabited premises, also furnishing oysters, cooked and raw, pies, cake, etc., to travelers, was a breach of the condition; but keeping or entertaining of one's friends is not such breach.

Bill in chancery. Heard on bill, answer and testimony, Orange county, December term, 1881. Bill dismissed. The opinion states the facts.

John H. Watson, for orator. *Farnham & Chamberlin*, for defendants.

Ross, J. January 1, 1855, the orator purchased and took a deed of the Trotter House property in Bradford, from Ellis Bliss, for the expressed consideration of \$6,750. He paid Bliss that amount. Bliss had for a number of years been keeping a hotel on premises adjoining the Trotter House property, known as the Bliss Hotel property. He had purchased the Trotter House property the March previous for about \$3,600, and laid out about \$400 in making repairs. As an inducement to the orator to purchase the Trotter House property and pay the price asked, he agreed to close and keep forever closed his own hotel property, for hotel, boarding-house and livery-stable purposes. The orator would not purchase the Trotter House property unless he could be secured from competition in the hotel and livery business upon the Bliss Hotel property, nor unless he could be effectually secured against such competition by a conveyance of the Bliss Hotel property. On the same day he received the conveyance of the Trotter House property, the orator took from Bliss a conveyance by deed, with the usual covenants of warranty, of the Bliss Hotel property, containing the following condition:

"Yet the condition of this deed is such, that if I, the said Ellis Bliss, my heirs, executors, administrators and assigns do and shall hereafter keep and hold the above premises free and clear from all the purposes of a hotel, tavern, inn or boarding-house; also, from all the purposes of livery or livery-stabling, as well the buildings that now are erected thereon, as any and all which shall hereafter be erected thereon, so long as wood grows and water runs, truly and faithfully as to the said Harry B. Stevens, his heirs, executors, administrators and assigns, then and in that case this deed is to be null and void, otherwise in full force and effect."

From the evidence, which does not much conflict, we find that the orator paid \$2,500 for this last conveyance, though the consideration named in the deed is \$4,000; and the Bliss Hotel property was then worth \$3,000 or more. Bliss observed the condition during the time he owned the property, but within a few years sold it in parcels, which, at the time of bringing this bill, were owned by the several defendants. It had been built upon, so that, it is agreed, it was then

* See 33 Hun, 307; 20 W. Dig. 180; 31 Am. Rep. 607; 35 id. 160; 45 N. J. L. 525. — Ed.

worth \$12,000. The bill was served May 23, 1872. The orator, in the bill, sets forth the two purchases and conveyances from Bliss, and alleges that there have been breaches of the condition by several of the subsequent grantees or their tenants, and prays that the land and premises be declared forfeited to the orator, and for an accounting for the rents and profits; and for such other and further relief in the premises as the nature and circumstances of the case may require." Just previously to bringing the bill, the orator in writing notified the defendants of the claimed breaches of the condition and demanded the premises. The defendants by answer deny that there have been any breaches of the condition, and aver that if there has been a technical breach thereof, the orator should not be allowed to wrest from them the premises worth many thousand dollars more than when the deed was given. In 1870 the orator had given a similar verbal notice to the then owners of the property, and brought a suit in ejectment for the recovery of the premises. On the case coming on for trial, and upon the statements of the respective attorneys, Judge PECK continued the case, suggesting that from the statement of the defendants' attorney, he thought there had been a technical forfeiture of the premises, but that equity would probably grant relief by way of compensation. The defendants not moving to bring a bill, the orator brought this bill, and discontinued the ejectment suit. The orator leased the Trotter House property, except the livery-stable, for two years and a half, commencing April 1, 1861, and sold and conveyed them May 6, 1867. The purchaser refused to buy from the orator the rights secured to him by the deed of the Bliss Hotel property. Henry B. Kennedy occupied a portion of the Bliss Hotel property in 1868, 1869 and 1870, and kept more or less boarders during that time. His receipts from this source were about \$800. This was a clear breach of the language of the condition. From about 1861 to the time of bringing the ejectment suit, a portion of the Bliss Hotel property was occupied by Merrill G. Beard and others, for an express office, grocery and eating saloon. They furnished oysters, cooked and raw, pies, cheese, etc., to persons who might call for the same, mostly to people who came to the village to do business from the surrounding country. There were fitted up in one side of the room several stalls where meals of this kind were furnished and eaten. Cooked meats were not furnished to any considerable extent. But quite a business was done by way of feeding teamsters and others, who were stopping in the village for a short time. We think this was also a breach of the condition of the deed. It is one of the purposes of a hotel, tavern, or inn, to furnish meals for that class of persons. If they obtained a meal of oysters, pie, cake and cheese, at the eating saloon, it was serving to them one of the purposes of a hotel, tavern or inn. The language of the condition is very comprehensive, and was intended to cover every case which would tend to withdraw custom from the Trotter House. It forbids any use of the Bliss Hotel property which would have such a tendency. A valuable consideration was paid for the conditional deed; and the condition should be fairly and reasonably construed to effectuate the intention of the parties to it, which was to inhibit any use of the Bliss Hotel property, which would infringe upon the purposes for which the orator was keeping the Trotter House, one of the most prominent of which was furnishing meals for persons who were temporarily in the village. We do not think that the proof clearly establishes that Bagley C. Currier made such use of the barn of the Bliss Hotel property as was a breach of the condition. Most of the testimony is reconcilable with a use of the barn for the friends and acquaintances of said Currier to hitch their teams in -- such a use as any private person makes of his barn. Nor do we think that the keeping of his sons-in-law and their wives and children by Jonathan H. Robinson, on the premises, was a breach of the condition. These sons-in-law and their wives and children were not boarders in the ordinary meaning of that word, but a part of the family. They contributed, as they felt disposed, to the support of the family, but did not regard themselves, nor did Mr. Robinson and his wife regard them, as boarders. Mr. Williams' occupation of the barn for keeping his own horses, and horses that he was training, was not an infringement of the condition in regard to livery or livery-stabling.

I. But admitting these facts the defendants contend that the orator has no

right to recover for any breaches while Witt & Fabyan were keeping the Trotter House, nor since the orator sold in 1867. They contend that the immunity secured by the conditional deed was a privilege or appurtenance of the Trotter House, and passed by the purchaser under his deed, although he refused to buy the same. We do not think that this contention can be sustained. A privilege or appurtenance to a grant is that which is so connected with, and necessary to, the thing granted, that without it the grant itself would not have full effect, according to the maxim, *Cuiusque aliquis quid concedit concedere videtur et in sine quo res ipsa esse non potuit*. Examples are windows, doors, etc., of a building, though temporarily removed, at the time of the conveyance; a right of way over the grantor's land, which wholly surrounds the land conveyed; a visible, plainly marked way in use in connection with the premises conveyed; or a stream of water running to and supplying the premises conveyed, etc. 1 Wash. R. P. 622, 623.

The inhibition, upon the use of the Bliss Hotel property for hotel and livery purposes, was not necessary to the reasonable enjoyment of the Trotter House property for such purposes. It was not necessarily, nor visibly connected with the use of the latter for such purposes. It might make them more valuable, but not more so than it would any other premises properly fitted up and suitably located in the village of Bradford. The inhibition was not peculiar, nor necessary to the use of the Trotter House property for such purposes. Although Bliss owned both premises at the time he conveyed the Trotter House property to the orator, it would not be seriously contended that that conveyance carried with it an inhibition upon the use of the Bliss hotel property for hotel and livery purposes. If it were a privilege or appurtenance of the Trotter House property, it would pass with it upon a conveyance thereof. The conveyance of the Bliss Hotel property was a conditional grant thereof to the orator. Adjacent real estate does not pass as appurtenant to the estate described and granted in the conveyance. 1 Wash. R. P. 623. Moreover, the grant, *habendum*, and condition of the deed are to the orator, his heirs, executors, administrators and assigns. Neither principle, nor the rules of construction, which are but formulæ to ascertain the intention of the parties, will allow the conditional estate created by the deed of the Bliss Hotel property to pass as a privilege or appurtenance to the Trotter House property.

II. The defendants also contend that, admitting the breaches of the condition, the orator can only recover such damages as he can show that he has personally sustained in the business of hotel and livery-stable keeping by reason thereof. By the deed the orator and Bliss made a breach of the condition of the deed, the contingency upon which the grant was to take effect. It is hardly correct to say that a breach of the condition worked a forfeiture of the Bliss Hotel property. Bliss for himself, his heirs, executors, administrators, and assigns, by the deed solemnly contracted with the orator, his heirs, etc., that upon a breach of the condition the orator's right to the described premises should become absolute. For this grant to become absolute upon the happening of the contingency named in the condition, the orator paid a large consideration. It would effectuate the intention of neither party to the deed, to hold that the orator could only recover such damages as he could show that he had suffered by breaches of the condition. It would in effect be making a contract for the parties thereto, rather than enforcing the one they have made. It is a case where the parties to the contract have by a solemn instrument declared what the effect of a breach thereof shall be. They have for themselves determined what the orator, his heirs, etc., shall recover for such breaches. They have thereby liquidated the damages for such breaches. While it is true that forfeitures, as such, are odious, both at law and in equity, and are never declared and enforced in equity; and while there is much learning and many distinctions as to when a sum agreed upon as damages for the breach of a contract by the parties thereto shall be treated as a penalty or security for the payment of the damages occasioned by such breach, and when as liquidated damages; and while the decisions upon the subject may not all be capable of being harmonized, it is now well settled that the intention of the parties, when ascertained, is to control. It is justly held that where the sum named in the obligation as the

measure of damages for a breach is unreasonably large; or where it is agreed upon to cover usurious interest; or where it is evidently security for the payment of a smaller sum, that the sum named in the obligation will be treated as a penalty. But where neither of the foregoing is apparent from the contract viewed in the light of surrounding circumstances, where the party may elect to do or not do as contracted and in default to pay a certain sum, and especially where the damages occasioned by the breach are difficult of ascertainment, and the rules for measuring them are uncertain, or of difficult application, it will be held that the damages agreed upon are liquidated. Wood's *Mayne on Dam.* chap. 8, pp. 198-218; 2 Sedg. *Dam.* 209-264; 29 Moak's *Eng. Rep.* 206-211; *Williams v. Vance*, 30 Am. Rep. 26, and note reviewing cases on this subject.

It has rarely been held that, in a contract by which a party has agreed to refrain from exercising a particular trade or profession within a named locality, and agreed upon the sum to be paid if he breaks his agreement, that the sum thus agreed upon has been held other than liquidated damages. In addition to the authorities last cited, see, also, *Barry v. Harris*, 49 Vt. 392; *Butler v. Burleson*, 16 id. 176; *Dakin v. Williams*, 17 Wend. 447; cases cited in note 3, § 170, Wood's *Mayne on Dam.*; *Williams v. Dakin*, 22 Wend. 201; *Leary v. Laflin*, 101 Mass. 834; *Pierce v. Fuller*, 8 id. 223; *Cushing v. Drew*, 97 id. 445; *Sainter v. Ferguson*, 62 E. C. L. 716; *Galeworthy v. Strutt*, 1 Exch. 659.

One of the principal reasons for so holding is, that there is no definite measure for the damages occasioned by the breach of such a contract, and they are very difficult of proof. The case at bar well illustrates the difficulty. There was another hotel in Bradford besides the Trotter House. How could the orator prove that the parties boarded by Kennedy, or fed at Beard's eating saloon would have been patrons of the Trotter House, except for such boarding or such feeding? and if they would have been such patrons, how much would have been the profits? They might have patronized the other hotel or another boarding-house. While it is thus difficult to prove the actual damages sustained by the breaches shown, all the evidence is to the effect that two equally well-kept and commodious hotels on the two properties would render both properties valueless as hotels. The profits to be derived from the custom obtainable by each would no more than pay running expenses, while if all the custom is given to one of them the profits are fairly remunerative. Neither is it reasonable to hold that the orator would pay Bliss \$2,500 for his agreement to hold the Bliss Hotel property free from such uses, under an agreement expressed or implied, that he was to keep watch for breaches of the agreement, and that an action arose for the recovery of a shilling's profit for every meal of victuals Bliss thereafter sold to a traveler on the inhibited premises. Besides such holding and such construction would in effect nullify the deed of the Bliss Hotel property. If the orator had not purchased the Trotter House property, and had not in it, nor in any other premises in Bradford, gone into the hotel business, he might lawfully have entered into the contract with Bliss, that he did, in regard to the use to which the Bliss Hotel property should thereafter be put, and in regard to the results that should follow the breach of the contract. He might have had various reasons for desiring such inhibition,—such as a private residence near by, or land on which he desired to have private residences erected. We think that it is quite clear upon authority and principle, that if Bliss himself had, soon after his deed of the Bliss Hotel property, violated the conditions of the deed, it would have been the duty of this court to enforce the deed, or to turn the orator over to an action at law, to recover possession of the premises.

III. But since making the deed the Bliss Hotel property has been divided by various conveyances, and has by some of the grantees been greatly improved by the erection of valuable buildings; and several of these grantees have carefully kept and used the premises owned and occupied by them free from the inhibited uses. The orator, too, has sold the Trotter House property, and gone out of the hotel business. Under these circumstances, inasmuch as the orator has come into a court of equity, thereby offering to do equity, we think it would be inequitable not to relieve the hotel owners of those portions of the Bliss Hotel property, who are innocent of any breach of the condition of the deed, from an entire loss

of the improvements and enhanced value of the property. But the damages being liquidated between the parties to that deed, only one recovery can be had for a breach of the conditions of the deed. Hence the orator should be, at least, made whole in relieving the defendants from a full enforcement of the deed. We think the orator will be made whole by the payment of the sum he paid for the deed — \$2,500 — and interest since he demanded the premises at the time he brought this bill. Although the first breaches were of a much earlier date, and continued to the time of the demand, they were of such a nature that they could be waived, or not insisted upon by the orator. We treat this failure to make a demand earlier an election by him not to insist earlier upon an enforcement of his rights under the deed. Generally in such a case the sum in equity to be recovered to compensate for the non-enforcement of the deed would be the value of the premises without the improvements put on by innocent parties. It would be somewhat difficult to fix upon such value in the present case, and the sum paid by him for the deed with interest under the circumstances fairly compensates the orator, and is very nearly the unimproved value of the premises at the time of the demand. The decree of the court of chancery is reversed and the cause remanded with a mandate to render a decree, that, to be relieved from the deed of January 1, 1855, the defendants pay to the orator within such time as shall be determined by the court of chancery, \$2,500, with interest since May 23, 1872, and costs; and on their failure to make payment, the defendants to be foreclosed of all equities in said premises.

STEWART v. FLINT.

October, 1884.

PLEADING — GUARDIAN — FAILURE TO ALLEGE WARD'S TITLE.

The orator, as a guardian, brought his bill to set aside a warranty deed executed by his insane ward, and failed to properly allege the ward's title; but the court thought it fairly inferable from the whole bill that she had some title, and held the defect to be one of form and overruled a general demurrer to the bill.

PRACTICE — DEMURRER OVERRULED.

When a demurrer is overruled, it is discretionary with the court to remand the case for trial, or for final decree; but it will not remand for final decree without exceptional circumstances.

Bill in chancery. Heard on demurrer, February term, 1883, Orleans county. REDFIELD, Chancellor, overruled the demurrer. The bill was brought by the orator, as guardian of one Emily Clark, to have her deed of certain lands set aside. It was alleged that said Emily was insane at the time of the conveyance.

Edwards, Dickerman & Young, for orator. *Crane & Alfred*, for defendants.

ROWELL, J. The point of defendants contention is, that the bill is defective in substance, for that it shows that the land described in said supposed deed is not the land alleged to have been left to the intestate at the death of her husband, and does not allege that at the time of the execution of said deed she had title to the land therein described, or to any other land. It is true that the bill in this respect is very loosely and inartificially drawn, and if title must be alleged, lacks the requisite degree of legal certainty. But we think it is fairly inferable from the whole bill that the land described in the deed is the same land alleged to have been left to the intestate, and that she had some title thereto at the time in question, and that the defect consists in not setting out that title with sufficient certainty, and so is one of form rather than of substance. This being so, and the defect not being assigned as a cause of demurrer, it cannot be noticed, and the demurrer was properly overruled.

In the event of thus holding, we are asked to remand the cause for final decree against the defendant, on the strength of *Bailey v. Holden*, 50 Vt. 14. It was formerly the practice in all cases in which a demurrer to the bill was overruled to remand the case if the defendant asked it, to be proceeded with in the court of chancery in due course. But for many years the practice has been to regard it as discretionary with the court whether to thus remand, or to remand for final

decree; but to induce the court to remand for final decree, and thus deprive the defendant of a trial on the merits, if he desires it, the case must be peculiar and exceptional in its circumstances, which this case is not.

Decree affirmed and cause remanded, with leave to defendants to answer.

DARLING v. CUTTING.

October, 1884.

SCIRE FACIAS — BAIL — COPIES OF APPEAL — EVIDENCE — PRACTICE.

In *scire facias* against bail on *meane* process, with a plea of *nul tiel record*, copies of appeal are record evidence of the proceedings and judgments shown thereby.

Such copies, when the officer's return is incorporated into them, attested, and shows that the defendants became bail, are *prima facie* evidence of that fact. The defendants by going on with the case, without raising the question, admitted, by implication, that they were the persons returned by the officer as bail.

A certified copy of the record and original writ were not admissible for the defendants, as they showed nothing amounting to a discharge of bail. An *exoneretur* should have been entered.

The failure of an officer to deliver a bailpiece will not discharge the bail.

The defendants in the court below claimed that there was a variance between the amount of the judgment offered in evidence and the judgment described.

Held, that they could not under such an objection raise the point that the execution issued for too large a sum. The court affirm the judgment below, deducting the amount of error.

Scire facias against bail on *meane* process. Plea, *nul tiel record*, with notice. Trial by jury, September term, 1883, Essex county. Judgment for the plaintiff.

The original action was brought by the present plaintiff before a justice of the peace against one Woodward. It was trover for the conversion of sheep. See *Darling v. Woodward*, 54 Vt. 101.

The present proceeding is against Woodward's bail. The copy of appeal objected to as evidence by the defendant's, was the copy of appeal from the justice court to the county court in the original suit. That suit was also appealed to the supreme court; and at the general term, 1881, judgment was rendered for the plaintiff to recover the sum of "\$165.08, with interest since October 1, 1876, and costs." The *scire facias* was dated March 6, 1882, and was brought to the county court. The declaration alleged that the judgment rendered in the supreme court was for the sum of \$215.98. The defendants offered in evidence a certified copy of the justice record in the original case, which was excluded by the court. This copy contained the following: "At the opening of the court, February 5, 1877, Nathaniel Cutting came in with defendant, H. C. Woodward, and made a surrender of said Woodward in the following language: 'Here is your man;—we won't be bail any longer.'" This did not appear in the original record, and was not in the plaintiff's copy. The court found from other evidence, that, "after the judgment in the supreme court, and about the time this suit was brought, the justice made the addenda to his record, or minutes, in regard to the surrender by Cutting of Woodward."

Nichols & Dunnett, for plaintiff. *Bates & May*, for defendant.

ROWELL, J. It is objected that the copies of appeal were not admissible under the plea of *nul tiel record*, and contended that *Murdock v. Hicks*, 50 Vt. 683, so holds. But the holding there was, not that copies of appeal are not evidence, but that the copies offered did not show a *record* of the recognizance, but only a *minute* of recognizance from which the justice might have made a record in due form, and that a mere *minute* of recognizance is not a *record* of recognizance that can be declared on as such, or that can be given in evidence under the plea of *nul tiel record*. This was no new holding, for the same thing was held in *Brackett v. McLeran*, 28 Vt. 90. We think it clear that copies of appeal, when properly made and certified, are competent *record* evidence of the proceedings and judgments properly shown thereby. The statute requires the appellant to procure and enter in the appellate court, attested copies of the original writ, process, record of judgment, and the evidence filed in the court from which the appeal was allowed; and the entry of such copies is necessary in order to give the appel-

late court jurisdiction. *Goodenow v. Stafford*, 27 Vt. 437. A compliance with this statute furnishes to the appellate court, an attested copy of the proceedings and record below, which is just as competent evidence in the appellate court of such proceedings and judgment as any other copy of the justice's record could be.

But it is further objected, that though the copies of appeal were properly admitted, yet they did not show that defendants became bail as alleged; that this could not be shown by the officer's return, but only by producing the original writ itself, with their names indorsed thereon. It was the duty of the officer to return the original writ with his doings thereon, and if he took bail, to say so, and his return was *prima facie* evidence against the bail of all he was bound to return; and although the return may not have been a necessary, nor even a proper part of the record, yet, when incorporated into the copies of appeal and attested, as here, such copies were proper proof of it, on the authority of *Mattocks v. Belamy*, 8 Vt. 468, where it is said to have been the uniform practice in this State to admit, and even prefer attested copies, not only of records, technically so called, but of all papers, files, rolls, etc., legally deposited in the clerk's office and there required to remain.

As to the objection that defendants were not shown to be the same persons whom the officer returned as having become bail, it is sufficient to say, that if this point could have been well taken when plaintiff rested, it was vitiated when defendants went on with their case and admitted, by implication at least, that they were the persons.

The objection that there was a variance between the amount of the judgment offered in evidence and the judgment described in the declaration went only to its admissibility as evidence under the declaration, and not at all to the point that the execution issued for too large a sum, and was therefore void and the bail discharged, as now claimed. It does not appear that that question was raised below in any way. The objection was, as stated in the exceptions, "to the amount named in said judgment," and that "there was a variance between that and the declaration;" but it is not otherwise stated wherein it was claimed the variance consisted. The judgment as rendered, was for the sum of \$165.08 damages and interest thereon since October 1, 1876, whereas the judgment as described in the declaration, was for the sum of \$215.98 damages, which was the amount of said first-mentioned sum with interest thereon from said date; and for aught that appears this may have been, and we think was, the ground of the objection, that a judgment for a sum certain with interest thereon is improperly described or declared upon as a judgment for a sum certain, larger by the amount of such interest.

It has been argued that the clerk's minute on the execution of the fact and time of its return to his office is not competent proof thereof; but no such question is raised by the exceptions, and hence is not considered.

There was no error in excluding the certified copy of record and the original writ offered by the defendants, for they showed nothing amounting to a discharge of the defendants as bail. The principal was not taken into custody, and the court took no notice whatever of the attempted surrender, not even to make a minute of it, much less to enter an *exoneretur*. It is plain that what we have here cannot discharge bail. In *Williams v. Williams*, 1 Salk. 98, plaintiff sued defendant in three actions, and defendant put in three bails, the plaintiff recovered in all. Defendant rendered himself, and one of the bail entered an *exoneretur* on the bailpiece, but the rest did not; and it was held that the rendering was a discharge *in posse* as to all but not complete and actual as to all till *exoneretur* entered upon all. See, also, *Blood v. Morrill*, 17 Vt. 598; *Humphrey v. Kasson*, 26 id. 760.

When a surety indorses a writ of attachment as bail, the statute makes it the duty of the officer to deliver out a bailpiece. But this is a matter between the surety and the officer, and the surety must see to it that he has a bailpiece if he desires one, and its non-delivery will not discharge him. The indorsement of the process is, in effect, the recognition of bail, and goes into court, and constitutes the ground of liability; while the bailpiece goes into the hands of the surety, and is merely evidence of the obligation he has assumed, whereby he is enabled

to obtain a warrant for the arrest of his principal. Bail thus given answers the purposes of bail below and bail above at common law, though the obligation it imposes is substantially like that imposed by a recognizance of bail by *bill* in the king's bench when taken before judgment. 1 Tidd, 250.

It has been made to appear and is conceded, that by mistake, the judgment in the original action was entered up for a sum too large in damages by \$84.40; and we are asked to bring forward that case, and correct the judgment. To do this might, perhaps, embarrass the *scire facias*, and so we accomplish the same thing by a rule in this case.

Judgment affirmed, under a rule that the plaintiff deduct therefrom the said sum of \$84.40 as of the date of the original judgment.

WELLS v. TUCKER.

October, 1884.

MORTGAGE—TWO ON SAME LAND—REDEMPTION—PAYMENT—PURCHASE OF NOTE—HUSBAND—WITNESS.

When one purchases land incumbered with two mortgages, each on an undivided half, and assumes and agrees to pay both as part of the purchase-money, he cannot redeem the one without redeeming the other. By force of the purchaser's agreement, as to him and all under him, the two mortgages are consolidated into one, the burden of each resting on the whole; and both must be redeemed.

When a husband is made a party defendant with others in a bill brought by his wife to redeem, on the ground that she has a homestead right in the premises, he is not a competent witness for her.

Bill to redeem. March term, 1884, Washington county. Chancellor decreed that the bill be dismissed.

The oratrix, Eleanor C. Wells, was the wife of the defendant Henry C. Wells, and Susan L. Wells was his mother. It appeared from the report, that the defendant C. W. Tucker, in 1874, conveyed a farm, subject to two mortgages, to the defendant H. C. Wells. Said Tucker gave one of said mortgages on an undivided half of said farm to his mother, Elvira D. Tucker, to secure to her a life support, and also three \$500 notes; and at the same time executed the other mortgage on the other undivided half of said farm to his two sisters—Ann Genet Lane and Carrie L. Tucker—to secure \$2,500. H. C. Wells went into possession of the farm soon after it was deeded to him, and, as part of the consideration, he paid Elvira D. \$1,500 in full discharge of her life support so secured. The notes were payable "on or before" certain dates at the option of the maker. Wells, by reason of the depreciation in real estate, had determined to pay only one of the two mortgages; namely, the one securing the life support.

The defendant H. C. Wells was "offered as a witness generally" to prove the allegations in the bill, both for his wife and mother.

Shurtleff & Lampson, for oratrix. *J. A. & Geo. W. Wing*, for defendants.

ROWELL, J. On the facts found by the master, and on the authority of *Collins v. Adams' Executor*, 53 Vt. 433, it is considered that the transaction touching the \$500 note held by the oratrix, Susan L. Wells, amounted to a payment of said note by the defendant Wells, and not to a purchase thereof by the said oratrix. This leaves the said oratrix to stand for a right to redeem on her deed from the said defendant of May 1, 1881.

As to the oratrix, Eleanor E. Wells, she stands on her inchoate right of homestead in the premises; and it is not denied but that this gives her a right to redeem. But the question is, may they redeem one mortgage without redeeming both?

By accepting the deed from Tucker and wife, and going into possession under it, Wells assumed and agreed to pay both mortgages as a part of the purchase-money, and to save Tucker harmless and indemnified therefrom. As between Tucker and Wells, Wells thereby became primarily liable for the payment of said mortgages, and Tucker became his surety therefor, and the land became the primary fund out of which payment was to be made. It is clear, Wells failing to pay as he agreed, that Tucker could pay and be subrogated in equity to th.

gage security. But this is not the only effect of Wells' agreement. By it the two mortgages were consolidated and made one as to Wells, and all persons claiming under him, and the burden of each was annexed to, and made to rest upon, the whole land; and this, not because the lien of each was thereby actually extended over the whole land, but because of the contract itself, which equity takes cognizance of, and will enforce in favor of Tucker as against Wells and all persons standing in his stead.

The case of *Welch v. Beers*, 8 Allen, 151, is full authority for this view, and was thus: Prescott held a mortgage for \$500 on a whole tract of land, and had taken possession to foreclose. After the making of said mortgage, the mortgagor conveyed a part of the tract, with an agreement recited in the deed that the grantee assumed and was to pay the whole of said mortgage as a part of the purchase-money. Afterward the mortgagor conveyed the remainder of the tract to the plaintiff in fee, not covenanting against said mortgage, but with an express understanding that it was to be paid in full by the prior purchaser. Prescott subsequently took a new mortgage of the first part for \$1,200, with full knowledge of said agreement and the value of that part was more than enough to pay the \$500 mortgage; *held*, that the plaintiff's part of the land was exempt from said last-mentioned mortgage, not because his deed of warranty left the whole burden of it to rest upon the other part, but because said agreement expressly annexed it to such part before the plaintiff purchased.

This is very analogous to the rule in equity, that when land subject to mortgage is sold by the mortgagor in separate parcels to different purchasers without an assumption by them of any part of the mortgage debt, and the deeds are duly recorded, or actual notice is had of the state of the title and the subsisting equities, the purchasers, as between themselves, are charged and must contribute in the inverse order of the time of their purchases.

This rule rests upon the ground that when a mortgagor sells a part of the mortgaged premises without reference to the incumbrance, it is right as between him and the purchaser that the part still held by him should be first applied to the payment of the debt, and so equity charges it with such payment. But this is not, as said in *Welch v. Beers*, because a deed of warranty of part, of itself, directly creates a lien on the remainder for the whole amount of the mortgage, but because equity recognizes the mortgagor's contract as binding on subsequent purchasers who take with notice thereof.

So here, it is right, as between Tucker and Wells, that Wells should pay both mortgages before holding any part of the farm free from either; and a court of equity would not aid him as against Tucker, to redeem one of them only, and thus enable him to hold an undivided half of the farm free from both, for this would be contrary to the spirit of his agreement, and he who seeks equity must do equity. And the complainants have no better right than Wells himself had, for they sit in his seat.

There is no other question in the case material to be considered, unless it be whether Wells was a competent witness: and we think he was not. As between him and his wife, she is the substantial party, and in testifying, he would testify for her and not for himself. The law of the subject is fully considered in *Simkins v. Eddie*, 56 Vt. 612.

Decree affirmed and case remanded.

NOYES v. PHILLIPS.

October, 1884.

PROBATE COURT — DISPUTED CLAIMS — REFERENCE — PLEADING — ACTION OF DEBT.

The probate court is not restricted to any particular class of "disputed claims" in ordering a reference under the statute — R. L., § 2148; and, after the parties have consented in writing to the reference, the court can appoint whom it pleases as referee.

Such a reference is not an arbitration proper; and no formal submission is required.

The decree of the probate court in such a case on the referee's report, unappealed from, may be the basis of an action of debt.

Debt on a decree of the probate court. Heard on special demurrer to the declaration, September term, 1883, Orleans county. Demurrer sustained.

The declaration alleged, that the matters of difference submitted were "in relation to the purchase, conveyance, and possession of a certain parcel of real estate;" that the court accepted the referee's report; and ordered the defendant to pay to the plaintiff the sum of \$187.25 as damages, and as costs of the reference, \$100.64; and that the "plaintiff says that the said defendant has not paid said sum to him, though requested so to do, nor any part of the heretofore mentioned sums; whereby an action hath accrued to the said plaintiff, to have and recover, etc.

The special demurrer set out the submission, a part of which was as follows: "Said Noyes of the first part, claiming that the said persons named of the second part are unlawfully possessed of certain property belonging to said Blanchard's estate, consisting of real estate, notes, accounts, bank stock," etc. The parties agreed to refer "said controversies and differences to," etc.

B. F. D. Carpenter, for plaintiff. *Grout & Miles*, for defendant.

POWERS, J. We think counsel have on both sides labored under a misapprehension respecting the scope of the statute under which the proceedings in this case were had. It has been argued upon the theory that Mr. Crane was an arbitrator, and the trial before him an arbitration limited by the terms of the submission agreed upon by the parties. The declaration, which is before us for consideration upon demurrer, sets forth that the trial before Mr. Crane was had pursuant to section 2148, R. L., which reads: "When there is a disputed claim between an executor or administrator in behalf of the estate he represents, and another person, it may, with the consent of the parties in writing, be referred, under an order of the probate court," etc. The referee's authority comes from the court, and the court's authority to refer is given by the statute, provided the parties consent in writing.

The consent in writing called for in the statute does not contemplate a formal submission to an arbitrator; and none is required as in arbitration proper. It is not requisite that the parties mutually choose the referee; he is the appointee of the court. All the agency of the parties demanded, is that they consent in writing to this mode of trial.

In this view of the statute, it is apparent that many of the questions discussed in argument, touching the scope of the submission and award, are unimportant.

The submission in this case shows the consent in writing of the parties that the court might refer the disputed claim to Mr. Thompson, or, in an alternative, to Mr. Crane. The court issued the rule to Mr. Crane; and as the *mode of trial* and not the selection of the referee is the only matter dependent upon the consent of the parties, the court might appoint whom it pleased.

The statute does not restrict the court to any particular class of claims in making a reference;—"a disputed claim" is the wording of the statute. It is apparent that a great variety of claims for and against estates may come into dispute; and the obvious purpose of the statute is, to provide a cheap and speedy mode of trial for their determination. A claim, disallowed by commissioners, and appealed by the claimant, if the appeal has not been entered in the county court, is within reach of this reference. The declaration in this case avers that the "disputed claim" related "to the purchase, conveyance and possession of a certain parcel of real estate." This language is broad enough to warrant an award for the purchase-money of such real estate.

It is not apparent why such a dispute could not as safely and properly be determined by a reference as any other matter. The intestate, if living, and the defendant could have agreed to such a trial without question; and as in this case the probate court is to determine whether the reference shall be made, no harm to the estate or persons interested in it is probable.

The statute requires the referee to return his award to the probate court; and when accepted by that court, it is to be final between the parties. On the return of the award to that court, any objections to its acceptance are to be made to the court; and the court may make any order in the premises necessary to protect the parties, as was held in *Lathrop v. Hithcock*, 38 Vt. 497; but its order accepting the award or report, once made and unappealed from, is a final decree or judgment upon the disputed claim in question, and is the basis of an action of debt on a judgment.

It was held in *Adams v. Campbell*, 4 Vt. 447, that the omission of the *debit* or *debitus* in the declaration in cases like this was fatal on demurrer. For this cause this declaration is defective.

The judgment of the county court was correct; but on motion the same is *pro forma* reversed, and the case remanded, with leave to amend on the usual terms.

COLLENDER Co. v. MARSHALL.

October, 1884.

CONDITIONAL SALE—LEASE—INSOLVENCY—ASSIGNEE—CONTRACT—LEX LOCI.

Property, sold conditionally and delivered, without a legal record of the lien, passes to the assignee of the vendee under the insolvent law.

A contract, by which a vendee of billiard tables agrees to pay in monthly installments in one year the entire value of the tables, and if he so paid, the property was to be his, and if not, the vendor's, is a conditional sale, and not a lease.*

When one here orders goods from a party in New York on certain terms as to payment, etc., but they are shipped, consigned to the vendor, and accepted on different terms,—*Held*, that the contract was made in this State.†

Replevin for two billiard tables. Trial by court, June term, 1883, Addison county. Judgment for the defendant.

The plaintiff—a corporation—is located in New York city. On the 16th day of December, 1881, H. A. Rowe, at Troy, N. Y., ordered the tables in question by two written orders. The writing put in as evidence by the plaintiff, and claimed to be a lease and contract to sell, was in part as follows:..... "That the said party of the first part hath let, and by these presents doth let, unto the said H. A. Rowe, the party of the second part, one maple 41-2x9 carom bevel billiard table, one maple 41-2x9 pocket billiard table, one set 23-8 ivory billiard balls, for the term of twelve months from date, and for the sum of \$525, to be paid in the following manner, namely: \$100 in cash, and the balance in eleven payments,..... that if the said party of the second part shall well and truly keep the covenants herein made, and shall make no default in the payment of the aforesaid installments, as the same shall become due and payable, and this lease shall not be determined by mutual consent sooner or otherwise, that they, the said party of the first part, will make, execute and deliver to the said party of the second part a good and sufficient bill of sale for said billiard table, the consideration whereof shall be the amount of the above-named payments received for the said term, in all the sum of \$525."

This writing, held by the court to be a conditional sale, was dated January 4, 1882, and provided that, if there was default in payment of the installments, the plaintiff could take possession of the tables and hold them as though no writing had been made. The writing was executed by the plaintiff in New York, and by Rowe in Middlebury, Vt. Rowe was adjudged an insolvent debtor July 31, 1882; and the defendant was assignee of his estate. When the defendant was appointed assignee he took possession of the tables; but it appeared that neither he nor the creditors knew of the plaintiff's claim. The writing was never recorded. The exceptions stated:

"Said Rowe also testified, that the contract for the tables was made in Troy, N. Y., and the lease was to be sent to him at Middlebury, Vt., when prepared, for his signature; that he paid \$20 at the time of making the contract at Troy, N. Y., and agreed to pay \$100 more upon the receipt of the tables, which he ordered shipped to Middlebury, Vt.; that subsequently to the making of the contracts the plaintiff sent a draft of \$100 to the National Bank of Middlebury upon him for collection, which he paid, and afterward received the tables. He also executed twelve notes to the plaintiff for the balance of the rents expressed in the contract, and afterward paid three of said notes of \$35.50 each."

The other facts are sufficiently stated in the opinion.

* See 34 Eng. Rep. 59; 35 id. 619; 15 Abb. N. C. 388, 394, *note*.

† See *Bish. on Cont.*, § 719 *et seq.*; 24 Am. Rep. 590; 33 id. 340.

A. P. Tupper and Lawrence & Meldon, for plaintiff. *Stewart & Wilds*, for defendant.

ROWELL, J. The contract in question was a conditional sale and not a lease. *Whitecomb v. Woodworth*, 54 Vt. 544.

Said contract was a Vermont contract. Rowe's orders for the property were given through plaintiff's agent subject to plaintiff's approval; but instead of approving them as given, plaintiff shipped the property to Middlebury, consigned to itself, and sent a contract to Pinney materially different from that called for by the orders, and accompanied it with a draft on Rowe for \$100 and twelve promissory notes for him to sign and an order on the station agent for the property, with directions to deliver the property to Rowe on payment by him of the draft and execution of the notes and the contract. Thus a new contract was proposed to Rowe, and Pinney was made plaintiff's agent to complete it with Rowe here in Vermont, as he did, and until thus completed, it was inoperative as a mutual agreement.

The next question is, did the defendant as assignee in insolvency of Rowe acquire title to this property as against the plaintiff? To solve this question, we must determine what force our Insolvency Act gives to assignments thereunder.

Under the National Bankrupt Act, in cases of this kind, assignees stood in the place of the bankrupt. His rights were their rights; and their rights, like the lien of judgments at law, were subordinate to all prior liens, legal and equitable, on the property. *Gibson v. Warden*, 14 Wall. 244. So in England, as between the person having a lien and the assignees, the latter stand in the place of the bankrupt, and take his property subject to all the equitable liens to which it would have been subject in the hands of the bankrupt himself. *Lempriere v. Pasley*, 2 T. R. 485; *Belcher v. Oldfield*, 6 Bing. N. C. 102. But by the Bankrupt Act of 1869—32 and 33 Vict., chap. 71, § 15—which is similar in this respect to 21 Jac. I, chap. 19, § 11—in the case of traders, the property of the bankrupt divisible among his creditors comprises, *inter alia*, all the goods and chattels that are at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt by the consent and permission of the true owner, whereof the bankrupt is reputed owner, or whereof he has taken upon himself the sale or disposition as owner. The object of this enactment is, to prevent persons in trade from obtaining false credit by the possession and apparent ownership of goods not their own, and thereby deluding their creditors; and it has received a liberal construction. *Gordon v. East India Co.*, 7 T. R. 228. So by the Bankrupt Law Consolidation Act of 1849, if *any* bankrupt at the time he became so, had in his like possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon himself the sale, etc., as owner, the court *might order* the same to be sold and disposed of for the benefit of the creditors under the bankruptcy. A somewhat similar provision was contained in 6 Geo. IV, chap. 16, § 72.

So under the Bills of Sale Act of 1854, unless the vendee files the bill of sale in the proper office within the time limited therefor by the act, or takes possession of the property within that time, the bill, as against the assignees in bankruptcy and insolvency of the person making the same, is null and void as far as regards the property in, or the right of possession of, any chattel comprised therein, that, at or after the time of the bankruptcy or of filing the insolvent's petition, was in the possession or the apparent possession of the maker. The purpose of this act, as shown by its preamble, was to prevent the frauds that were frequently committed on creditors by secret bills of sale of personal chattels whereby persons were enabled to keep up the appearance of being in good circumstances and possessed of property, whereas the grantees or other holders of such bills had the power of taking possession of the property of such persons to the exclusion of their other creditors.

Our Liens Act—R. L., § 1992—provides that no lien reserved on personal property sold conditionally and passing into the hands of the conditional purchaser shall be valid against attaching creditors or subsequent purchasers without notice, unless the vendor takes a written memorandum, signed by the purchaser, witnessing such lien, and causes it to be recorded in the proper office within a

time limited. This act points to the same evil that the 21 Jac. and the 82 and 83 Vict. sought to remedy in the case of traders, and the Bills of Sale Act generally, namely, the obtaining of false credit: And such statutes should be construed and administered with a reasonable degree of liberality, that they may, as far as possible, effectuate the purpose of their enactment.

It is obvious that this same evil may exist in the case of insolvent debtors and bankrupts as well as in other cases, and that the creditors of such persons need protection therefrom as much as the creditors of any other debtors; and it would seem that in this behalf our Insolvency Act has embodied the spirit of the English acts to which we have referred, as well as of our Liens Act, and especially of the Massachusetts Insolvency Act of 1838, of which in respect to 'the effect given to assignments thereunder it is a transcript,—in the provision that "an assignment under order of a court of insolvency shall vest in the assignee all the property of the debtor, real or personal, which.....might have been taken on execution upon a judgment against him at the time of the filing of the petition." R. L., § 1820. This language is too explicit for interpretation. By it the assignee is clothed with much higher and more extensive rights than the debtor himself possessed, and under it the simple question is: Could the property in question have been taken on execution against the debtor at the time of filing his petition? If it could, it passed to the assignee by the very terms of the statute. This has always been the effect given in Massachusetts to assignments under the act of 1838, as will be seen by referring to *Clark v. Minot*, 4 Metc. 346; *Bingham v. Jordan*, 1 Allen, 373; and *Freeland v. Freeland*, 103 Mass. 477. And *Audenried v. Betteley*, 5 Allen, 382, is not to the contrary; for it decides only that the right to treat property that is fraudulently represented as the property of the debtor as though it really were his, is a personal right of the creditor who is defrauded, and not transferable by the assignment for the benefit of the creditors generally; in other words, that rights by estoppel between a creditor and third persons do not pass by the assignment.

But it is said that this case is different from the Massachusetts cases, and especially from *Bingham v. Jordan*, in which the property was once the debtor's and remained in his possession, because here it never was the debtor's as against the plaintiff. But it is obvious that both cases are equally within the mischief sought to be remedied by the law, and so within the policy and provision of the law; and while, as said by Mr. Justice GROSE in *Gordon v. East India Company*, "it is always unfortunate when the goods of one person are taken to pay the debt of another," yet it were better thus than that by the conventional possession of another's goods one may have the means of deluding and defrauding his creditors.

This being a Vermont contract, no question is made but that, under the circumstances of this case, this property could have been taken on execution against Rowe at the time of filling his petition; and the result is,

Judgment affirmed.

GARITY v. WILDER.

October, 1884.

MARRIED WOMAN — HUSBAND — PRACTICE.

The bill was first dismissed on demurrer; then an amendment was allowed, but the case made by the master's report was not as strong as that made by the bill.

Held, that the rule that the court will not reverse its decision in the same cause applies.

The bill alleged, that the materials used in the erection of the wife's house were procured by the husband at the request of the wife, that the orator supposed the house was owned by the husband, and that, through this misunderstanding as to the title, the charges were made to the husband.

Held, on demurrer, that a bill, brought to compel payment of the wife, should be dismissed.

Bill in chancery. Heard on a master's report, June term, 1888, Caledonia county. Bill dismissed.

Cahoon & Hoffman, for orator. *Belden & Ide* and *Stafford*, for defendants.

TAFT, J. The original bill in this cause seeks to charge the property of the female defendant with the payment for certain materials and labor, furnished by the orator, in the erection of a dwelling-house in Lowell, Mass. The bill alleges, that the materials and labor were procured of the orator by Elias F. Wilder, at the request of his wife, Elvira, and that the orator at the time supposed that Elias was the owner of the house, and that the original charges were made to said Elias through the orator's misunderstanding as to the title of the property. Upon demurrer to the original bill, it was adjudged by this court — general term, October, 1881 — that upon the facts alleged, the orator was not entitled to relief; but he was allowed to amend his bill, and the cause now stands upon the report of a master, who finds that the materials and labor were purchased upon the credit of Elias, that Elvira did not pledge her credit in the matter, nor did she authorize any one to do so. The case, therefore, as made by the report, is not as strong as the one made by the original bill, and as the question made by the bill has already been adjudicated between these parties, the rule that the court will not reverse a decision made in the same cause applies; and the result is, that the decree of the court of chancery is affirmed, and cause remanded, with a mandate that the bill be dismissed.

NEW YORK COURT OF APPEALS.

PEOPLE v. PETMECKY.*

June 26, 1885.

CRIMINAL LAW — MURDER — CHARGE OF COURT.

The defendant, on his trial for murder, testified in his own behalf. The court charged the jury as follows: "A party is now declared to be a competent witness in his own behalf, and the question of the credit to be attached to his testimony is a question for the jury. But the interest he has in the issue is never to be excluded from the minds of the jury. The testimony is entitled to all the weight which the jury can fairly give it, and was subject to the same tests as the testimony of any other witness. So far as the testimony of the prisoner at the bar is contradictory of itself, it cannot be true. Two contradictory statements cannot be true. When he testifies he knew nothing of the personal property which he took from that house, until after he took the cars at Auburn, and when he testifies afterward that he took the watch from the wall, and took the bank-book from the bureau drawer, so far as those statements are contradictory, one of them is to be considered false. Whenever you find that the prisoner has made a statement not true, to establish a falsity instead of a truth, his testimony is not entitled to the credit of a witness who stands fairly before you uncontradicted. His testimony then is entitled to no weight or credit of itself, except so far as it is consistent with the known and established facts of the case, or corroborated by other witnesses. This is a consideration which you cannot avoid, it is forced upon you by the facts of the case and the importance of the issues here involved."

Held no error; the court intended no more than that a jury are permitted to disbelieve the testimony of a witness who has willfully testified falsely before them as to any material fact.

Appeal from judgment of general term, fifth department, affirming a judgment of oyer and terminer, upon a conviction of murder in the first degree. The opinion states the case.

John W. O'Brien, for appellant. *Richard C. Steel*, for respondents.

RUGER, C. J. The defendant was convicted of the crime of murder in the first degree, at a court of oyer and terminer held in Cayuga county in January, 1884.

The indictment charged him with the act of killing one Paulina Froitzheim at the city of Auburn on the 1st day of June, 1883, with malice aforethought and from a deliberate and premeditated design to effect her death. Another count was to the effect that the commission of the same crime was effected by

* 20 W. Dig. 107, affirmed. Defendant was executed at Auburn, Aug. 21, 1885.

him while engaged in perpetration of a felony, to-wit—grand larceny. The evidence shows that the crime was committed on the day alleged, at the residence of the deceased in the city of Auburn, between the hours of one and five o'clock, P. M., by numerous blows inflicted on the head and body of the deceased, with a hatchet and other dangerous weapons, and that the defendant and the deceased were the only persons present at the time of its commission. No witness saw the parties together during these hours, or knew of the occurrence until after five o'clock of the day named. The evidence of the prosecution, however, tended strongly to show that the defendant was the perpetrator of the crime, and when called as a witness in his own behalf, he admitted that the wounds causing her death were inflicted by himself.

This testimony left as the only question for the consideration of the jury, that of the motives which influenced the defendant in perpetrating the crime. He testified that it was done in self-defense, and the material question submitted to the jury was as to the degree of credibility to be accorded to his testimony in establishing his alleged justification, and the absence on his part of the deliberation and premeditation required by the statute to constitute the crime of murder in the first degree.

The evidence showed that the defendant emigrated to this country from Prussia about the year 1880, and being related to the family of the Froitzheims, went immediately there on his arrival, and became an inmate and boarder with them at their residence in Auburn. He was then a young man about twenty-one years of age, who had come to this country for the purpose of obtaining employment by which to support himself, and the deceased was a married woman of mature age, living with her husband and being the mother of two grown-up sons, who were also inmates of the family. It was testified to by the defendant, that soon after he took up his residence with the Froitzheims, the deceased began to profess a passionate attachment for him, and annoyed him by constant and repeated declarations of affection, which were continued to such an extent that after a period of five months' endurance, he left the Froitzheims and engaged board at other places for the period of an additional year, during which he was prosecuting his employment as a mechanic in Auburn. After this period the defendant did not again reside in Auburn, but removed to Cleveland, and after living awhile at that place and in Canada, returned to Prussia. There he resided and worked at his trade until February, 1883, when he returned to the city of New York and resided there until the time of the homicide. While residing there he absented himself from the city for four days in May, during which time he visited Madison county and married a Swiss girl with whom he became acquainted on his last voyage to this country. After remaining with his wife for two days, he abandoned her penniless at Syracuse, and returned to New York.

The evidence tended to show that in April or May, 1883, while the defendant was living at Cleveland, he met the deceased by appointment at Syracuse, and remained with her at a hotel for about two days and nights, subsequent to which time they did not meet again until the day of the homicide. It was also claimed by the defendant that frequently after leaving Auburn, he received letters from the deceased, requesting to see him, and that shortly before leaving New York on May 30, 1883, he received a letter from her asking him to visit Auburn, stating that she had something she wished to tell him. The letters were not produced in evidence, the defendant claiming that he had destroyed them. The direct testimony of the defendant was to the effect that he started from New York the afternoon of the 30th of May, and arrived in Auburn at 4:35 P. M., the day after. That he visited the Froitzheim house the succeeding forenoon and had an interview with the deceased, during which she made an appointment for him to call again in the afternoon while her husband was absent at his work. That he did call again about two o'clock in the afternoon, and the deceased then told him that she wanted to leave her husband and go away, and thereafter live with him. Upon the defendant's replying that he would not do this, and that he was married, the deceased became enraged and struck him in the face and seized him by the throat; that he thereupon drew his loaded revolver from his pocket for the purpose of scaring her; that he struck her with it on the head, and during

the struggle ensuing, the revolver dropped on the floor and was picked up by the deceased; that she then forced him into the kitchen, menacing him by threats and with the revolver, until he backed up against the stove, and being unable to retreat any further, seized a hatchet from the wall and struck her the blows producing death; that during this time he was not in his right mind, and acted instinctively and unconsciously in striking the deceased; that he then arranged his clothes, washed his hands in a bowl standing near, took an overcoat from the house, and at 5:55 P. M., left on the train of the New York Central railroad for Albany. While on board of the train between Auburn and Syracuse, he found in the pockets of the overcoat taken by him a savings bank-book, two watches and a cigar-holder.

The defendant was arrested next morning at Albany, while attempting to procure money upon a savings deposit book belonging to Martin Froitzheim.

Upon his cross-examination the prisoner admitted that he took the bank-book from a bureau with the intention of using it in obtaining money to get away with and to keep him while staying in New York, and that he took one of the watches from the wall, and another from some place which he did not recollect. He claimed that he did not know that he took an undershirt which was found on his person when arrested, but admitted the taking of a pocket-book containing money from a table in the sitting-room after the killing had been accomplished.

The defendant involved himself in other inconsistencies and contradictions which it is needless now to point out.

The evidence of the prosecution showed that the defendant when arrested had in his possession an overcoat, wrapper, two watches, a savings bank deposit-book, a pocket-book containing money, a gold ring, a watch chain and cigar-holder, and other property belonging to different members of the Froitzheim family, and taken from their residence at the time of the commission of the homicide in question; that he signed the name of Martin Froitzheim to an order with which he was endeavoring to raise money upon the bank-book in question, and afterward claimed that his name was Nathan Heymann, and had not been in Auburn, but obtained the book of a man in New York, who told him to take it and go to Albany and get the money on it. The evidence also tended to show the presence of blood stains in various places on the furniture, walls and doors in the two stories of the Froitzheim's house, and raising the presumption that the defendant thoroughly examined the premises after committing the homicide.

When the premises were first visited after the killing, the outer doors of the house were all found to be locked and the keys taken away, a ring belonging to the defendant lay on the floor near the body, and two buttons, apparently torn from his vest, also lay near. The hatchet, whose usual place of deposit was in the woodshed, was found under the bed in a bed-room on the first floor stained with blood, and a bowl used for cooking purposes stood on a chair near the body filled with bloody water. The defendant had been seen in the streets and lots near Froitzheim's on the 1st day of June, both before and after the commission of the crime, and apparently attempting to conceal his identity from those who formerly knew him. On the forenoon of that day he inquired of a groceress in the vicinity, as to who the inmates of the Froitzheim's family then were, and whether they were all at home, and as to the time when Andrew Froitzheim returned from his work, and of other persons as to the time of departure of the railroad trains over various roads running out of Auburn. From this abbreviated summary of the evidence given at the trial, it will be seen while there are some facts tending to corroborate portions of his testimony, there was also much that was irreconcilable with its truth.

The synopsis given is quite as favorable to the prisoner as the evidence will justify, and seems to present the bearing of the only exception taken by his counsel, which was urged for our consideration upon the argument.

In commenting upon the effect to be given to the defendant's evidence, the trial judge (*inter alia*) stated that "a party is now declared to be a competent witness in his own behalf, and the question of the credit to be attached to his testimony is a question for the jury. But the interest he has in the issue is never to be excluded from the minds of the jury. The testimony is entitled to all the weight

which the jury can fairly give it, and was subject to the same tests as the testimony of any other witness. So far as the testimony of the prisoner at the bar is contradictory of itself, it cannot be true. Two contradictory statements cannot be true. When he testifies he knew nothing of the personal property which he took from that house, until after he took the cars at Auburn, and when he testifies afterward that he took the watch from the wall, and took the bank-book from the bureau drawer, so far as those statements are contradictory, one of them is to be considered false. Whenever you find that the prisoner has made a statement not true, to establish a falsity instead of a truth, his testimony is not entitled to the credit of a witness who stands fairly before you uncontradicted. His testimony then is entitled to no weight or credit of itself, except so far as it is consistent with the known and established facts of the case, or corroborated by other witnesses. This is a consideration which you cannot avoid, it is forced upon you by the facts of the case and the importance of the issues here involved. When he testified that he had no purpose to draw any money on the bank-book, having been surprised at finding it in his possession on his way to Albany, and on his cross-examination says he took it from the bureau drawer, and that he took it with the intention to draw money upon it with which to escape to New York, and when being reminded that he had money enough to go to New York, he testified that he intended to draw money upon it enough to keep him in New York for a time, one of those statements must be false, and if intentionally false, the influence of a falsity attaches to the whole of the evidence which he has given in the case." After this statement of the rule, the court go on and say: "It is upon the whole of this testimony that you are to say whether he was unconscious of what he did during any of this time. If unconscious of what he did, it would seem that he would have been unconscious of what he saw, and yet he testifies that when he left the house he saw Mrs. Froitzheim sitting in the chair and clasping the revolver in her hand. According to his testimony he was unconscious of that series of acts by which he locked all of the doors of the house. If he has not told the truth in regard to his unconsciousness during the whole period of time he remained in the house after Mrs. Froitzheim was rendered incapable of resistance, it will be for you to say whether his testimony that he was unconscious during any period of the time was credible."

When the court concluded its charge, the prisoner's counsel "excepted to the charge that the testimony of the prisoner was entitled to no weight, except as corroborated by others." Although this exception did not correctly state the language or spirit of the charge, yet conceding that it raised the question argued before us, we do not think the charge is justly susceptible to that construction placed upon it by the defendant's counsel. The trial judge immediately disclaimed, in the presence of the jury, the interpretation put upon it by the defendant's counsel, and replied: "I have not said that, gentlemen," and then proceeded to explain the meaning he attached to the language used. To this explanation no exception was taken. Considering the charge as a whole, we do not think there is reasonable ground for claiming that any part of the evidence was intended thereby to be withdrawn from the consideration of the jury. The court did charge that a witness who testified to a willful falsehood is not entitled to credit, and that fact authorized them to disbelieve his entire testimony; but this proposition we suppose to be indisputably correct. The appellant's contention is, that it embraced a direction to the jury to wholly disregard the defendant's evidence in making up their verdict, if they should find that he had intentionally testified falsely as to any material fact. If this contention could find support in the language of the charge, there is some authority for the claim that the rule laid down is erroneous, but without deciding that question, we feel constrained to hold that the charge is not susceptible of the construction attempted to be put upon it. That a jury are permitted to disbelieve the testimony of a witness who has willfully testified falsely before them as to any fact is not disputed, and the question here is, whether the court below said any thing more than this. That it did not intend to go beyond this instruction seems to us quite clear, not only from the prompt and decisive manner in which it disclaimed that interpretation when it was put upon its language, but also from the general

tenor and effect of the charge. There is certainly no express language in the charge authorizing the claim made, and we do not think it can be fairly implied from the language used by the court. Even if this were otherwise, we think that it is an unwarrantable construction to ascribe to the court a meaning which it expressly disclaimed, and an improbable assumption to say that a jury would be likely to act on an instruction which the court had unequivocally declared it did not intend to make.

That careful regard for the rights of accused persons which the doctrines of the common law enjoin upon courts requires them to be ever astute in scrutinizing proceedings by which persons accused of crime may be unfairly jeopardized, but this rule does not call for the exercise of hypercritical construction, or the reversal of judgment rendered after a long and painstaking trial, upon speculative or impracticable considerations. The obvious design of the charge seems to have been to leave the questions of fact in the case entirely to the jury, on the whole evidence in the case, and to instruct them as to the legal rules affecting the credibility of a witness. We think the rule was correctly laid down by the trial court. We do not now mean to hold that it might not go even further, and direct them wholly to disregard the evidence of such witnesses, but we deem it unnecessary to review the authorities or express any opinion on that point. It is enough in this case to hold that the circumstance referred to would impair the credibility of the witness, and that his whole testimony should be weighed by a jury in the light of such discrediting influences. Other questions raised by the defendant's counsel in the argument before us were not founded upon any exception, or where they were, no material evidence was given under them, and they present no questions which this court is authorized to consider. *People v. Hovey*, 92 N. Y. 554 ; *People v. Boas*, id. 563.

The judgment should, therefore, be affirmed.

All concur.

WILLIAMS v. FREEL.

June 26, 1885.

MECHANICS' LIEN — VARIANCE BETWEEN NOTICE AND PROOF.

In the notice of lien it was alleged that the stone were delivered on and between the 11th day of June and the 6th day of November, 1879, and so also it is alleged in the complaint, and the claim of the appellants is that the stone were actually furnished after November, 1879, and in the year 1880.

Held not a fatal variance.

James Troy, for appellants. *L. Lafin Kellogg*, for respondent.

EARL, J. The defendants Freel and McNamee had a contract for the performance of certain work for the city of New York, and the plaintiff furnished certain stone to them to be used in the performance of their contract. Not having been paid for all the stone so furnished, the plaintiff gave notice to the comptroller of the city and the commissioner of public works, of a lien upon the balance due the contractors from the city under chapter 315 of the Laws of 1878; and this action was subsequently commenced to enforce such lien. No question is made upon this appeal that the plaintiff's proceedings have been regular under the act mentioned, and but one objection is made to the recovery. In the notice of lien it is alleged that the stone were delivered to Freel and McNamee, on and between the 11th day of June and the 6th day of November, 1879, and so also it is alleged in the complaint, and the claim of the appellants is that the stone were actually furnished after November, 1879, and in the year 1880, and that, therefore, the plaintiff has recovered upon a cause of action not alleged in his notice of lien or in his complaint. But the facts are that the plaintiff delivered stone between the dates mentioned, which were used and accepted between those dates and paid for by the contractors; that they also delivered between those dates along the line of the work upon which the contractors were engaged other stone which were subsequently used and accepted by the contractors; and it was for such stone that the recovery in this action was had. There was not, therefore, a fatal variance, and we see no reason for reversing the judgment.

The judgment should be affirmed.

All concur.

PEOPLE v. MORSE.

June 23, 1885.

LARCENY—PARTING WITH POSSESSION AND RETAINING TITLE.

Where one is induced by false and fraudulent representations to pledge money as security, parting with its possession, but without intending to part with the title thereto, a conversion of the money, by a party inducing the fraud, constitutes the crime of larceny.

This is an appeal from a judgment of the general term affirming a judgment of conviction of the defendant under an indictment for grand larceny. The crime was committed before the Penal Code went into effect. The defendant was charged with obtaining, by false and fraudulent representations, the sum of \$600, and converting the same to her own use. The receipt given for the money was as follows:

"NEW YORK, October 12, 1882.

"Miss Helen Wilson has this day deposited in my hands six hundred dollars (\$600) as security for the faithful performance of the duties of Miss Hattie M. Herder, who it is agreed shall enter my employ on Monday, October 23, 1882, and will continue to work for me every day except Sundays, from 10 A. M. till 3 o'clock, P. M., at the salary of twelve dollars per week (\$12), payable weekly, for the term of six months or longer if mutually agreeable. It is further agreed that if either Miss Hattie M. Herder or myself wish to terminate this contract, either party must give thirty days' notice, in which case this six hundred dollars will be returned to Miss Helen Wilson, and all salary due Miss H. M. Herder paid to said Miss H. M. Herder up to date of her leaving my employ. I also agree to pay six per cent interest on this six hundred dollars (\$600) during the time it remains in my hands, payable to Miss Helen Wilson."

Defendant's counsel claimed that the crime was procuring money by false pretenses and not grand larceny.

Henry A. Meyenborg, for appellant. *De Lancey Nicoll*, for respondents.

EARL, J. There is no dispute but that the defendant was guilty of a crime in obtaining and appropriating the money of Miss Wilson; but her counsel claims that the crime was procuring the money by false pretenses and not grand larceny of which she was convicted. It is conceded by the district attorney that if Miss Wilson intended to part not only with the possession but also with the title of the money, then the defendant could not be properly convicted of grand larceny, but could be convicted only of the crime of false pretenses. It is also conceded by the defendant's counsel that if Miss Wilson intended to part with the possession of the money only for a particular purpose and not with the title, then upon the facts of this case the defendant was properly convicted of grand larceny. The rules of law applicable to such a case as this have been so clearly laid down and so thoroughly discussed in various cases in this court that a further statement or examination of them at this time is wholly unnecessary. *People v. McDonald*, 43 N. Y. 61; *Smith v. The People*, 58 id. 111; *Hilderbrand v. People*, 56 id. 394; S. C., 15 Am. Rep. 435; *People v. Loomis*, 67 id. 322; S. C., 23 Am. Rep. 128; *Zink v. People*, 77 id. 122; S. C., 38 Am. Rep. 589; *Thorne v. Trucks*, 94 id. 95; S. C., 46 Am. Rep. 126.

No just complaint can be made of the charge of the trial judge to the jury. He charged: "If you are satisfied from the evidence beyond any reasonable doubt that it was the design of the defendant, Carrie R. Morse, to fraudulently and feloniously obtain the complainant's money and convert it absolutely to her own use without the complainant's consent, and that in pursuance of that design the defendant so obtained \$600 by the means and in the manner and under the circumstances testified to by the people's witnesses, with the intention of converting the money absolutely to her own use without the consent and against the will of the complainant, and that the complainant did not intend to part with the \$600 absolutely, but only gave the accused temporary possession thereof as security for the faithful performance of the duties of Hattie M. Herder, I charge you, that you can and ought to convict the defendant of grand larceny, otherwise

she should be acquitted. Did she part with the money for the specific purpose of securing the defendant against any loss by reason of the acts of Hattie M. Herder while in her employ? Was that the only reason she parted with it? Was that the intention she had when she gave up the physical possession of it to the defendant? If such you find to be the fact, and then you further find, as I have instructed you here, that all the acts disclosed by the evidence do constitute a scheme, a trick and device for the purpose of feloniously getting the money, then your verdict shall be guilty," and further to the same effect.

The intention of Miss Wilson must be derived from all the facts of the case. Did she intend to part not only with the possession but with the title of the money, or did she simply intend to pledge the money as security, retaining the title thereto? In determining these questions we are not confined exclusively to the instrument that was executed between Miss Wilson and the defendant at the time of the delivery of the money, because that instrument was obtained by fraud and was one of the tricks and devices by which the crime was consummated, and it is not conclusive as to the precise intention and agreement of the parties upon the trial of the defendant for the crime. But in that instrument it is stated that the \$600 was deposited as security for the faithful performance of the duties of Miss Herder; and it is apparent from the instrument itself that that was the sole purpose for which the deposit was made. It is stated in the instrument that if Miss Herder or the defendant should wish to terminate the contract either party should give thirty days' notice, in which case it is provided that "this \$600," the identical \$600, should be returned. It is further stated that interest at six per cent should be paid by the defendant on "this" identical \$600, during the time it remained in her hands. But reading the instrument in the light of all the circumstances accompanying and preceding its execution, we think it was competent for the jury to find that Miss Wilson did not intend to part with the title to the \$600, and that therefore their finding that the defendant was guilty of grand larceny can be upheld.

The judgment should be affirmed.

All concur.

[See 28 Eng. Rep. 127; 46 Am. Rep. 188, 185; 40 id. 558; 88 id. 589.—Ed.]

PEOPLE v. JONES.*

June 26, 1885.

CRIMINAL LAW—EVIDENCE—THREATS AGAINST DECEASED.

On a trial for murder it is competent to show the conduct and feelings of the prisoner toward the deceased as is also proof of previous threats or attempts to kill his victim. Although such evidence does not establish the fact that the prisoner intended to kill at the time of firing that fatal shot, yet it is to be weighed by the jury in connection with all the facts in the case, for the purpose of determining the questions of motive, intent, deliberation and premeditation.†

TRIAL—CHARGE OF COURT—REQUEST COVERED BY.

Defendant's counsel requested the court to charge "that if the jury find that the defendant was not acting deliberately but impulsively when he first struck his wife, and that the subsequent striking of Mrs. Harris and the boy Neals, was impulsive and not deliberate, then they must take into consideration the defendant's state of mind, which would be consistent with such impulse when they consider the question of the deliberation of the defendant when he fired the shot." The court said "Yes. It is a mere play upon words. It seems to me I have covered the whole ground." Defendant's counsel excepted to the language "It is a mere play upon words."

Held, that defendant was not prejudiced, as the court had already presented to the jury, but in different language, the ideas included in the request.‡

William J. Ludden, for appellant. *LaMott W. Rhodes*, for respondents.

EARL, J. The defendant was convicted of murder in the first degree for shooting his wife on the 3d day of July, 1884. We have carefully read and examined

* 34 Hun, 620, affirmed. Defendant executed at Troy, Aug. 18, 1885.

† 4 Crim. Law Mag. 588.

‡ See 71 N. Y. 594; 87 id. 377; 23 How. Pr. 448; 181 Mass. 207.—Ed.

the evidence and proceedings upon this trial, and are satisfied that he had a fair trial in which all his rights were protected. The whole case was considered at the general term, under section 527 of the Code of Criminal Procedure, and it affirmed the judgment both upon the law and the facts. The able opinion pronounced there furnishes a satisfactory discussion of the most material points now made on behalf of the defendant, and were it not for the serious nature of this case, we would rest our decision upon that opinion. We will, however, briefly notice the main objections to the judgment now made.

Upon the trial the people were permitted to show the prior relations between the prisoner and his wife; that he had repeatedly used violence to her person, and had threatened to injure her and to kill her. On one occasion in August, 1883, a witness testified that she was in a room near to that occupied by the defendant and his wife; that she heard the prisoner say "damn you," and then heard the report of a pistol, and that his wife came rushing into her room badly frightened and agitated. In the spring of 1884, while in a room near that occupied by the defendant and his wife, the same witness heard again the report of a pistol in that room, and upon entering the room found the wife in bed in a fainting condition. The proof of the pistol shots upon these two occasions was objected to, and we think the objection was properly overruled. There was evidence sufficient to enable the jury to find that the shots were fired by the defendant, either at his wife, or in anger to frighten her. In cases of homicide, it has always been held competent to show the conduct and feelings of the prisoner toward his victim, and proof that he had made previous threats or attempts to kill his victim has always been received. 3 Russell on Crimes (9th ed.), 288; Roscoe's Crim. Ev. (7th ed.) 18; Wharton Hom. (2d ed.), § 698; 2 Colby's Crim. Law, 193. Evidence of such facts is received, not because the facts give rise to a presumption of law as to guilt, but because from them, in connection with other circumstances, and proof of the *corpus delicti*, guilt may be inferred. This evidence did not, of itself, establish the fact that the defendant intended to kill his wife at the time he fired the fatal shot; but it was to be weighed by the jury in connection with all the facts surrounding the homicide, for the purpose of determining the motive and intent of the defendant at the time.

It is claimed that the court erred in refusing to charge, as requested by the defendant's counsel, "that if the jury find that when the shot in question was fired by the defendant, he was acting under the same impulse as when he first struck her (his wife) with his fist on the 3d day of July, they cannot find the defendant guilty of murder in the first degree." It is difficult to perceive precisely what was meant by the word "impulse" in this request. What was the defendant's impulse when he assaulted his wife just before he shot her? Did he then intend to do her great bodily harm? He may have had the same impulse when he fired the shot, and may yet have fired it for the purpose of giving effect to that impulse. It was for the jury to determine what his impulse or motive was when he assaulted his wife, and with what motive and intent he fired the pistol. It was competent for them to find upon the evidence that defendant entered upon his work of death at the time he entered upon the assault of his wife, and that his motive was finally consummated by the shooting.

The defendant's counsel also requested the judge to charge "that if the jury find the defendant was not acting deliberately but impulsively when he first struck his wife, and that the subsequent striking of Mrs. Harris and the boy Neals was impulsive and not deliberate, then they must take into consideration the defendant's state of mind, which would be consistent with such impulse when they consider the question of the deliberation of the defendant when he fired the shot." The court said "yes. It is a mere play upon words. It seems to me I have covered the whole ground." Counsel for the defendant excepted to the language "It is a mere play upon words." The request is obscure in its phraseology, and it is not clear what was meant thereby; but as we understand it, was fully covered by the charge which the judge had already made. The request to charge, included ideas which the judge had already presented to the jury in a little different language, and hence it could be truly said that it was a

mere play upon words, and it is impossible to perceive how that language could have prejudiced the defendant.

Counsel for the defendant also requested the judge to charge "that upon the question of deliberation under the facts of this case the jury must not consider the previous threats or attempts to take the life of the deceased which have been sworn to by the witnesses for the people," and the judge refused to so charge, to which refusal defendant's counsel excepted. The previous threats and attempts to take the life of the deceased were evidence tending to show that the defendant had long deliberated upon the subject; that he had conceived the purpose of killing his wife long before the 8d day of July; and they were competent evidence both upon the question of deliberation and of premeditation.

We have carefully scrutinized the other requests to charge and certain portions of the charge to which our attention has been called, and are clearly of the opinion that no error was committed by the trial judge. His charge was full and fair, covering all the rules of law which the defendant was entitled to have laid down for the guidance of the jury, and was fully as favorable to him as he had any right to ask.

Our attention is also called to certain rulings upon questions of evidence. But it is so clear that the exceptions to such rulings have no foundation that we think it is unnecessary to give them particular attention here.

It is claimed that upon all the evidence there was not sufficient proof to establish premeditation and deliberation on the part of the defendant in committing the crime. We think there was abundant evidence upon these subjects for the consideration of the jury. The defendant, upon the occasion of the homicide, commenced by striking his wife and finally knocked her down, and while she was down went eighteen feet and a half, took the pistol out of a drawer and then approached and fired the fatal shot.

Taking into consideration his previous treatment of his wife, and all the circumstances surrounding the shooting, it was a question for the jury whether there were premeditation and deliberation. To show absence of premeditation and deliberation it is not sufficient that the defendant was in a passion or a frenzy at the time. That is only one of the circumstances to be taken into account. A man may deliberate, may premeditate, and intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time. All the evidence was open for consideration at the general term upon this branch of the case, and we cannot say as matter of law that there is no evidence of premeditation and deliberation.

Finding no reason to believe, therefore, that there is any error affecting the judgment, it should be affirmed.

All concur.

SUPREME JUDICIAL COURT OF MAINE.

STATE v. MAINE CENTRAL RAILROAD COMPANY.

April 6, 1885.

INDICTMENT AGAINST RAILROAD COMPANY — PRACTICE — NOLLE PROSEQUI.

A *nolle prosequi* may be entered by the prosecutor, with leave of court, during the trial before a jury of a statutory indictment of a railroad company to recover damages for the loss of life of a person alleged to have been instantly killed by reason of the negligent management of the defendant's train.

W. T. Haines, county attorney, for State. Baker, Baker & Cornish and G. C. Voss, for defendant.

PETERS, C. J. Whilst the trial was going on under this indictment, the evidence being partially in, the prosecutor was permitted by the presiding judge to discontinue the indictment by entering a *nolle prosequi*. The discontinuance was entered according to the civil and also according to the criminal form of procedure. If the proceeding is a civil suit, the nonsuit was allowable, but otherwise, if a criminal prosecution, for at such stage of the trial the alleged criminal, if he demanded it, would have the right to have a verdict rendered. *State v. Smith*, 67 Me. 328.

We think the proceeding is essentially civil in its nature, in form a criminal prosecution, in fact a suit. It is for reasons a privileged proceeding. It has the rights incident to a civil suit and something more. It would have a less right than belongs to a civil action if the prosecutor cannot, the court assenting to the act, become nonsuit before the cause be committed to the jury. Our opinion is that the prosecutor had such right, and that it could be done by nonsuit or *nolle prosequi*, although *nolle prosequi* would be the more formal and accurate entry. *State v. Railroad*, 58 Me. 176; *State v. Railroad*, 67 id. 479.

Exceptions overruled.

WALTON, DANFORTH, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

McNICHOL v. EATON.

April 7, 1885.

ADMINISTRATORS — WASTE UPON REAL ESTATE IN INSOLVENT ESTATES — CUTTING TIMBER FROM WILD LANDS.

In order to enable an administrator to maintain trespass against the purchaser from the heirs, who, after the intestate's death and before the appointment of the administrator, cut and removed timber from timber lands belonging to the estate, he must show that the estate he represents is actually insolvent.

This he can show only by the probate records which must include the records where his last domicile was, since the principal assets must be presumed to be there. And the administrator is bound to know the last domicile of his intestate.

The cutting of timber from wild lands in a careful and prudent manner, keeping in view the future value of the land as well as the present income, is not waste within the meaning of R. S., 1871, chap. 66, § 20, or chap. 95, § 12.

A. McNichol, for plaintiff. Harvey & Gardner, for defendant.

The opinion states the case.

DANFORTH, J. If the action is maintainable it must be by virtue of R. S. 1871, chap. 66, § 20, which provides that "when an administrator commits waste or trespass. . . on real estate of his intestate insolvent, he is liable for treble the amount of damage. He may recover damages, in an action of trespass, of a person committing the same, to be accounted for as assets, although such person is heir or devisee of the estate." In chapter 95, section 12, of the same revision, it is provided that when an heir after the estate is represented insolvent and before the real estate is sold for payment of debts, or before all the debts are paid, "removes or injures any buildings or trees, except what is needed for fuel or repairs, or commits any strip or waste on such estate, he shall forfeit treble the

amount of damages, to be recovered by the executor or administrator in an action of trespass."

Both of these sections had their origin in chapter 191, section 4, of the acts of 1835. Before the passage of the last-named act the administrator had no claim in, or control over the real estate of his intestate, except the right to sell under a license when necessary to pay debts. No liability for waste rested upon the heir, and when any was committed, the right of action vested in him alone. *Fuller v. Young*, 10 Me. 365; *Moody v. Moody*, 15 id. 205. Hence, the statute being in derogation of the common law, in its meaning cannot be extended beyond what a fair construction of its terms requires.

The title of the plaintiff's intestate to the real estate upon which the alleged trespass or waste was committed is not questioned. The defendant in what he did, justifies under a license from the owner, whose title is derived from the heir of the intestate; therefore he stands in the place of and represents the heir. But for the statute he has all the rights of an owner except the naked right to sell existing in the administrator. The burden of proof rests upon the plaintiff to bring his case within the provisions of the statutes.

The first question raised is, whether the defendant is liable for waste committed before the estate was represented insolvent. By the act of 1835 the heirs were in express terms made liable only for waste committed after a representation of insolvency and before the land was sold for the payment of debts, or the debts actually paid, and then only in case the estate should be "absolutely insolvent," and they were liable for treble damages. By the revision of 1841 this section was divided. In chapter 109, section 37, the executor or administrator, whether an heir or not, if he shall commit such waste or trespass upon any real estate, as is described in chapter 129, section 15, is made liable to treble damages and is given authority to prosecute actions of trespass against any persons committing such waste, whether they be heirs or devisees or not, and the damages so recovered shall be accounted for as assets. In chapter 129, section 15, we find the same provision as in the first act as to the time of committing the waste. If the heirs or devisees shall, between the time of the representation of insolvency and the sale or payment of the debts, commit waste such as is there described, "he shall forfeit and pay treble the value thereof." In the subsequent revisions these sections, though slightly changed in phraseology, remain the same in meaning unless changed by the omission in the earlier section in the revision of 1841 of the reference to the later one. It would seem that in the case of an heir or devisee the waste must be after the representation of insolvency, and very good reasons may be given why it should be so. But upon this point we make no decision as it is not necessary to the case.

In any event, the heir can only be liable in case the estate is proved to be insolvent. This term is frequently applied to estates in process of settlement under a representation of insolvency either by an administrator or in the hands of an assignee without regard to the final result as to its ability to pay all its debts, or otherwise. But we may well suppose that under the statute upon which this action rests, the word is used in its more literal and perhaps more correct meaning — an absolute insufficiency to pay all its debts. In this case it is immaterial in which sense it is used; for, if in the former, the action must fail, for, at the time of the alleged waste, the estate had not been represented insolvent and was not therefore in that sense an insolvent estate. If in the latter sense, as we hold it is, the action must equally fail, for there is no proof of such insolvency. In *Bates v. Avery*, 59 Me. 354, in the opinion of the court, WALTON, J., says the action may be maintained "if the estate is, in fact, insolvent." A mere representation, then, is not enough. In the same case it was held that the documentary evidence from the probate office is the only proper evidence of insolvency. Here we have no other, no admission as in that case. From the probate office we have the inventory of the appraisers, the representation of insolvency, the appointment and return of the commissioners to adjudicate upon the several claims presented. We have also the proper evidence of an appeal from an allowance of the only two claims which were allowed, and so far as appears, neither of those appeals have as yet been disposed of. There have been no debts proved against the estate, and

of course no certainty that any ever will be. We have no decree of insolvency from the court, for in the present state of the case there could be none. Upon the appointment of the commissioners it was decreed that the estate was apparently insolvent.

Further, from the evidence in this case it is apparent that the court here under any circumstances could not furnish the proper, or any evidence of the actual insolvency of this estate. The evidence in the case leaves no doubt that the intestate died in New Brunswick, and at the time of his death his domicile was there. That was, therefore, the place where the principal administration should be granted and where he should look to ascertain the real condition of his affairs. The judge of probate here had a right to appoint an administrator here who could and should administer such property and pay such debts as might be found here. It does not appear whether any administration has been had under the foreign government, but until it shall be had, or it is in some proper way shown that there are no assets there, there is no way perceived in which it can be shown that the estate is really insolvent. The court may here, so far as its jurisdiction goes, show that the estate here is insufficient to pay the creditors here, and for the purpose of paying debts here may authorize the sale of the real estate as in *Foule v. Coe*, 68 Me. 245. It may even furnish the proof that the estate is insolvent here, but that will not show it insolvent there, or as a whole. We do not mean to say that the administrator must look the world over to discover assets, but he is bound to know the last domicile of his intestate, the place where his assets are presumed to be and where the principal administration should be, and if he should sustain an action of waste against the heir, be prepared to show, what the statute requires, an actual insolvency. The duties of the administrators of the same estate in different localities, especially in their relations to each other, may be found in the following cases: *Fay v. Haven*, 8 Metc. 103; *Livermore v. Haven*, 23 Pick. 116; *Dawes v. Heald*, 3 id. 128, 143; *Boston v. Boylston*, 2 Mass. 384; *Davis v. Eddy*, 8 Pick. 475; and many others of the like kind. The necessary inference from the principles enunciated in these cases is that an estate cannot be known to be insolvent unless it so appears at the last domicile of the intestate, and if as held in *Bates v. Avery*, *supra*, it is to be proved from the records of the court, it would seem necessary that there should first be an administration there — as held in *Livermore v. Haven*, *supra*, the heir is not to be deprived of his inheritance until the general assets are exhausted, and the waste in question is as much the inheritance of the heir as the land from which it was taken.

We are not unmindful of the fact that the letters of administration in this case represent the intestate as late of Calais in the county of Washington; nor do we overlook R. S., chap. 62, § 7, in which it is provided that "the jurisdiction assumed in any case, except in cases of fraud, so far as it depends upon the residence of any person, . . . shall not be contested in any proceeding whatever, except on an appeal from the probate court in the original case, or when the want of jurisdiction appears on the same record." In the case of *Board v. Howard*, 55 Me. 225, the soundness of which we do not question. But this action is not a proceeding in the probate court, nor will it be made any part of the record of that court, or in any way interfere with the jurisdiction which it has assumed. It may still go on and settle the estate. But because it is an action of probate, does not change the fact which is fully proved as to the domicile of the intestate, or its effect upon the ability of the defendant, or change into waste that which was otherwise not waste, or remove the action of probate from probate and make it upon the point of whether the estate is insolvent.

Another fact important to the maintenance of this action is that no evidence or waste has been proved. In the matter as we are before us in *Board v. Howard*, 55 Me. 225, the issue is between a son and the estate and part of the real estate of the deceased or intestate, who is supposed to be deceased, and it is said for the payment of the debts and for the return to him of the immediate possession of the estate and the return of the estate to him. The statute gives no definition of the waste committed except as found in R. S., chap. 62, § 12 which appears to be the waste committed after a determination of insolvency, and is improper rather than waste itself, such as land belonging upon

them, and those in occupation have occasion to cut wood and lumber for fuel and repairs. We must, therefore, resort to the common law as understood in this State for the meaning of the term "waste," as used in this statute, as applied to wild lands.

The statute uses the words "trespass or waste," but trespass must be used as nearly or quite synonymous with waste, for under the principles above stated in *Kimball v. Sumner*, *supra*, no act upon land so situated would be trespass, unless it resulted in a permanent injury to the freehold. The meaning must, therefore, depend somewhat upon the nature of the land to which it is applied. That which would be waste upon improved land, or woodland used in connection with improved land, might not be so upon wild, or such as is used exclusively for the lumber which it produces. The land here in question was occupied for the latter purpose, and the only income which could be obtained from it would be the value of the lumber taken. Much of the land in this State is kept for that purpose. This may be stripped or wasted, but there is no use of it by which profit may be obtained without either strip or waste. There is a natural growth, a liability to fire or wind by which the timber may become a burden to the land so that a removal would be a benefit rather than an injury. Certainly it cannot be that the legislature intended that the heir should wait twenty years, the time in which an administrator may be appointed, before he could remove such timber lest he might be liable for waste. Further than this something must be left to the judgment fairly and honestly exercised as to what timber, dead or living, should be removed consistently with a careful and prudent use of the land, keeping in view its value for future production, as well as a present income. These views are sustained by *Drown v. Smith*, 52 Me. 142, and cases cited; approved with considerable emphasis in *Abbott v. Holway*, 72 id. 308. If then the defendant used this land in the application of these principles as an owner, of common care and prudence, would use his own, we think he would not be guilty of waste. He would be receiving that, and only that, to which the heir would be entitled.

Applying these principles to the testimony and we find no evidence of waste. It cannot be in taking off the down lumber, for that was no injury to the realty; nor in cutting that which had been burned, for that, as the evidence shows, would soon have become worthless. Nor does it appear that the cutting of that portion which was green, was not, from its interference with other and younger growth, or from its own condition, or from some other reason, an act of prudence, and not such a permanent injury to the freehold as would amount to trespass or waste. There is in fact no evidence as to the condition of the land at the decease of the intestate, or at any time since, before or after the cutting complained of, nothing to show whether any injury has been done.

The action cannot be maintained upon the second count in the writ, for it does not appear that the intestate ever owned the down lumber except as a part of the realty. It would, therefore, belong to the heir unless the cutting of it was waste, and in that case the liability would be for the cutting, for which no claim is made upon this defendant.

Judgment for defendant.

PETERS, C. J., WALTON, VIRGIN, EMERY and FOSTER, JJ., concurred.

MERRITT v. BUCKNAM.

April 8, 1885.

WILL—DEVISE—PERPETUITIES.

A devise was as follows: "I give and bequeath unto Hiram Coffin, his heirs, etc., the remainder of my homestead farm . . . upon condition as follows: that he pay annually the sum of \$50 to the M. E. Church in Columbia village, for the support of preaching, or if the said Hiram choose to pay the principal of which the above sum is the interest all at one time or in payments within . . . then my executors, hereinafter named, shall give a good and sufficient deed to the said Hiram Coffin, his heirs, etc., which shall be as good and binding as if given by me. . . . But if the said Hiram or his heirs fail in any way to perform the conditions above named, then I give and bequeath the farm before named to the said M. E. Church."

Held, 1. That as the contingency upon which the devise to the church was to vest might

not happen within life in being and twenty-one years, the devise was void, as offending the rule against perpetuities.

2. That the option given the first taker to extinguish the condition and perfect his own title, did not remove the uncertainty of the time of the vesting of the devise over, and hence did not take the devise out of the rule.

3. That the first taker was not made a trustee for the second contingent devisee, but held in fee subject to the conditions.

4. That whatever rights the demandants representing the church have in equity, they have not the legal title accompanied by a present right of entry.

Davis & Bailey, for plaintiff. *Charles A. Bucknam*, for defendant.

EMERY J. Whatever may be the equitable interests of the demandants in the demanded land, or whatever interest or title they may acquire therein, through appropriate equity proceedings, they cannot recover judgment in this real action, unless at the date of their writ, December 15, 1883, they had then vested in themselves the legal title, and immediate right of possession.

Their only claim of title is under the fifth clause of the will of Louise J. Bucknam, which is stated in full in the report of the case. The demandants are the trustees referred to in said clause. The tenant claiming under said Coffin had ceased to pay said annual sum of \$50, and the alternative condition named in the will has not been performed.

It may be admitted that the legal title the testatrix intended to confer on the demandants, on the happening of the contingency, is a fee. It is equally clear, we think, that whatever equitable rights the testatrix intended to confer on the demandants, she did not intend them to take any legal title until the contingency happened. She first devised the land to "Hiram Coffin, his heirs, etc.," upon conditions. "But if (to quote from the will) the said Hiram or his heirs fail in any way to perform the conditions above named, then I give and bequeath the farm to the M. E. Church, etc." The devise to "Hiram Coffin, his heirs, etc.," was in effect a fee, though charged with certain burdens and conditions.

The devise over was of the fee, but clearly the devise over of the legal title to the land itself was not to be, unless and until the failure of the first devisee or his heirs to perform the conditions. Whatever equitable interest the second devisees might have in the land, whatever rights they might have against it, to enforce the payment of the annuity, their legal title, their fee, could not be in existence until the time when there should be a failure to perform the conditions.

That date was wholly uncertain. It might have been immediately after the death of the testatrix. It might not have been until long after the lapse of a lifetime, and twenty-one years. Such a devise is an executory devise, and to be valid, it must take effect, the fee must vest, contingency occur, within a life in being and twenty-one years, reckoning from the death of the testator.

The contingency must happen. It must be such, that it will necessarily happen within the time of a life in being and twenty-one years.

If the contingency be such that possibly it may not happen within the prescribed time, the devise over is void.

This is the old, well-known, inflexible rule, established long ago in the common law, to guard against perpetuities. Whatever may be the intention of a testator, no effect can be given to it, if it violate that rule. It may seem an arbitrary rule, but it is a wise rule, and one that must be enforced. A full and clear exposition of this whole subject of the nature of executory devises, the scope of the rule against perpetuities, and its effect on executory devises, may be found in *Brattle Square Church v. Grant*, 3 Gray, 142; *Fosdick v. Fosdick*, 6 Allen, 41; *Odell v. Odell*, 10 id. 1.

The authorities are there fully and correctly cited, and we refer to those cases, rather than consume space by quoting from them, or other authorities. See, also, the late case; *Theological Education Society v. Attorney-General*, 135 Mass. 285; also *Slade v. Patten*, 68 Me. 380. The devise over in this case, under which the demandant claims, depends upon a contingency which might not happen until after the period prescribed by law. The conditions might not have been performed until after such lapse. The devise, therefore, offends against the rule, and cannot be sustained. The testatrix's attempt to create an estate in the demandants in that contingency failed, as not being permitted by law, and the demand-

ants, whatever rights they may have, did not acquire under the will the legal estate necessary to entitle them to judgment in this action.

The demandant's counsel claim that there are some matters or provisions connected with the devise of the farm, which will uphold the devise to the demandants, as not offending against the rule above named.

They say that the devise to Coffin and his heirs is upon a condition with an alternative, which he could perform at his option. The alternative was the right to free himself from the condition by paying a gross sum at once. The argument is, that he could make an absolute title in himself, free from any condition, by paying a gross sum, that the limitation of the estate is within his control, that he should be held to sustain all the devises and should not be allowed to defeat the devise over, and thereby enlarge his own estate by neglecting to either perform, or commute the condition.

We have no occasion to consider the estate, rights, or duties of Coffin, or of those claiming under him. Whatever duties they may owe in relation to this land, can perhaps be enforced against them, or the land, by proper proceedings. This case stands or falls on the legal title of the demandants under the will. The time of the vesting that title has been shown to be too uncertain, and possibly too remote. The addition of the alternative to the condition does not remove the uncertainty, nor abridge the possible remoteness of the time. The contingency of the failure to perform both alternatives might not happen until after the lapse of the time prescribed by law. Whatever may be the rights or duties of the first taker, the inflexible rule of law will not recognize any estate attempted to be vested in a second taker so long as there is any chance that it may not vest until after the prescribed time. The ingenuity of the able counsel has not removed that chance from their clients' claim.

Again it is contended, that the church took, at the death of the testatrix, a present vested interest of some kind, capable of being released, and that a conveyance by the church and by Coffin would convey the whole estate, free from condition, thus removing the objection of a perpetuity.

But the church took no legal estate in the land. It was not entitled to all the rents, or income. It only took a right to a specified sum as an annuity. It could in no way interfere with the land, its title, or possession by its own act. It could not maintain any process in relation to it, so long as the annuity was paid. There was no provision in the devise, that the church could surrender the annuity, except at the option of Coffin, or those claiming under him.

The annuity could not be assigned by the church. Coffin need not have paid it to any one else but the church. The testatrix's bounty was intended for the support of the preaching of the Gospel presumably in that church. That bounty could not be diverted. If that church would not administer it, trustees would be appointed by the court, that the benevolent interest of the testatrix might not fail. The cases cited by the demandant's counsel appear to be cases where it was sought to reach the land by process in equity, to charge it with the payment of a legacy, or annuity.

The cases cited may declare that such a legatee has a vested interest in the payment of the annuity, but we think none of them go farther, than to declare a lien on the land for such payment, enforceable in equity. We find no case in which it is declared that such a legatee has a legal estate in the land independent of a court of equity. We do not need to discuss further the interest of the church, nor the estate of Coffin, or the tenant under him.

Whatever the testatrix may have intended to give Coffin, or give the church, she gave a fee, a legal estate to the church trustees only upon a contingency uncertain as to time. No view of the church's interest that has been presented removes that uncertainty.

The main reliance of the demandants, however, is upon the charitable nature of the devise to them. They claim that the rule against perpetuities does not apply to such devises, and that this devise, being to a charity, is valid notwithstanding. It may be admitted that the devise over is to a charity, and that a devise to a charity may lawfully be made perpetual.

Indeed, charities are of lasting benefit to humanity, and their perpetuity is

desirable, and intentions of donors to make their gifts perpetual are readily inferred and upheld. *Odell v. Odell*, 10 Allen, 6, and cases cited. But it is not the perpetuity of the estate intended to be given to the church trustees that breaks against the rule. It is the possible perpetuity of the estate given the first taker, the possibility that the estate given to the charity may not begin in time. It is well settled that if a gift is made in the first instance to an individual, and then over to a charity upon a contingency which may not happen within the prescribed limit, the gift to the charity is void. *Perry on Trusts*, § 736 (1st ed.), and cases there cited; *Odell v. Odell*, 10 Allen, 7; *Brattle Square Church v. Grant*, 3 Gray, 154. The case of *Commissioners of Charitable Donations v. De Clifford*, 1 D. & W. 240, 258, seems to be a leading case on this point.

There, the testator devised lands to trustees. He directed that the yearly rents, to a certain amount, be appropriated to certain charities. He then provided that, if an increase of rents was obtained, the surplus over the amount first appropriated should go to such persons of certain families, as should be lords of Downpatrick manor. He further provided that in case said families became extinct, or did not protect the charities established by the will, then the surplus rent should go to the first charities to whom the first rent was given.

It was held that the gift over of the surplus rents, although to a charity, was too remote, as the contingency upon which it was to take effect was not restricted within proper limits. This case is quoted with approval in the *Brattle Square Church Case*, and in *Odell v. Odell*, *supra*, and seems analogous to the present case.

The demandant's counsel cites *Christ's Hospital v. Grainger*, 16 Sim, 88; S. C., on appeal, 1 Mac. & G. 459, where property was given to one charity, to go over to another on a certain event, and was allowed to vest in the second charity, after two hundred years.

The devise of the legal estate was to charities in each instance, and could properly have been perpetual in either.

There was no more perpetuity in both charities than in one. The takers of the legal estate were simple trustees.

The lord chancellor on appeal said in effect that the substance of the provision in the will was a substitution of one trust for another, rather than a forfeiture of one estate, and creation of another. In the case at bar, Coffin, the first taker, was not a trustee. He did not hold the land for the church but for himself, it being charged with a fixed annuity. The case cited does not apply. The demandants also quote from the language of the master of rolls, and the lord chancellors, in the *Wax Chandlers' Co. Case*, L. R., 8 Eq. 452; S. C., on appeal, L. R., 5 Ch. App. 512. But in both those cases, the first takers were held to be trustees to a certain extent for a charity, and the process was by the attorney-general to direct the application of the income. The devisees under the devise over were not parties, and made no claim. The validity of the devise over was not a question, and could not have been a question. We do not think those cases are compelling authorities in support of the demandant's proposition.

We do not undertake to pass upon the legal rights or estate of the tenant, or to say whether he has any estate. We do not mean to conclude any rights of the church, or its trustees, to the annuity, or any of its equitable rights in the land.

We only decide that so far as now appears the legal estate, which demandants say was devised to them, does not exist, for the reason that the contingency fixed for its beginning was not fixed within the legal limits.

Demandants nonsuit.

PETERS, C. J., WALTON, VIRGIN, FOSTER and HASKELL, JJ., concurred.

[See Theobald Constr. of Wills. chap. 24; 81 Alb. L. J. 405.]

DEXTER SAVINGS BANK v. COPELAND.

April 9, 1885.

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE — CONSIDERATION — ASSIGNMENT.

A note made by the treasurer of a savings bank without the knowledge of the trustees, running to the bank, for the purpose of making up to the bank a loss on loans for which he was neither morally nor legally responsible, is void for want of a consideration.

An assignment of a life insurance policy to secure such a note, made without the knowledge of the trustees, is void for want of a delivery.

Where money is received by the trustees of a savings bank upon a life insurance policy upon the life of a deceased treasurer and applied by them to pay a note of such treasurer to the bank, which was void for want of consideration, that sum should be allowed as a credit in an action upon an account of the bank against such deceased treasurer.

Josiah Crosby and J. H. Drummond, for plaintiff. *D. D. Stewart and T. H. B. Pierce*, for defendant.

DANFORTH, J. This case, having been submitted to auditors, comes before this court upon their report with the documents and evidence attached, with the provision that if in the "opinion of the court, the plaintiff has made out a *prima facie* case for any balance, the action is to stand for trial upon such items as the court shall find the plaintiff has made a legal *prima facie* case to sustain, otherwise judgment for the defendant shall be rendered in accordance with the law of the case."

Under this report the first question that arises is, whether the plaintiff has made out a *prima facie* case for "any balance" in its favor. The report of the auditors shows a balance for the plaintiff, and so far perhaps a *prima facie* case for that balance. But from the terms of the report as well as from the course pursued by the counsel in the argument we do not understand that the balance so found is sufficient, or that the parties so understood it, but rather that the decision shall rest upon the facts reported. The auditors have not made a full report of the evidence upon which their conclusions are based, but have reported what certainly appears to be a full, fair and clear report of the facts upon which this statement of the account was made up. Relying upon these facts there are several items allowed by the auditors to which the defendant objects and some credit disallowed which he claims should have been allowed. On the other hand, it does not appear that any item of charge has been omitted which the plaintiff claims should have been allowed, or credit allowed which should have been rejected.

There is one item claimed by the defendant as credit—the money received by the bank upon the testator's note for \$2,000—upon which the auditors have reported the facts, but which they have neither allowed or rejected; leaving it to the decision of the court. Assuming the account as stated by the auditors to be correct as far as it goes, if this item should be allowed it changes the balance, and upon this question depends the result of this case in its present stage.

Ought the proceeds of this note to be allowed the defendant as a credit? From the facts as they appear in the report we think they should be. The note was in fact never delivered to the bank. It remained under the maker's control so long as he lived, was payable by its terms only from an insurance upon his life except at his option, and it does not appear that during his life he elected to pay it in any other way. Nor was it in his life-time accepted by the bank, for its officers had no knowledge of its existence until after his death.

But independent of these considerations by an indorsement upon the back of the note which became a part of it, it was given to make up in part for a loss for which the maker was neither legally or morally responsible. The note was, therefore, without consideration and not valid or binding upon the maker even as a gift, as is universally conceded, certainly since the case of *Parish v. Stone*, 14 Pick. 198. It could not, therefore, have been collected by any legal process, and the appropriation of the money received upon the insurance policy to its payment was without authority or validity.

The note itself as well as the indorsement upon the back shows that it was secured upon a life insurance policy. The policy shows an absolute assignment

to the bank except so far as it was limited by a separate but accompanying writing. This assignment, like the note, was not delivered or accepted, nor was it intended to operate during the assignor's life-time. It being, therefore, in the nature of a testamentary disposition of his property, was a void instrument either with or without the note. But under the accompanying memorandum, the trustees of the bank, though having no legal right to the proceeds of the insurance, unlike the note, had a color of authority for collecting the money and appropriating it as directed. This memorandum explained more fully the reasons for, and purpose of obtaining the insurance, and what was to be done with it in case of the death of the insured. At the beginning, after recognizing the liability to sudden death or incapacity to transact business, the insured declares his purpose to be "that some way may be provided to make good any possible loss to the bank by reason of any neglect of mine or occurring under my administration during my term of office." He refers to the Leavitt loss and of his intention, if he lives long enough, to make good to the bank that loss. He then says: "I desire strict and exact justice in the execution of this trust," and names certain persons he desires to have appointed by the trustees of the bank to examine the securities, calculate the probable losses and pay the balance, if any, to his family. At the close he adds a request which amounts to a condition, that if he made good the loss, his family should be indemnified against all liability for dower under deeds of warranty he had given of the Leavitt property. Here there was an instrument intended to impose a trust upon the officers of the bank to receive the money upon the policy, and after pursuing the course pointed out to ascertain the losses to the bank, both those for which the insured was liable as well as those for which he was not, and after making such losses good, pay the balance to his family. Without following the directions the trustees have appropriated sufficient of the money to pay the note, and call it a gift to the bank. This money has gone into the funds of the bank; it has been entered upon the books. This suit is in effect to recover a deficit as shown by the books. This is as much a credit as any other sum credited upon the books, and in making up the deficit should be taken into consideration precisely as the other sums were, and there is no more need of filing it in set-off than of the others. The appropriation was an illegal one. Making the disposition of it they did, the trustees cannot complain if it is treated as a credit, and if so treated, the defendant has the right to say it shall be first applied to losses for which his testator was liable, and by making that claim in this action it follows that the amount necessary and used to make good such losses he cannot recover in this or any other action. He cannot recover for the excess in this action, for no account in set-off has been filed. Whether he can do so in any other we have no occasion now to decide.

There is, therefore, from the facts reported, no *prima facie* balance in favor of the plaintiff, and under the provisions of the report, the court must render "such judgment for the defendant as shall be in accordance with the law of the case."

That judgment cannot be for any balance, for the reason already given that no account has been filed in set-off. Nor can any specific balance be made, for at most under this report we can only decide whether any item is, *prima facie*, sustained by the facts, and cannot decide its validity as upon a full hearing upon its merits. Therefore no judgment should be entered which will preclude the plaintiff from a further hearing upon these items in another action, so far as they may be available in defense of a suit to recover the money paid upon the note or otherwise. For these reasons the entry must be, plaintiff nonsuit.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

Ex parte CONAUT. *In re* FOGLER.

April 13, 1885.

INSOLVENCY — "MERCHANT OR TRADER" — DISCHARGE.

Casual transactions in mining stocks, independent and outside of an established business, amounting in all, in the course of a year to about \$3,500, do not constitute a man a "merchant or trader" within the meaning of the insolvent law.*

C. E. Littlefield, for creditor. J. E. Hanly, for insolvent.

LIBBEY, J. The creditor objected to the insolvent debtor's discharge on the ground that he was a merchant or trader, and did not keep a cash-book. The judge of the court of insolvency found that the debtor was entitled to a discharge and decreed accordingly. The creditor appealed to the supreme judicial court, and the case was heard by the presiding judge at *nisi prius*, who affirmed the decree below. The case comes here on exceptions to the rulings of the judge in matters of law.

To sustain his objection that the debtor was a trader, the objecting creditor proved that during a period of about a year the debtor, from time to time, bought and sold mining stocks amounting in all to about \$3,500. These transactions were casual, outside of his established business and independent of it. The judge who heard the case held that these facts did not constitute the debtor a trader within the meaning of R. S., chap. 70, § 46. The main question for determination is whether that ruling is correct. We think it is.

One who makes it his business, or a part of his business, to buy and sell goods, merchandise, or commodities is undoubtedly a trader within the meaning of the statute. *Groves v. Kilgore*, 72 Me. 491; *Sylvester v. Edgecomb*, 76 id. 499. But we find no authorities that hold that speculating in stocks constitutes one a trader. The authorities cited by the counsel, and those which we have been able to find hold the other way. A trader is defined to be "one who makes it his business to buy merchandise or goods and chattels, and to sell the same for the purpose of making a profit." Bouv. Law Dic. 594. Shares in stocks are neither merchandise, goods, or chattels. *In re Clelland*, L. R., 2 Ch. 466, it was held that buying and selling stocks did not constitute one a dealer in "goods or commodities" within the meaning of the English Bankrupt Act, so as to subject him to its provisions.

In re Marston, 5 Ben. 313, it was held that speculating in stocks did not render the bankrupt a "merchant or tradesman" within the meaning of the United States Bankruptcy Act, which denied a discharge to the bankrupt, "if, being a merchant or tradesman, he has not, subsequently to the passage of the act, kept proper books of account." BLATCHFORD, J., in his opinion, says: "Although, according to the lexicons, one who is engaged in the business of buying and selling for gain may be called a merchant, and also a tradesman, yet I do not think it would ever occur to any one to speak of a person carrying on the business which the bankrupt carried on in the way in which he carried it on, as a merchant or as a tradesman, nor do I think that those words, as used in the twenty-ninth section, embrace such a person." "A clergyman, or a physician, or a lawyer might carry on the same business in the same way, in addition to his regular professional business, and no one would call him, in consequence, a merchant or a tradesman. If not, the bankrupt cannot be so called." It appeared that speculating in stocks was the bankrupt's only business.

The same rule was fully affirmed in *In re Woodward*, 8 Ben. 563. In this case the sole business of the bankrupt was that of a speculator in stocks and a stock broker. He was a member of the board of brokers, kept an office, and bought and sold to a very large amount; his liabilities, when he was declared a bankrupt, reaching nearly \$3,000,000. In his opinion, BENEDICT, J., says: "Upon these facts the court has been urged to hold that the bankrupt was a merchant or tradesman, and to refuse the discharge because of his failure to keep proper books of account. But my opinion is, that the bankrupt cannot be held to have been a

* See 30 Am. Rep. 94; 38 id. 336; 136 Mass. 88.

merchant or tradesman within the meaning of the bankrupt law. The words "merchant and tradesman" involve the idea of dealing with merchandise in some form or other. In their ordinary and natural signification they do not include one who makes profits by buying and selling of shares on speculation, whether for himself or for others. Such person, in ordinary parlance, cannot be said to be engaged in trade. No case has been cited which furnishes authority for extending the meaning of these words, so as to include the occupation of this bankrupt. The adjudged cases look the other way. The case of *Marston*, 5 Ben. 313, is quite in point. It is supposed that the present case differs from the case of *Marston*, in that the dealings of this bankrupt were not casual, that he had an office, made contracts in his own name as well as for others, and acquired by his dealings a credit that enabled him to make extensive purchases of stocks. But these circumstances, assuming them to be proved, do not bring him within the statute, for they do not disclose the characteristic features of the occupation of a merchant or tradesman, namely, a trading in goods, wares or merchandise."

Our insolvency law was enacted to take the place of the bankrupt law on its repeal, and we think the words "merchant or trader" are used with the same meaning as the words "merchant or tradesman" in the bankrupt law.

It becomes unnecessary to consider the other point discussed by the counsel, whether the debtor kept a cash-book of his stock transactions, or its equivalent.

Exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

BIRD v. KELLAR.

April 13, 1885.

MORTGAGE — FORECLOSURE — REDEMPTION.

The statute of Maine, relating to the foreclosure of real estate mortgages by an action at law, applies to mortgages in existence at the time of its enactment. Under it a foreclosure is ineffectual if there is a failure to record the abstract of the writ of possession with the time of obtaining possession.

When the mortgagor remains in the possession of the premises, occupying for himself and not for the mortgagee, the right of redemption is not barred by lapse of time.

The interest of a deceased mortgagee of real estate passes to the administrator as assets, and the widow and heirs cannot convey a title to the same.

Thompson & Dunton, for plaintiff. *Joseph Williamson*, for defendants.

DANFORTH, J. October 7, 1847, Stephen P. Moody and Thomas J. Moody, having title to the premises in dispute, conveyed them in mortgage to Jacob Moody. There was a breach of the condition, and January 16, 1856, Jacob recovered judgment as of mortgage, upon which a writ of possession was issued March 31, 1856. Before that writ was served, Jacob conveyed the premises, by deed of warranty, dated May 13, 1856, to John Payne, who died October 8, 1857. His widow conveyed her interest to Thomas P. Moody, May 14, 1880, and Mary Payne, the widow of Miller, a son of John and Virginia, the sole surviving heir of John, conveyed their interest to the same grantee by quit-claim deed dated February 3, 1883. The plaintiff claims by deed of warranty from Thomas P. Moody.

Thus it appears that the plaintiff traces his title through mesne conveyances to the mortgage of Stephen P. and Thomas J. Moody to Jacob Moody; one of the links in this chain being the deeds from the widow and heir of John Payne. If this title fails he must fail in his suit. The objection to it is two fold.

First, that the attempted foreclosure was not a valid or completed one; and second, in any event under the undisputed facts in this case, the widow and heir of John Payne never had any title under the mortgage, and, therefore, could convey none.

I. Was the foreclosure a valid one? There was an attempt to foreclose by the service of the writ of possession some time in 1856, and as the law was at the date of the mortgage, perhaps all the steps necessary to begin the foreclosure were taken. But some years before the commencement of the action to recover possession, the act of 1849—chap. 105—was passed, which, as an amendment to the statute previously in force, provides that "when the foreclosure is by an action at law, an abstract of the writ of possession, with the time of the obtain-

ing possession, certified by the clerk of the courts where judgment was rendered, shall be recorded within thirty days after possession is obtained, in the registry of deeds in which the mortgage is or ought to be recorded." This act was incorporated into the subsequent revision of the statutes, and has been in force ever since.

This act was not complied with in this case. That it is material and its omission fatal, when applicable, is settled in *Hatch v. Bates*, 54 Me. 136, 141.

That by its terms it is applicable in this case there can be no doubt. It was in force before the attempted foreclosure, is general in its provisions, and makes no exception of mortgages previously executed. It is however, claimed that as it was not in force at the date of the mortgage, if applied, it is unconstitutional as impairing the obligation of a contract.

That there is a distinction between the contract and the remedy is too well settled to need discussion. That this act relates to the remedy would seem to be equally clear. It in no respect alters or modifies a single provision of the contract. In its terms it remains the same as before. It only provides for a single step in the particular process resorted to for enforcing its obligations. True there are cases where an alteration of the remedy has been held to be within the constitutional prohibition. But that is only where the change necessarily affects the obligation of the contract, taking from it somewhat of its force and efficiency, rendering it of less value to the party who is to receive its benefits. That is not this case. No part of it is rendered any less efficient by the act; it is of no less value to the mortgagee as a security for his debts under the law than without it. It may be even more valuable, for taking the whole act, it provides that the "certificate of the register shall be received as *prima facie* evidence of entry . . . and sheriff's return;" a valuable provision in case of the loss of the writ of possession, as in this case. The object of the record is to give better notice of the entry and preserve the evidence of it, a provision apparently as much for the benefit of a mortgagee as a mortgagor. The principle here involved has been fully discussed in *Bronson v. Kinzie*, 1 How. 811, and *K. & P. R. R. Co. v. P. & K. R. R. Co.*, 59 Me. 9, leading to the conclusion that the act in question is applicable, and does not come within the constitutional prohibition.

It is, however, claimed that the right of redemption was barred by lapse of time; which under a certain state of facts might occur. So a lapse of time of sufficient length would raise a presumption of payment. But both these facts cannot exist in relation to the same mortgage at the same time. Whether the one or the other will prevail must depend upon the possession. If the mortgagor were in possession for twenty years after the debt became payable, the presumption of payment would follow. Perhaps the same result might follow if the mortgagee were not in possession. But if the mortgagee were in possession for the same length of time there would be a presumption of foreclosure. From the report in this case it appears that at the attempted service of the writ of possession, one of the mortgagors was in possession, and at that time, with perhaps some doubt and uncertainty, Payne, then the assignee of the mortgage was put into possession. But it appears that the mortgagor was not ousted, that he did not become the tenant of Payne, or in any way agree to hold the premises for him, and that Payne, instead of continuing in the possession as the law requires in order to complete the foreclosure, left the mortgagor there, who continued to hold and occupy as before, taking the rents and profits without accounting for them or paying rent, or being called upon to do either, and on one occasion at least exercising the right of an absolute owner by giving a mortgage under which the defendants claim to hold. Thus for more than twenty years after the attempted foreclosure, the premises were in the actual possession of one of the mortgagors, which would not only prevent the completion of the foreclosure, but raise the presumption of payment.

But it is claimed that the possession of the mortgagor is that of the mortgagee. If this were true without qualification the presumption of payment could seldom if ever arise. While it may be true in some cases and for some purposes, it is not so for others. A mortgagor in possession is undoubtedly bound in the exercise of good faith under his contract to hold the property in accordance with

that contract and preserve the property as security for the debt with all due subjection and regard to the rights and interests of the mortgagee, so far as his possession is the possession of the mortgagee and no farther. When it comes to the foreclosure it is another matter. This to be sure is a right which accrues to the mortgagee from the mortgage, but it is a right which he may exercise or omit at his option. If he chooses to put it in force, he does so by himself or his authority, and in doing it he becomes antagonistic to the mortgagor. The mortgagor has no duty to perform in this respect, and herein their relations become such that the possession of the one is not the possession of the other but antagonistic to it.

It is true that the mortgagor may assume new relations to the mortgagee; he may become his tenant, as any other person might; he may agree to hold the property under and in subordination to the control of the mortgagee. Then his possession would, in respect to the foreclosure, become the possession of the mortgagee. But this would be by virtue of a new contract; one outside of and in addition to that evidenced by the mortgage. No such contract, but the opposite, is shown by the report in this case.

It thus appearing that the attempted foreclosure of the mortgage did not accomplish its purpose, there still remains a right of redemption unless the title has become absolute in the mortgagor by a presumption of payment. In either case the title of the plaintiff must fail and there is no occasion for examining the second objection to it.

If the mortgage had been paid, then Payne's heirs could derive no title to the premises. If it has not been paid, his attempted foreclosure, as we have seen, being ineffectual, it would become assets in the hands of his administrator. His estate was represented insolvent and proved to be so. As the creditors had the prior right after the widow's allowance, it was the duty of the administrator to appropriate it to the widow or creditors, or both. The title was in him for this purpose, and the heirs or widow could convey no title. Thus the plaintiff's title coming from the widow and heirs failing, it is unnecessary to examine that of the defendants.

Judgment for the defendants.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

FOSTER v. FOSS.

April 14, 1885.

DEED — DESCRIPTION — "NORTHERLY AND EASTERLY."

A deed contained the following reservation: "But reserving all the lumber on the northerly and easterly side of the bog on said lot, and meaning to convey all the lumber on the southerly and westerly side of said bog." The bog was of irregular shape and extended beyond the east and south lines of the lot, but did not intersect with the north and west lines. Calling the most northerly point of the bog A, and the westerly point C —

Held, that the reservation covers only the timber upon that part of the lot which lies northerly and easterly of the boundary line of the bog leading from A to where it strikes the east line of the lot and east of a line running north from A to the north line of the lot.

Held, further, that the reservation did not cover the timber on that part of the lot lying northerly of the boundary line of the bog from A to C.

Davis & Bailey, for plaintiffs. *Jasper Hutchings*, for defendants.

DANFORTH, J. The only question raised in this case is the proper construction of a clause following the description in a deed from the defendants to the plaintiffs which reads as follows, viz.: "But reserving for two years all the lumber on the northerly and easterly side of the bog on said lot, and meaning to convey all the lumber on the southerly and westerly side of said bog."

The latter part of this clause relating to the conveyance is not material, except as it may throw light upon the construction of that part making the reservation. All the lumber was conveyed by the deed except that reserved, and none was reserved except as was on the lot lying northerly and easterly of the bog. The question then to be settled is, what part of the lot did so lie? Here is no latent ambiguity to be explained, for the matter to which the language is to be applied,

is free from doubt. Hence much of the evidence reported, some of which has been used in the course of argument, is inadmissible and can render no aid in ascertaining the meaning of the parties.

There is however, a portion of the testimony — that which shows the circumstances surrounding the parties and the purpose they had in view — which is admissible, not to change to any extent the words used, but the better to enable the court to understand the meaning to be attached to such language as is used. This testimony, we think, may be of considerable value in this case. But this will not enable the court to correct any mistakes as to the facts under which the grantors acted, of which it is quite probable there were some. In the absence of fraud, of which there is no suggestion here, they must abide by the language of their deed. We are also to bear in mind the fact that the words to be construed are those of the grantor's, a reservation in a deed, and, in case of doubt and uncertainty, are to be strictly construed against the party using them.

The words "northerly and easterly" may be more comprehensive in their meaning than north and east, depending very largely for that meaning upon the facts to which they are applied. When there is no object to direct the course they must, at least in the description in a deed, be taken to indicate a direction due north or east; but when there are monuments upon the face of the earth to which they are applicable, they may have their legitimate meaning and full force and yet the course incline either way to any distance so long as it tends toward the north or east, and in connection with these facts retain a definite and unmistakable meaning. The course will still retain its characteristic as northerly or easterly, or both. *Brandt v. Ogden*, 1 Johns. 156; *Garvin v. Dean*, 115 Mass. 577.

The bog to which these words "northerly and easterly" are applied has no distinctly north side bounded by a straight line or nearly straight line. In running that line, beginning at point C, as claimed by the defendants, following the bog which is made a monument, we pursue a northerly course tending to the east until we arrive at point A; still following the line of the bog, our course is easterly tending on the whole, southerly, until we arrive at the point where the bog crosses the east line of the lot, and, for the purposes of this case, we have no occasion to trace the line farther.

The words "northerly and easterly," as used in the reservation, are connected by a copulative conjunction; both are adjectives and both qualify the word "side," which is in the singular number. We have then, one side in the reservation, and that side, to answer the description, must be both northerly and easterly. With this explanation, applying the language of the reservation to the face of the earth, we have an exact description of that part of the lot reserved. That portion which adjoins the line running easterly and southerly must necessarily be northerly and easterly of it.

The defendants claim that the word "northerly" includes that part of the lot which adjoins the line from C to A. So it would if that qualifying word were used alone. But it is not, and by no fair interpretation can we describe it by the words "northerly and easterly," for in fact it lies northerly and westerly of the bog. Hence, to sustain the defendants' view, we must eliminate the word "easterly" as without meaning; or, if we are to give the words "northerly and easterly" distinct meanings as applicable to different sides, then we must do the same with the words "southerly and westerly" used in the grant. By this method that part of the lot in question lies as much westerly of the bog as northerly, and would be described by the one word as well as the other. This would leave it uncertain whether it would be included in the reservation or grant; in which case, upon the familiar principle of interpretation already referred to, it must be included in the latter.

If we adopt the conclusion contended for, that the grantors, in the reservation and grant, intended to cover the whole lot, it would not change the result, for then the portion of the lot in dispute would be included in the grant rather than in the reservation.

But, while the grantors probably intended to convey or reserve all the timber upon the lot, we see no evidence tending to show that under the clause in question they intended to cover the whole lot, and certainly there is no phrase in it

which, by a fair construction, will include the north-west corner of the lot. The testimony, which is admissible, leads us to the conclusion that the parties, especially the grantor, who was principally instrumental in the sale, at the time, supposed there was no lumber upon that part which he cared to reserve. When running the northerly line the point of starting at the west end was fixed upon by him when he was upon the ground, with a view to running the line so far south as to leave such lumber as he wanted to the north of it, while conveying as much of the bog as possible. Fearing that a line due east would not save to him the lumber he wanted on the easterly part of the lot, he suggested a line tending to the south, and after some discussion, it was agreed that the variation should be thirty degrees south. Subsequently, fearing that this variation might not be sufficient to save his desired lumber at the east end, so far as appears, not doubting the sufficiency of the starting point, out of an abundant caution he puts in this reservation which, as we have seen, is in apt words to reserve his lumber upon the north-east corner of the lot, the very object he had in view, and not upon the north-west, where he supposed there was none of the kind he wanted. Thus he accomplished the purpose he had in view. That the defendants subsequently found the mistake in regard to the lumber on the north-west corner, if it was a mistake, is not material. If there is any remedy, it is not in the course they have taken to secure their alleged rights, nor can it be found in a defense to this action. In the absence of any allegation of fraud, they must abide the language of their deed.

Our conclusion is that the reservation covers only the timber upon that part of the lot conveyed, which lies northerly and easterly of the boundary line of the bog leading from point A to where it strikes the east line of the lot, and extending westerly to a line running from A to the north line of the lot.

Action to stand for trial.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

DILLINGHAM v. ROBERTS.

April 16, 1885.

EQUITY — PRACTICE — WATERS — CONSTRUCTING WHARF.

The plaintiff in a bill of complaint, prayed for an injunction to restrain the defendant from constructing his wharf, on the ground that, if constructed as proposed, it will lie directly in front of the plaintiff's lot, and materially obstruct the access to it by water.

Held, That the facts alleged, being denied in the answer,— the burden was on the plaintiff to prove them.

H. E. Hamlin, for plaintiff. *A. P. Winwell* and *L. B. Deasy*, for defendant.

LIBBEY, J. Assuming that, if the defendant is constructing his wharf below low water in front of the plaintiff's lot, in a manner to obstruct or impair access to his lot by water, the plaintiff may maintain his bill in equity for the injunction prayed for (but on this point we express no opinion), still, the facts being in issue, it is incumbent upon the plaintiff to prove them. The plaintiff alleges in his bill, that all of the wharf below low-water mark, if completed, would lay directly in front of his lot. The defendant in his answer, denies this allegation. The burden is on the plaintiff to prove it.

The only evidence in the case is the deeds to the parties, and the plan, which are made a part of the case.

The construction of the defendant's deed was before this court in *Dillingham v. Roberts*, 75 Me. 469, and it was held that it embraced the flats in front of the upland, extending the land conveyed to low-water mark. The lines across the flats must be located by the rules laid down in *Emerson v. Taylor*, 9 Me. 42. The plaintiff's deed by its terms extends his west line, without an angle, to low-water mark, but the defendant's deed was prior to the plaintiff's, and when the plaintiff's line called for by his deed strikes the defendant's line on the flats, it must stop, and from that point to low water his line is coincident with the defendants.

Applying these rules to the plan, we are not satisfied that any portion of the

wharf can be said to be in front of the plaintiff's land. The location of the lines across the flats cannot be determined by the plan with accuracy, but may be approximately and thus determined, if the defendant's line across the flats should be extended below low water as far as the wharf extends, it does not appear that any material portion of the wharf will extend over that line.

Nor does it appear, by any evidence in the case, that the wharf will materially affect the access by water to the plaintiff's land.

The decree must be, bill dismissed without prejudice, costs for defendant.

PETERS, C. J., WALTON, VIRGIN and HASKELL, JJ., concurred.

TROTT v. LOWELL.

April 20, 1885.

TAXES — ASSESSMENTS.

An assessment of taxes to L. "*et ux.*," cannot be upheld.

An action by the collector of taxes of the city of Bath, against Abner I. Lowell and Ada I. Lowell, to collect a tax assessed to Abner I. Lowell *et ux.*

Francis Adams, for plaintiff. *E. J. Millay*, for defendants.

PER CURIAM. Debt to recover a certain sum alleged to have been assessed for taxes on personal property of the defendant's in Bath, for the year, 1883.

The lists of assessments for that year bore the names: "Abner I. Lowell *et ux.*" Assuming that this annex was intended for the familiar "*et ux.*" (and wife), still there is no evidence in the case that Ada I. Lowell was the wife of Abner, or that the assessors intended by the term to assess the tax to Ada I. Lowell. *Farnsworth v. Rand*, 65 Me. 19; *Tyler v. Hardwick*, 6 Metc. 470. Such mode of assessment cannot be upheld.

Judgment for the defendants.

ALDRICH v. INHABITANTS OF GORHAM.

April 20, 1885.

NEGLECT — PROXIMATE CAUSE — HORSE MOMENTARILY UNCONTROLLED — DEFECTIVE BRIDGE.

If a well-broken horse, while being carefully driven, suddenly swerves or shies from a direct course, passing momentarily out of the control of the driver, and at that instant comes in contact with a defect in the road, such conduct of the horse will not be considered as the proximate cause of the accident. (*Note*, p. 400.)

S. C. Strout and *F. M. Ray*, for plaintiff. *Strout & Holmes* for defendants.

FOSTER, J. This case is before the court upon exceptions and a motion to set aside the verdict, rendered for the defendants, accompanied by a full report of the evidence.

The plaintiff with horse and open express wagon was traveling from Buxton to Saccrappa, and at about four o'clock in the morning in September was passing over a bridge in the town of Gorham, when, as he claims, his horse suddenly shied to the left, and in so doing broke through the bridge, struggled, and together with the wagon went over the railing into the stream below; that at the moment the horse broke through, on account of the sudden stopping of the carriage, he was thrown forward from his seat over the bridge, and fell near the foot of the abutment, sustaining severe personal injuries, in which situation he was found in a nearly unconscious condition, and for the injuries thus received this action was brought.

The bridge over which the plaintiff was passing, and near the easterly end of which this accident is alleged to have occurred, was about twenty feet in length by eighteen in width, twelve feet above the bed of the stream, having a railing upon each side, and covered with one thickness of plank, thereby rendering the surface uniform the entire width between the rails.

That the plaintiff received severe bodily injury, and that the bridge was defective by reason of the covering having become badly decayed and rotten at the

place where it is alleged the horse shied and broke through, there can be little doubt, if we are to judge from the testimony in the case.

One of the principal positions relied upon in defense was, that taking the plaintiff's statement to be true, if the way was defective at that particular point, and the injury was received by the plaintiff as claimed, such injury was not occasioned by the defect alone, but by some other cause contributing to produce it; in other words, that it was produced by the shying of the plaintiff's horse occasioned by the movement of a bird in the bushes which caused the horse to shy or jump several feet from the usually traveled part of the bridge, and coming upon the weakened and defective place in the crossing, floundered and went over the railing.

Assuming this to be true, and the facts to be as claimed by the plaintiff, the shying was momentary, followed the next instant by the accident. The testimony discloses no want of care on the part of the plaintiff up to the very moment when the horse shied; moreover the plaintiff testifies that the horse was under his control. With no premonition of what was to occur, "all of a sudden he jumped to one side," and in so doing came in contact with the defect in the bridge of which the proper officers had sufficient notice.

It is undoubtedly the law of this State, as settled in a line of decisions from *Moore v. Abbot*, 32 Me. 46, to the present time, that in order to render a town or city liable on account of an accident happening on a highway, it must appear that the defect in the way was the sole cause of the injury. If any other efficient, independent cause, for which the town is not responsible, contributes directly to produce such injury, the town or city is not liable. Some portion of the harness or carriage may be defective and unsafe, and the accident may be the combined result of the defect in the harness or carriage, and the defect in the way; in such case there is an efficient co-operating cause, in connection with the defect in the way, that produces the injury, and the town is not rendered liable. The same principle applies where a horse, becoming frightened at an object for which the town is not responsible, breaks way from his driver, and escapes from all control, while traveling on the way, and afterward, while thus free from the management and control of the driver, meets with an injury through a defect in the way. *Davis v. Dudley*, 4 Allen, 557; *Moulton v. Sanford*, 51 Me. 127. Where such is the fact, it cannot be said that the defect in the way is the sole cause of the injury. There are other efficient, co-operating causes which combine to produce the accident, and which may be regarded as much the true and real cause of the accident as the defect in the way.

But whether the fright or misconduct of the horse is such as to be regarded as the true and proximate cause of the injury, in any given case, is to be governed by the extent of such misconduct. It may in some remote degree even bear upon or influence, though not in any legal sense be said to cause it. "Every thing which induces or influences an accident," says Chief Justice PETERS, in the very recent case of *Spaulding v. Winslow*, 74 Me. 534, "does not necessarily and legally cause it." And not only is it the doctrine of the court in our own State, but also in Massachusetts, that if a horse well-broken and adapted to the road, while being properly driven suddenly swerves or shies from the direct course, he is not in any just sense to be considered as escaping from the control of the driver, or becoming unmanageable, if he is in fact only momentarily not controlled; and that if while thus momentarily swerving or shying he is brought in contact with a defect in the road and an injury is thereby sustained, such conduct of the horse will not be considered as the proximate cause of the accident, though it may be one of the agencies or mediums through which it was produced, and a recovery may be had for such injury. This doctrine is not at variance with that laid down in *Moulton v. Sanford*, 51 Me. 127, or *Perkins v. Fayette*, 68 id. 162; S. C., 28 Am. Rep. 84, in both of which there were two independent, efficient, proximate causes of the accident; and it is in harmony with that of *Spaulding v. Winslow*, *supra*; and with the decisions of the Massachusetts court. *Titus v. Northbridge*, 7 Mass. 258; *Stone v. Hubbardston*, 100 id. 55; *Bemis v. Arlington*, 114 id. 508; *Wright v. Templeton*, 132 id. 50.

While these principles may be regarded as well established, the difficulty which

sometimes arises is in their application to the circumstances of the particular cases; especially true is this when the occurrences out of which the accident arose, as in this case, are almost instantaneous.

The plaintiff's exceptions, in the case at bar, relate to that portion of the charge in which the court speaks of the fright and shying of the horse; and herein we think the plaintiff's rights before the jury were more or less prejudiced. The instructions which they received were, in substance, that if the plaintiff's horse, frightened at some bird or animal, for which the town was not responsible without fault of the driver, shied from the regular line of travel and went over the bridge or into a hole, and an injury was thereby received, the town was not liable, on the ground that the primary cause of the accident was not the defect in the way.

This statement, without qualification, we think was too broad. It was not qualified either in reference to whether the shying was sudden, momentary or otherwise, or as to the distance of such shying or swerving from the regular line of travel, but was absolute and unqualified that the town would not be liable, and that it would be a primary cause of the accident. Whereas, it is not every sudden, momentary starting or shying of a horse properly driven, or momentary loss of control by the driver, that will constitute a primary or proximate cause of accident, when a defect in the way is thereby, at the same moment, encountered and an accident happens. The evidence in the case upon which the instructions were based was not such as to show that the horse had broken away and escaped from the management and control of the driver previous to coming in contact with the defect, and as CHAPMAN, J., said in *Titus v. Northbridge*, *supra*, "a horse is not to be considered as uncontrollable that merely shies or starts, or is momentarily not controlled by the driver." Though possibly swerving a few feet from the line of travel, the horse, at the point where he broke through, was nevertheless upon that portion of the bridge equally as inviting and accessible to travel as any part of it.

In the opinion of the court in *Spaulding v. Winslow*, *supra*, which had not been announced at the time of the trial in the case, this principle is expressed thus: "If, however, the horse while being properly driven, upon sight of the hole suddenly started or shied, and swerved or sheared a few feet from the direct line of travel, and through only a momentary loss of control by the driver, threw the wagon into the ditch on account of the want of a railing, and the road was defective for want of a railing, in such case the misadventure of the horse should not be considered as causing the accident." See, also, as in accordance with what is here expressed, *Wright v. Templeton*, 132 Mass. 50.

This portion of the charge, taken in the connection in which it is found, is not aided by the preceding hypothesis wherein the term "manageable," as applied to the horse at the time of the shying, was not explained or defined fully in accordance with the principles of law applicable in cases of this kind. The jury may have inferred that want of control, even momentarily, was such unmanageableness as would exempt the town from liability. We think that the instructions were not such as to enable the jury to decide the case understandingly.

Exceptions sustained.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and EMERY, JJ., concurred.

NOTE. — See 38 Am. Rep. 574; 34 id. 630; 47 id. 381; 29 Eng. Rep. 530: In *Sherwood v. City of Hamilton*, 37 Up. Can. Q. B. 410, the plaintiff with a wagon and load of bricks was coming down the hill on a road, by the side of a precipice; he had stopped to speak to some one, when in starting again the horses ran away, and when they came to an opening in the fence or railing along the road near the foot of the hill, they bolted through it down the precipice. At the trial the plaintiff was nonsuited, on the ground that the proximate cause of the accident was the horses getting beyond the plaintiff's control, not the defect in the fence. The court held that the mere fact of the horses running away and becoming unmanageable would not prevent the plaintiff from recovering, unless he had been guilty of a want of reasonable care and skill, which was a question for the jury, and therefore the nonsuit was set aside.

That the rule is, that where two causes combine to produce the injury, both in their nature proximate, the one being the defect in the highway, and the other some occurrence for which neither party is responsible, the corporation is liable, provided this injury would not have been sustained but for the defect in the highway.

Chief Justice HARRISON said: "A plaintiff, in order to recover in an action of this kind, must, however, not only establish the default of the corporation, but that such default was the cause of the injury in respect of which he sues.

"If it be shown that there was contributory negligence on the plaintiff's part directly, not remotely, contributing to the injury of which he complains, he cannot, of course, recover. *Tuff v. Warman*, 2 C. B. (N. S.) 740; affirmed, 5 id. 578; *Witherly v. Regents' Canal Co.*, 12 id. 2; *Gee v. Metropolitan Ry. Co.*, L. R., 8 Q. B. 161; *Bradley v. Brown*, 82 Up. Can. Rep. 408.

"But if it be shown that without fault or negligence on his part his horse escaped from his control and ran away, or became unmanageable, so that no care could be exercised by him in respect to them, and this condition of things is not produced by a defect in the highway, the question is whether the plaintiff can recover.

"This, it seems to me, is the question, and the only question for our decision in this case. The court of appeals did not, as I understand the opinions of the learned judges in *Tome v. Whitby*, 87 Up. Can. Rep. 100, decide the question now raised.

"On the contrary, Mr. Justice BURTON said, at page 107: 'Assuming for the present to the fullest extent that the municipality are only bound to keep the road in such a state as to render it safe for travel, according to the ordinary usages of travel, and that if it had been shown that the horse had, from no fault or negligence of these defendants, taken fright and become unmanageable, and whilst so beyond the control of the driver had come upon a defect in the highway by which an injury had been occasioned, that municipality would not have been liable; that is not the present case. A horse is not to be considered uncontrollable in this sense, if he merely shies or starts, or is momentarily not controlled by his driver.'

"The question here presented for decision is not free from conflict of opinion.

"In the State of Maine, under a statute not unlike ours, it has been in several cases held that the corporation is not liable if there be two efficient, independent proximate causes of an injury sustained by a traveler upon a highway, the primary cause being one for which the corporation is not liable, and as to which the traveler himself is in no fault, and the other being a defect in the highway. See *Moore v. Inhabitants of Abbott*, 82 Me. 46; *Farrer v. Inhabitants of Greene*, id. 574; *Coombs v. Inhabitants of Topsham*, 88 id. 204; *Anderson v. City of Bath*, 42 id. 346; *Moulton v. Inhabitants of Sandford*, 57 id. 127.

"In the State of New Hampshire, under a statute also like ours, the contrary is held. It is there held that where two causes combined to produce the injury, both of which were in their nature proximate, the one being the defect in the highway, and the other some occurrence for which neither party is responsible, that the corporation is liable, provided the injury would not have been sustained but for the defect in the highway. See *Winslip v. Enfield*, 42 N. H. 197; *Clark v. Barrington*, 41 id. 44; *Tucker v. Hunnicker*, id. 317; *Norris v. Litchfield*, 85 id. 271.

"In the State of Vermont, under a similar statute, the courts appear to be in unison with the courts of the State of New Hampshire on this question. *Hunt v. Town of Pownal*, 9 Vt. 411; *Kelsey v. Town of Glover*, 15 id. 708; *Allen v. Town of Hancock*, 16 id. 280.

"In the State of Massachusetts, under a similar statute, the decisions are apparently conflicting. In *Pulmer v. Inhabitants of Andover*, 2 Cush. 600, it was held that the corporation is liable for an injury occasioned by a defect in a highway where the primary cause of the injury is pure accident. But subsequent decisions have shaken it. See *Murdock v. Inhabitants of Warwick*, 4 Gray, 178; *Marble v. City of Worcester*, id. 385.

"And still later it has been approved. *Bowell v. City of Lowell*, 7 Gray, 100.

"The result of the Massachusetts decisions would appear to be to hold that, if at the time the accident happened the horses were, and for some considerable time had been, out of the control of the driver, the corporation is not liable. See *Davis v. Inhabitants of Dudley*, 4 Allen, 557; *Titus v. Inhabitants of Northbridge*, 97 Mass. 258; *Horton v. Taunton*, id. 266, note; *Fogg v. Nahant*, 98 id. 678; reported also in *Withrow's American Cases*, 464.

"In the State of Wisconsin, where a similar statute exists, the principle of the last-mentioned cases appears also to prevail. *Dreher v. Fitchburg*, 22 Wis. 675; *Houfe v. Town of Fulton*, 29 id. 296; S. C., 9 Am. Rep. 568.

"In *Houfe v. Fulton*, will be found a summary of the cases by Chief Justice DIXON of the supreme court of Wisconsin. In referring to the Massachusetts cases, he says, at p. 575 of 9 Am. Rep.: 'Some of these cases seem to go upon the principle that the horses being actually uncontrollable the plaintiff is unable to show the exercise of ordinary care, or of any care at the time of the injury, in order to avoid it. Others say that the fright or unmanageableness of the horses is the misfortune of the traveler, of which he must bear the loss. A better reason would seem to be that it is not within the spirit or intent of the statute that the towns shall be bound to provide roads that shall be safe for frightened and runaway horses, that the remedy is presumed to have been given only to those who have their horses and carriages under their control at the time. But whatever the true ground of such decisions may be, or whether they are sound or not, it is unnecessary to inquire here, since a recognized exception to them is, that a horse is not to be considered uncontrollable that merely shies, or starts, or is momentarily not controlled by his driver.' He concludes his judgment by saying, at p. 575, that 'the decided weight of authority is that if besides the defect in the way, there is another proximate cause of the injury contributing directly to the result, but which cause is not attributable to the fault or negligence of the plaintiff, nor of any third person, and is unconnected with the fright or unmanageableness of the team, caused as above stated, the town is liable, provided the jury shall determine that the damage would not have been sustained but for the defect in the way. Some of the reasons against the conclusions thus adopted are

very strong we admit, but on the other hand those which favor it seem equally forcible, and in such a case we know of no better rule than to be governed by the weight of authority.

"The last United States decision on the point that I have seen is *Hull v. City of Kansas*, 54 Mo. 598; 14 Am. Rep. 487, decided last year. The action was to recover damages to a horse and buggy alleged to have been occasioned by a hole in the street negligently left uncovered. The facts appeared to be that the driver of the buggy, when attempting to turn from one street into another, got one of the lines entangled under the horse's tail, which caused the horse to commence backing, and as the driver was about to jump out the horse fell into the hole in the embankment.

"The circuit court, on the trial, declared the law to be that it was the duty of the defendant to keep its streets in a proper state of repair, so that they should be reasonably safe for travel, and if the defendant permitted one of its streets to be and remain so out of repair, and the plaintiff's horse and buggy were being driven along the same, and without the fault of the driver, the horse and buggy of the plaintiff were injured by reason of the said street being out of repair, then the plaintiff is entitled to recover, even though such injury was the combined result of the accident and of the defendants' neglect to keep the street in repair, provided the driver of the horse was in no fault.

"The court thus adopted the view of the New Hampshire cases, and determined that although the injury was the result of accident in the temporary loss of control over the horse, yet if that accident would have resulted in no damage had the street been in proper repair, the city must be held responsible.

"Mr. Justice NORTON, of the supreme court of Missouri, in affirming the decision of the circuit court, said, at page 448 of 14 Am. Rep.: 'The point presented by the instructions in this case, I understand, was decided at the last term at St. Joseph, in the case of *Bassett v. The City of St. Joseph*, 53 Mo. 290, in which case this court adopted the view taken by the New Hampshire court in *Winship v. Enfield*, 42 N. H. 202, and declined to follow the decisions in Massachusetts referred to in the brief of defendants' counsel. Indeed, it is not very clear that the Massachusetts cases go to the extent of holding that a mere temporary loss of control over the horse driven along the street would relieve the city from responsibility. It is held, that where the horse escapes from the driver entirely, or is totally ungovernable, or is a vicious animal, the damage occasioned is not chargeable to the city or town, because it ultimately occurs in a street, or at a place where the street is out of repair.'

"In the conclusion of the judgment, the following language of Mr. Justice REDFIELD, in *Hunt v. Pownall*, 9 Vt. 111, is quoted with approbation: 'In every case of damage occurring on a highway, we could suppose a state of circumstances in which the injury would not have occurred. If the team had not been too young, or restive, or too old, or headstrong, or the harness had not been defective, or the carriage insufficient, no loss would have occurred. It is to guard against these constantly occurring accidents, that towns are required to guard in building highways. The traveler is not bound to see to it that his carriage and harness are always perfect, and his team of the most manageable character and in the most perfect training, before he ventures upon a highway. If he could be always sure of all this, he would not require any further guaranty of his safety, unless the roads were absolutely impassable. If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road conspiring with some accidental cause, the defendants are liable.

"The supreme court of Missouri held, that as the driver had not lost the control of the horse, except during the short period of his backing into the hole, and there was neglect on the part of the defendants, the decision of the circuit court should be affirmed, and this seems to me to be in accordance with the decision of our court of appeals in *Toms v. Whitty*, 37 Up. Can. Rep. 100.

"In *Toms v. Whitty*, both in the court of queens' bench—reported 35 Up. Can. Rep. 195—and in the court of appeals, I, as counsel for the defendants, endeavored to get the court to adopt the decisions of Maine, but while Mr. Justice MORRISON was inclined to adopt the view for which I argued, the majority of the court was against me. Mr. Justice WILSON, after a very careful review of all the United States decisions then known, expressed the opinion that a road or bridge must be reasonably safe for the public use, and if it be not so, the fact that the horse was running away or unmanageable will not prevent the person injured from recovering the damage he has sustained.

"Chief Justice RICHARDS in the same case said, in 35 Up. Can. Rep. 226: 'The mere fact that the horse was restive and broke the wagon, or was for the time being not under the control of the driver, cannot relieve the defendants from their responsibility. One of the very objects of guards to a bridge is to prevent just such accidents, and when they occur, and injury is sustained in consequence of the omission of the corporation to keep the bridge in a reasonably proper state of repair, I fail to see how they can free themselves from liability, unless they can show that the party complaining has been guilty of want of reasonable skill or care in driving. The mere fact that the horse shied, as it is termed, does not imply want of care or skill in driving, and it must be a fact for the jury to determine whether there was such want of care or skill.'

"Not one of the judges in appeal has in any manner dissented from the expressions of opinion as to the law thus enunciated in the court below.

"It remains to be observed that it is not shown in this case what distance the horses ran after they started, so that I could not, if so disposed, apply the doctrine of the Massachusetts cases to the limited extent stated in *Hone v. Town of Fulton*, 9 Am. Rep. 588, and in this view alone the nonsuit would have to be set aside. But if the law, as understood and expounded in New Hampshire, be the correct rule of decision, the nonsuit cannot in any view be upheld.

I must say, contrary to the opinion which I held when counsel in *Toms v. Whitty*, 35 Up. Can. Rep. 195, that the weight of authority now appears to be in favor of the law as pronounced in the New Hampshire courts, and as this is in accordance with the opinions expressed by the majority of the judges of this court as constituted when *Toms v. Whitty* was decided — opinions not in any manner dissented from by the judges of the court of appeal — I have the less hesitation in coming to the conclusion that in this case the rule must be made absolute to set aside the nonsuit and for a new trial."

LOCKWOOD COMPANY v. LAWRENCE.

April 22, 1885.

WATER AND WATER-COURSES — WASTE FROM SAW MILLS THROWN INTO THE RIVER — RIPARIAN OWNERS — REASONABLE USE — PRESCRIPTION — EQUITY PRACTICE — MULTIFARIOUSNESS.

Where several respondents, acting separately and independently of each other, deposit the refuse material and debris arising from the operation of their saw-mills into the same stream, whence, by the natural current of the water, it is carried down the stream and commingles into one indistinguishable mass before reaching the complainant's premises where it creates the nuisance and inflicts the injuries complained of,—

Held, upon a bill in equity for perpetual injunction, that the several acts of the respondents constitute but one cause of action and all the respondents may be joined in the same bill to restrain the nuisance.

Where the same relief is asked against all claiming a common right, and the same general acts are alleged and proved against all as contributing to the same nuisance, and the object of the bill is to obtain relief for one nuisance to which all the respondents contribute, it is not multifarious, although the respondents may have different and separate interests.

Nuisances and injuries affecting waters, including the obstruction, diversion and polluting of streams, affords sufficient ground for equitable interference, and that, too, without first establishing the fact of the nuisance by a suit at law, where the injury is irreparable or where adequate compensation therefor cannot be obtained at law.

The law does not lay down any fixed rule for determining what is a reasonable use of the water of a stream by a riparian owner. It is such reasonable use as will not interfere with a like reasonable use by all others affected by his acts, and must depend upon the circumstances of each particular case.

In order to obtain a prescriptive right to the use of the water of a stream there must have been a perceptible amount of injury to the adverse party throughout the period necessary to gain such right.

E. F. Webb and *Appleton Webb*, for complainants. There was no appearance for *Washington B. Bragg*, one of the respondents. *J. W. Spaulding* and *F. J. Baker*, for *Levi B. Weston* and *Charles M. Brainard*. *Brown & Carver*, for other respondents.

FOSTER, J. The bill alleges in substance that the complainants are the owners and in possession of a large amount of real estate, consisting of lands, dams and water-power, including mills and machinery employed in manufacturing cotton into fabrics, situated at Waterville, on both banks of the Kennebec river, not navigable for vessels or boats at that place, their dams extending across said river; that in 1874 they built a manufactory of thirty-four thousand spindles, and in 1882 another of fifty-five thousand spindles, both of which have been in use since their erection, and that in said business they have a capital of \$2,200,000, employing more than one thousand persons, with a pay-roll of about \$2,500 each day, and an annual production of \$1,800,000; that they are entitled to the natural flow of the water in said river, and to have it come to their manufactories in its natural purity. And they allege that the respondents, during the past six years, have severally owned and operated large saw-mills, cutting shingles, clapboards and other manufacturing machine and planing-mills, and shovel-handle mills, situated above the complainants on said river between and including Skowhegan and Fairfield, which they are respectively and separately operating, by means of which the refuse material, saw-dust, edgings, shavings, refuse wood, and other debris arising therefrom, are discharged therefrom into said river, and vast quantities are carried by the current down the river, and, before reaching the complainants' premises, it commingles into one undistinguishable mass, and thus uniting, flows along said river into their ponds, race-ways, racks and wheels, filling the same and thereby stopping the wheels and retarding and preventing the running and operating of their manufactories, whereby they lose the benefit, ad-

vantage and profits of the same, rendering it necessary to expend large sums of money in removing this waste and debris, causing great damage, constituting a great nuisance which is rapidly increasing and becoming more intolerable, which operations are still continued and will be continued, and that a destruction of complainants' profits, and irreparable injury will result unless the respondents are restrained by injunction; that each respondent is independently working his own mill without any conspiracy or preconcert of understanding or action with the others, and it is impossible to distinguish what particular share of damage each has inflicted or will inflict, but that each has contributed and is now contributing to constitute the nuisance, making an unreasonable use of the water of said river, destroying its value, illegally interrupting the complainants in its use, and rendering it unfit for manufacturing purposes; and that they have no remedy except in equity.

The prayer is for a perpetual injunction, restraining the respondents from depositing waste, enumerated in the bill, in said river.

The answer substantially sets forth admission of title and possession of the premises of the parties as alleged, and claiming that the respondents were severally operating such mills, manufactories and machinery as alleged, which are used to manufacture lumber owned by most of the respondents, and cut near the headwaters of the Kennebec; that most of the respondents own large tracts of timber land situate in the northern part of the State, and have invested in said lumbering business large amounts of money, and employ annually a large number of men in cutting, hauling, driving, booming and sawing said lumber, their business having continued for more than thirty years, and having become of very large proportions, furnishing employment for a large proportion of the laboring men living on Kennebec river; that said mills and manufactories were all located where they now, are more than thirty years ago, having been operated during all that period in the same places and manner as now, and that there have always, during said time, been thrown into said river whatever refuse materials the occupiers of said mills saw fit, consisting of slabs, edgings, shavings and all other refuse materials of various kinds evolved from said operations, but with much less quantity during the past six years, and only so much as, with proper care and caution on the part of complainants to protect their manufactories, would do injury to them, and that the respondents have acquired a prescriptive right to use said river as they have heretofore done; they deny that, during the past six years, any refuse or waste from their mills have been unlawfully deposited in the said river, or unlawfully interfered with the complainants' rights, and that whatever damage or annoyance they have suffered is attributable to the improper construction of their dams, flumes, racks, wheels or other apparatus used in carrying on their manufactories; that the granting of the prayer of the complainants, as set forth, will prevent the respondents from operating their mills, and destroy their lumbering business. They also deny that the allegations of the bill entitle the complainants to equitable relief, and, claiming all benefit of demurrer in their answer to this part of the bill, say that it cannot be maintained against these respondents jointly, they being, as therein alleged, engaged independently of each other in operating their several mills, manufactories and machinery, and with no conspiracy or preconcert of understanding or action with each other.

I. The case is of importance, as it embraces the rights of parties in property of great value on each side, and in the lawful management and enjoyment of which each party is entitled to protection by law. It is one, also, that in its proper consideration is not entirely free from difficulties. The parties have interests which, in the management and enjoyment of their property, are conflicting; and while it becomes the duty of the court to settle their respective rights, we must be governed by the established rules and principles of equity, and which in their operation are just and salutary.

1. The question is first considered, is the objection raised in the answer, with the force of a demurrer, to the joinder of these several respondents in this bill. It is insisted that the cause of action is distinct and several as against each of the respondents, and that neither they, nor the several causes of action, can be joined in the same bill, and that the objection by demurrer, is fatal on account of misjoinder and multifariousness.

While it is true that the allegations in the bill set forth that each respondent is independently working his own mill and machinery, without any conspiracy or preconcert of understanding or action with the others, it also appears that the refuse material, saw-dust, edgings, shavings, refuse wood, and other debris arising from operating said mills, cast and deposited into the river, are carried down by the current, and before reaching the complainants' commingles into one indistinguishable mass, and thence are carried down into the ponds, raceways, racks, and wheels of the complainants' manufactories, inflicting the injury of which they complain; and that it is impossible to distinguish what particular share of damage each respondent has inflicted, or will inflict, but that each has contributed and now is contributing to constitute the said nuisance. In considering the questions thus raised by the pleadings upon this branch of the case, and assuming the facts set forth by the allegations in the bill to be true, no other conclusion can be reached than that the respondents, though acting independently of each other as alleged, all deposit the refuse material and debris arising from the operation of their mills into the same stream whence by the natural current of the water it is carried down the river and commingles before reaching the complainants' ponds, raceways, racks and wheels, where the nuisance complained of is committed. This commingling of the waste thus thrown into the stream, and which, after thus uniting and commingling, is precipitated by the current upon the premises of the complainants, creating the nuisance and inflicting the injuries of which they complain, is the natural and necessary consequence of the several and independent action of these respondents. It is the combined action of this waste from the different mills, uniting and mingling, and thence drifting upon the complainants, which creates the nuisance, and produces the injuries, complained of.

Whatever, then, may have been the act of these different respondents either in the operation of their mills or in the depositing of the waste and debris, arising from such operations, into the stream, there is a co-operation in fact in the production of the nuisance. They all claim the right to discharge the waste and debris from their mills into this river, and in this, their claim constitutes one common interest, though not a joint right. The acts of the respondents may be independent and several, but the result of these several acts combines to produce whatever damage or injury these complainants suffer, and in equity constitutes but one cause of action. It is otherwise in law where damages are sought to be recovered. There, only those parties can be joined who have acted jointly in the commission of the act. There must be concert of action and co-operation to make several persons jointly liable in an action at law. "There is very great difference," says the court, in *Woodruff v. North Bloomfield Gravel Mining Co.*, 8 Sawyer, 628, "between seeking to recover damages at law, for an injury already inflicted by several parties acting independently of each other, and restraining parties from committing a nuisance in the future. In equity the court is not tied down in one particular form of judgment. It can adapt its decrees to the circumstances in each case, and give the proper relief as against each party, without reference to the action of the others, and without injury to either. Each is dealt with, with respect to his own acts, either as affected or unaffected by the acts of the others. It is not necessary, for the prevention of future injury, to ascertain what particular share of the damages each defendant has inflicted in the past, or is about to inflict in the future. It is enough to know that he has contributed, and is continuing to contribute, to a nuisance, without ascertaining to what extent, and to restrain him from contributing at all."

This question has recently been before the court in California in the case of *Keyes v. Little York Gold Washing Co.*, 53 Cal. 724, where a different doctrine was laid down, and in support of that claimed by the counsel for the respondents. But that case may be considered as substantially overruled by the more recent decision of *Hillman v. Newington*, 57 Cal. 56, a case in the same court sustaining the views which we entertain in the case before us.

Again, the same question arose in that State and was decided as late as 1883, in the circuit court of the United States, in the case of *Woodruff v. North Bloomfield Gravel Mining Co.*, 8 Sawyer, 628. In that case the complainant was

the owner of lands situated on the Yuba and Feather rivers; the respondents were miners, severally and independently engaged in hydraulic mining at points above on the Yuba river and its affluents, and by means of which large quantities of gravel, waste, earth and other debris arising therefrom were discharged into the several streams on which the mines were situated, and by the rapid currents of the water were carried down the various streams into the Yuba river where they commingled before reaching the valley, and after thus uniting flowed along the main Yuba river and were deposited upon the complainants' lands. An injunction was sought to restrain the several respondents from depositing the debris of their mines where it would be swept into the river. The respondents demurred to the bill. In that case, as in this, no damages were sought, but equitable relief to restrain future action — future contribution by each to the alleged nuisance. Judge SAWYER held that the bill could be filed against all the respondents who contributed to produce the injury by depositing debris in the stream above, and denied the doctrine of *Keyes v. Little York Gold Washing Co.*, as not being "in accordance with the principles of equity jurisprudence in England, or generally in the United States, as established by the authorities."

Another recent case is that of *Blaisdell v. Stephens*, 14 Nev. 17; S. C., 33 Am. Rep. 523, 526, note, which was a combined suit at law to recover damages which had already resulted from a nuisance, and in equity, for an injunction to restrain its continuance. There were two respondents who each, separately and independently of the other, allowed water to run from his land upon land of the complainant, and from the combined action of which the complainant's ditch was injured, which constituted the nuisance complained of. There was a joint judgment for the damages, and an injunction, from which an appeal was taken to the supreme court, where it was held, that the acts of each party being independent of the other, there was no joint liability for the damages, reversed the judgment and ordered a new trial. Upon a rehearing it was claimed that, even if the judgment at law for damages could not be maintained, it was a proper case for equitable relief, and the court held in accordance with the authorities, that there could be no joint recovery at law for damages, but that it was a proper case for an injunction; the case was remanded with directions that if the damages which had been recovered at law should be remitted within fifteen days, the decree for injunction should stand. In that case the principle is clearly recognized and adopted, that parties who, by their several and independent acts, contribute to the production of a nuisance, although they cannot properly be joined in an action at law for damages, may be rightfully joined in a suit in equity for injunction to restrain a future contribution by each to the nuisance.

"There is a common interest," says SAWYER, J., in *Woodruff v. North Bloomfield Gravel Mining Co.*, *supra*, "a common, though not a joint right claimed; and the action on the part of all the defendants is the same, in contributing to the common nuisance. The rights of all involve, and depend upon identically the same question, both of law and fact. It is one of the class of cases, like bills of peace, and bills founded on analogous principles, where a single individual may bring a suit against numerous defendants, where there is no joint interest or title, but where the questions at issue, and the evidence to establish the rights of parties, and the relief demanded are identical."

Prof. Pomeroy, in his recent work—*Pom. Eq. Jur.*, §§ 269, 1894—after an exhaustive examination of the authorities in the American courts, sustains the doctrine on the ground of prevention of multiplicity of suits, in bills of this nature which are not technically "bills of peace," but "are analogous to," or "within the principle of" such bills. "Courts of the highest standing and ability," says the learned writer, "have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy."

The same principle is expressly recognized in *Chipman v. Palmer*, 77 N. Y. 56; S. C., 33 Am. Rep. 556, where the court say that "an equitable action will lie

to restrain parties who severally contribute to a nuisance," while it holds that they cannot be joined in an action at law. To the same point are *Duke of Buccleugh v. Coman*, 5 Macph. 214; *Crossley v. Lightowler*, L. R., 3 Eq. 279; *Thorpe v. Brumfitt*, L. R., 8 Ch. App. 650.

In the last case a bill was sustained, and a decree granting a perpetual injunction affirmed, against several persons acting individually and severally in obstructing the passage to an inn by loading and unloading wagons. Lord Justice JAMES said: "Then it was said that the plaintiff alleges an obstruction, caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose a person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to use the way has a right to prevent; and it is no defense to any one person among the hundred to say that what he does, causes no damage to the complainant."

In the case at bar, it may be that the act of any one respondent alone might not be sufficient cause for any well-grounded action on the part of the complainants; but when the individual acts of the several respondents, through the combined results of these individual acts, produce appreciable and serious injury, it is a single result, not traceable perhaps to any particular one of these respondents, but a result for which they may be liable in equity as contributing to the common nuisance, as we have before stated. Hence, there can be no well-founded objection, either upon principle or authority, against this bill upon the ground of misjoinder.

2. The same may be said in relation to the objection urged on account of multifariousness. Here the same relief is asked against all; the same common right is claimed; the same general acts are alleged against all as contributing to the same nuisance. Where the object of the bill is single, to establish and obtain relief for one claim, in which all the respondents may be interested, it is not multifarious, although the respondents may have different and separate interests. *Bugbee v. Sargent*, 23 Me. 269; *Brinkerhoff v. Brown*, 6 Johns. Ch. 157. If the matters are in any material degree blended, so that directly or indirectly they concern all the respondents, the bill is not multifarious. *Drewry's Eq. Pl. 42*. In *Campbell v. Mackay*, 1 Mylne & Craig, 602, Lord COTTENHAM held that where the plaintiffs have a common interest against all the defendants in a suit as to one or more of the questions raised by it, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstances of some of the defendants being subject to distinct liabilities in respect to the different branches of the subject-matter will not render the bill multifarious. Also, *Gaines v. Chew*, 2 How. 642.

Therefore, whether the case before us, as disclosed by the allegations, may or may not be exactly like any other that has come before the courts, we are satisfied that it falls within the principles of equity enunciated in the cases to which we have referred, and which are not only salutary, but in accordance with reason, and that the bill is not objectionable on account of misjoinder of respondents or multifariousness.

3. The next objection urged is that upon the allegations set forth in the bill, the complainants show no sufficient grounds to entitle them to equitable relief.

The relief granted by a court of equity is either remedial or preventive. In this case the complainants' prayer is for preventive relief only. It may well be assumed that the facts stated are sufficient to constitute the case of a private nuisance, and to give this court, *prima facie*, jurisdiction over the subject-matter and the parties. It is well settled that private nuisances may, under some circumstances, fall within the jurisdiction of a court of equity, in reference to obtaining relief from further molestation by restraining the acts which constitute the nuisance.

Nuisances and injuries affecting waters, including the obstructions, diversion

or pollution of streams, afford frequent ground for equitable interference, on the principle of restraining irreparable mischief. The jurisdiction of equity in this class of cases may be regarded as ancient and well established. Especially is this true when the acts complained of are of such a character that irreparable injury will result to the complainant without such interference, or when adequate compensation for the injury arising therefrom may not be obtained at law, or, if continued, would lead to multiplicity of suits. Whenever this is admitted, or established by proof, a court of equity may, by injunction, restrain the continuance of such acts. *Canfield v. Andrew*, 54 Vt. 1.

It is true "that it is not every case which would furnish a right of action against a party for a nuisance which will justify the interposition of a court of equity to redress the injury or remove the annoyance." Story's Eq. Jur., § 925. And the general rule, as claimed by the learned counsel for the respondents, is, that where a nuisance is claimed to exist the fact of its existence should ordinarily be established by a suit at law before a court of equity will interfere. This rule, however, is not without exceptions. The ground upon which equity takes jurisdiction is that the injury complained of is irreparable, or of such a nature that there is no adequate remedy at law. An examination of the cases which sustain the doctrine of the necessity of the prior interposition of an action at law admit that in cases of pressing or imperious necessity, or where the right is in danger of being injured or destroyed, or there is no adequate remedy at law, equity will intervene. *Varney v. Pope*, 60 Me. 195; *Porter v. Witham*, 17 id. 294; *Morse v. Machias Water Power Co.*, 42 id. 127, 128; *Parker v. Winnipiseogee Lake Co.*, 2 Black, 552; *Coe v. Winnipiseogee Manufacturing Co.*, 37 N. H. 254; *Gould on Waters*, § 508, and cases cited.

As stated by Chancellor KENT in *Gardner v. Newburgh*, 2 Johns. Ch. 165: "The foundation of jurisdiction in such a case is the necessity of a preventive remedy when great and immediate mischief, or material injury, would arise to the comfort and enjoyment of property." The fact that the complainant has not established his right at law is no ground for demurrer to the bill. *Soltau v. De Held*, 2 Sim. (N. S.) 133; *Robeson v. Pittenger*, 1 Green's Ch. 57; *Holsman v. Boiling Spring Co.*, 1 McCarter, 335; *Olmsted v. Loomis*, 9 N. Y. 432.

And by irreparable injury is meant one for which there is no adequate remedy at law. *Gould on Waters*, § 508. "To deprive a plaintiff of the aid of equity by injunction, it must also appear that the remedy at law is plain and adequate; in other words, that it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity. And unless this is shown, a court of equity may lend its extraordinary aid by injunction, notwithstanding the existence of a remedy at law." 1 High on Inj., § 30; *Boyce's Ex'rs v. Grundy*, 8 Pet. 215. Especially is this the case where the injury is of such a nature as, from its continuance or permanent mischief, must cause constantly recurring grievance, which cannot otherwise be prevented. *Adams' Eq.* 211; *Belknap v. Trimble*, 8 Paige, 601; *Webber v. Gage*, 39 N. H. 186; *Merrifield v. Lombard*, 13 Allen, 18; *Cadigan v. Brown*, 120 Mass. 494. In such case an action at law affords no adequate remedy, and vexatious litigation and multiplicity of suits, which equity seeks to avoid, would afford just grounds for equitable interference. *Clark v. Stewart*, 56 Wis. 154. The very difficulty of obtaining substantial damages was stated to be a ground for relief by injunction in *Clowes v. Staffordshire Potteries Co.*, L. R., 8 Ch. App. 125; S. C., 4 Eng. R. 407. With still greater force does this apply in a case where the injury is caused by so many, and in such a way that it would be difficult, if not impossible, to apportion the damage, or say how far any one may have contributed to the result, and so damages would be but nominal, and repeated actions, without any substantial benefit, might be the result.

In *Lyon v. McLaughlin*, 32 Vt. 423, the court say: "When the invasion of the right in this kind of property is threatened and intended which is necessarily to be continuing and operate prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estimation, the writ of injunction is not only permissible, but is the most appropriate means of remedy. It affords, in fact, the only adequate and sure remedy. The very doubtfulness as

to the extent of the prospective injury and the impossibility of ascertaining the measure of just reparation render such an injury irreparable in the sense of the "law relating to this subject."

The court in Massachusetts has very recently had occasion to allude to this question in a case relating to the rights of riparian owners where the waters in a natural stream were polluted, in which case the court say: "The defendant contends that, according to the general principles of the common law, the plaintiff has a complete remedy upon the facts alleged by him, and that he should be compelled to resort to his action at law before seeking relief in equity. But it is quite clear that a bill in equity may be maintained by a riparian owner to restrain another from polluting the stream to the plaintiff's material injury. *Merrifield v. Lombard*, 13 Allen, 16; *Woodward v. Worcester*, 121 Mass. 245.

"The acts of the defendant, as alleged, tend to create a nuisance of a continuous nature, for which an action at law can furnish no adequate relief." *Harris v. Mackintosh*, 133 Mass. 230.

Equity, as well as the common law, has growth. It is said that prior to Lord ELDON's time, injunctions were rarely issued by courts of equity, but that, with the development of equity jurisprudence, it has become of frequent use. In the earlier history of the jurisprudence relating to this branch of the law, it was rarely issued in the case of a private nuisance until the plaintiff's right had been established in a suit at law. "But now," say the court in *Campbell v. Seaman*, 63 N. Y. 582; S. C., 20 Am. Rep. 567, "a suit at law is no longer a preliminary, and the right to an injunction in a proper case in England and most of the States is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits."

II. It remains then to be determined from the pleadings and proof whether the allegations are so far supported by the testimony as to entitle the complainants to equitable relief.

A large mass of testimony has been taken in support of the claims set up in the bill, and particularly in reference to the amount of waste that has been discharged into the river from the respondents' mills, and which, to a greater or less extent, has lodged in the ponds, racks, wheels and raceways of the complainants' mills, thereby causing damage and injury to their property and business, and of which they complain. Much of this testimony is uncontradicted, and fully sustains the allegations in reference to the amount and kind of waste from the respondents' mills — situated at Fairfield and Somerset Mills — and with which the water coming into the complainants' ponds is polluted. It is unnecessary to enumerate all the facts established by the testimony. The proof shows that the canal or pond, which is about seven hundred feet long, ninety feet in width, and from fifteen to twenty feet deep, situated at the westerly end of the complainants' dam, was so filled with waste during the space of about six weeks preceding the taking of this testimony — March 25 to May 12 — that the complainants were obliged to clear it out from six to eight times, and that several hundred cords were thus removed during that time besides the large quantities that had accumulated and obstructed the raceways. It also shows that they were thus continually troubled with it, and were obliged to shut down their mills on account of it from one to sixteen times a day, and at times whole days, and to employ from ten to forty and sometimes fifty men in clearing the racks and removing this waste, at an expense for that alone, during the time named, of more than \$2,000, occasioning a loss to the employees in their mills, during the month of April, of \$8,000 on account of the loss of time resulting from the frequent shutting down of the mills, thereby causing trouble and dissatisfaction. That this had been troubling them every year in the same way since commencing operations, in 1876, more at some seasons of the year than at other times, but that it had continued each year, notwithstanding they had requested the respondents to cease throwing their waste into the river, and had obtained an act from the legislature prohibiting the throwing of waste and debris into this river, and that they had already on account of this waste been damaged between \$40,000 and \$50,000, and that it was continuing and liable to continue in the future with increasing damage each year.

The proof further shows that the waste which causes this trouble, consists of great quantities of refuse material, saw-dust, edgings, shavings, and other debris arising from the operating of respondents' mills in the manufacture of more than twenty-five million of lumber annually, besides various other manufactures. It is cast and discharged into the river, and before reaching the complainants' premises commingles and is carried by the action of the water down into their ponds, racks, raceways and wheels, causing the nuisance complained of.

It appears in proof also, that the respondents and those preceding them have been accustomed to discharge the waste from their mills into this river for many years, and, although they do not strenuously controvert the fact of the great damage to the complainants, they claim that in what they do in thus disposing of their waste is but a reasonable use of this river; and if not, then that they have a prescriptive right so to do, and that the complainants contribute to the production of such injury by improperly constructed dams, canals, racks, etc. From a very careful examination of the testimony, we are satisfied that neither of these propositions can be supported by it.

1. These parties are riparian proprietors. They represent the great and important manufacturing industries of our State. While the complainants have a capital of more than \$2,200,000 invested in the manufacture of cotton, producing \$1,500,000 annually, the respondents have invested above them upon the same river in the manufacture of lumber, more than \$250,000, and whose annual production is more than \$600,000.

However great these industries, or however important to either may be the result of this suit, the rights of the parties to the use of the water in that river are established by well-settled principles.

Every proprietor upon a natural stream is entitled to the reasonable use and enjoyment of such stream as it flows through or along his own land, taking into consideration a like reasonable use of such stream by all other proprietors above or below him. The rights of the owners are not absolute but qualified, and each party must exercise his own reasonable use with a just regard to the like reasonable use by all others who may be affected by his acts. Any diversion or obstruction which substantially and materially diminishes the quantity of water, so that it does not flow as it has been accustomed to, or which defiles and corrupts it so as to essentially impair its purity, thereby preventing the use of it for any of the reasonable and proper purposes to which it is usually applied, is an infringement of the rights of other owners of land through which the stream flows, and creates a nuisance for which those thereby injured are entitled to a remedy. *Merrifield v. Lombard*, 13 Allen, 17.

It is laid down by the courts that the general principles governing the use of running streams in respect to the diversion, obstruction or detention of water must also govern in respect to the amount of waste resulting from the process of manufacture. The reasonable use in such cases depends upon the circumstances of each particular case. The law does not lay down any fixed rule for determining what is a reasonable use of the water of a stream by a riparian proprietor. For domestic, agricultural and manufacturing purposes, to which every riparian owner is entitled, there may be, consistently with that right, some diminution, retardation or acceleration of the natural flow. So in regard to the use of the stream for manufacturing purposes, there must necessarily be more or less waste which it would be impossible to exclude from it, and which by no ordinary care or prudence could be prevented from falling into the stream. The reasonableness of such use of the water must determine the right, and this must be governed by the extent of detriment received by the riparian proprietors below. See *Hayes v. Waldron*, 44 N. H. 580. In the recent case of *Red River Roller Mills v. Wright*, 30 Minn. 249; S. C., 44 Am. Rep. 194, the court say: "In determining what is a reasonable use, regard must be had to the subject-matter of the use; the occasion and manner of its application; the object, extent, necessity and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and the extent of the injury to the other party; the state of improvement of the country in regard to mills and machinery, and the use of water as a propelling

power; the general and established usages of the country in similar cases; and all the other and ever varying circumstances of each particular case bearing upon the question of the fitness and propriety of the use of the water under consideration."

This case is before us on report, and it becomes the duty of the court to determine this question of use. All evidence upon the question of reasonable use, together with all the various circumstances connected with the use of this river by these riparian proprietors in operating their different mills and manufactories, becomes important in the determination of their respective rights. It is claimed on the part of the respondents that the deposit of a great portion of the waste and refuse material arising from the different manufactories at their mills, into the river, is necessary to their successful operation, and that the expense and inconvenience to which they would necessarily be put in otherwise disposing of it would necessitate the shutting down of their mills and result in a suspension of their business in the manufacture of lumber and other materials. On the other hand, the complainants, as lower proprietors upon the same river, claim an equal right in the use of the water, and from the evidence, show that they are and have been greatly injured in the use of their property on account of this same waste and refuse material deposited above them by these respondents.

The evidence is such as to leave no doubt in our minds that the use which the respondents have made and are making of this river in reference to the rights of these complainants is other than a reasonable use of it. What may have been a reasonable use at one time may not be said to be a reasonable use now. The state of the country, the state of improvement in regard to mills and machinery, and the use of this river as a propelling power, was far different from what it is to-day. And so in considering the reasonableness of suffering this waste to be deposited in the current above, much must depend upon the use to which the stream below is applied, and the detriment caused to those whose rights as riparian proprietors are entitled to just consideration.

The complainants' cotton mills were built, one in 1874 and the other in 1882, where formerly was a saw and grist-mill, and at one time a tannery. The racks and wheels which are now connected with these cotton mills, as the proof shows, are of standard and approved construction, and yet very different from those that formerly existed there. The old mills gave way to the advance in manufacturing interests, and to the improvement in the propelling power and machinery necessarily incident to such manufactures.

The vast quantities of debris and waste brought into the complainants' canal, and which they are obliged to remove, thereby seriously interfering with the profitable use of their mills, causing frequent suspension of operations, and occasioning the damage and annoyance to which we have alluded, justifies us in the conclusion that such is not a reasonable use of this river by the respondents. And we are equally satisfied that, while it is of great convenience for them thus to dispose of their waste, and considerable expense and great inconvenience would be occasioned by any other disposition of it, it is not absolutely necessary to the operation of their mills that it should be thus deposited in the stream. Other manufacturers of lumber, not only on the Penobscot, but on other principal rivers in this State, dispose of their waste in other ways than by allowing it to pass into the streams. It was otherwise at one time. But the state of improvement of the country, and the springing into existence of other industries have each had a qualifying influence in determining the reasonable use of such waters.

2. Again, the respondents claiming a special right to the use of this river, more beneficial to themselves and more burdensome to the riparian proprietors below than the natural right to the reasonable use of it, must establish such right either by grant or prescription. They do not claim it by grant. Have they established such right by prescription? The answer to this does not depend entirely upon proof of the manner in which the respondents have conducted in reference to the operation of their mills and the disposition of the waste therefrom. In connection with that fact must be considered the situation of the parties, against whom such right is claimed, during the time necessary to the establishment of such right. For it is well settled that in order to establish the presumption of a right

or easement in the land or waters of another person, the enjoyment of such right must have been uninterrupted, adverse, under claim of right, and with the knowledge of the owner, or with such other acts that knowledge will be presumed. *Parker v. Foote*, 19 Wend. 313; *Smith v. Miller*, 11 Gray, 149; *Flora v. Carbean*, 38 N. Y. 115; *Gilford v. Winnipiseogee Lake Co.*, 52 N. H. 262; *Gould on Waters*, §§ 334, 341; *Angell on Waters*, § 219. And it must have been inconsistent with or contrary to the interests of the owner and of such a nature that it is difficult or impossible to account for it except on the presumption of a grant from him, otherwise no such presumption arises. *Morse v. Williams*, 62 Me. 445; *Brace v. Yale*, 10 Allen, 444; *Gould on Waters*, § 334. The prescriptive right to the use of a stream beyond the general right of reasonable use, as against other riparian owners, is governed by the same principles as those in relation to easements in land, and in order to establish such right there must be a perceptible amount of injury throughout the period necessary to gain such right. *Crosby v. Besse*, 49 Me. 539; *Donnell v. Clark*, 19 id. 174; *Murgatroyd v. Robinson*, 7 El. & Bl. 391 (90 E. C. L. 391); *Gould on Waters*, § 346. Nor does the period of limitation begin to run against the owner until there has been an actionable invasion or infringement of a right.

In *Holsman v. Boiling Spring Bleaching Co.*, 1 McCarter, 335, the court say: "The defendants have a right to use the water upon their own soil in such manner as they may deem for their interest, provided they discharge it upon the soil of the plaintiffs in its accustomed channel, pure and unpolluted. They can, therefore, acquire no right by prescription until they show that the acts which are claimed to constitute the adverse user injured the plaintiffs and gave to them, or those under whom they claim title, a right of action. The very ground of title by adverse enjoyment is that the party against whom it is set up has so long permitted the adverse enjoyment and failed to indicate his rights, that the presumption of a grant is raised. But there can be no such presumption, and consequently no title by adverse enjoyment, where no violation of a right is shown to exist." And see *Pratt v. Lamson*, 2 Allen, 288.

And in this case, although the proof establishes the fact that these respondents and those under whom they claim, for more than thirty years have been accustomed to use the water of this river as a receptacle for the waste from their mills, yet it fails to establish any prescriptive right as against these complainants, or those under whom they claim. The mills now in existence were erected less than ten years prior to the commencement of this suit. Soon after they were built trouble arose in regard to this waste, and in 1878 these complainants appeared before the legislature and obtained an act to prevent the throwing of refuse material into the Kennebec river, and which, it appears, these respondents have disregarded.

The use of the water and privilege at Waterville, where these mills are located, prior to 1874, was very different from what it has since been. In 1866 the Ticonic Water-power and Manufacturing Co. was organized, and two years later a dam was built at a cost of \$23,000, which is one of those now owned and used by the complainants. In 1869 a saw-mill was built, and the next year the old grist-mill was repaired. Many years prior to that there had existed a grist-mill and saw-mill, and a tannery. But prior to the erection of the saw-mill in 1869, it does not appear that any trouble had ever been experienced on account of this waste. The testimony of Emery who built the new dam and who had known the old canal for many years, having worked in the old mills more than forty years ago, is that "this drift stuff didn't trouble the racks, at the time I worked there, that I remember of." The present canal is shown to be three or four times as large as the old one was. Although it appears that the old one, at the time the new one was built, was more or less filled at the lower end with logs, slabs and mill-waste, it does not appear whether it came from the mills once standing there, or from what source.

There appears to have been no complaint made, or injury proved to have been sustained, by any parties owning or operating there, till within a very few years prior to the time when these complainants purchased. The dam and canal, as well as the mills, which formerly existed at that place, were not the same as those

of to-day. There could have been no adverse right so long as there was no perceptible amount of injury sustained. What might at the present time occasion not only great inconvenience and annoyance, but also very serious injury, may have been in the past, of not the slightest detriment to those engaged in other manufactures, with different machinery and more simply constructed appliances with which to utilize the water as a propelling power. In the latter case, no prescriptive right could be gained without the proof of other elements of such right. Hence, the facts do not establish any right by prescription, or adverse use, by virtue of which the complainants can claim the use of this river otherwise than as riparian owners, entitled to the natural rights and reasonable use thereof legally belonging to them as such.

From a full consideration of this case it is clear that they have been guilty of an infraction of the complainants' rights; and that from the allegations in the bill, and the proof in support of the same, the latter are entitled to equitable relief. This relief, however, should be against those parties who are shown to have contributed to the injury.

We are not satisfied that the three respondents whose mills are situated at Skowhegan have contributed to the injury complained of. There is some testimony relating to the nature and the amount of waste produced at their mills. The quantity is small, however, compared with that which is produced by the other respondents. Furthermore, it would have to pass over a distance of twenty miles in the waters of the Kennebec before reaching the complainants' premises, and the proof is insufficient to satisfy us of the liability of these parties. This fact can be ascertained much better after the mills of the other respondents, at Fairfield, have ceased depositing their waste in the river, and subsequent experience may make this question more certain; and the complainants should not be prejudiced against enforcing their remedy in relation to them in the future whenever the fact may be established that they contribute to the production of the nuisance.

As against the other respondents a perpetual injunction should issue in accordance with the prayer in the bill, enjoining them from casting or depositing in the Kennebec river above complainants' dams, and manufactories, any refuse materials, edgings, shavings, debris, wood refuse, and what is denominated long saw-dust—not including, however, common saw-dust. In regard to common saw-dust, we do not feel satisfied that, at this time, it should be held to be productive of the nuisance; nor should the complainants be prejudiced as to any future action concerning that under other circumstances, or upon other evidence.

Neither should this injunction issue immediately. The respondents must have a reasonable time in which to prepare for the disposal of such waste as is inhibited from going into the river.

Bill dismissed as to Washington B. Bragg, Levi B. Weston and Charles M. Brainard, without prejudice, and without costs for them. Bill sustained as against all the other respondents named therein, with costs, and against whom perpetual injunction is to issue, in accordance with this opinion at the end of four months from the time the rescript in this case shall be received by the clerk of the district in which this suit is pending. Costs to be equally apportioned between the eight different firms represented by the sixteen respondents.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

[See 85 Eng. Rep. 515; 84 id. 878; 81 id. 874; 26 id. 808; 80 id. 90; 44 Am. Rep. 898; 40 id. 419; 18 id. 246; Moak's Underhill on Torts, 448 *et seq.*—Ed.]

COURT OF APPEALS OF NEW YORK.

LAWRENCE v. SPENCE.

June 26, 1885.

SEDUCTION—LOSS OF SERVICES OF CHILD—ACTION BY PARENT.

The seduction of a child without the father's consent, resulting in a loss to him of her services, entitles him to maintain an action against her seducer.*

Whether the act was produced by force or persuasion is a question with which the appellate court has no concern.

This is an appeal from a judgment of the general term, affirming a judgment entered upon a verdict in favor of the plaintiff for \$3,000, for the seduction of his minor daughter. The facts in the case were not controverted, as the defendant produced no evidence on the trial.

Henry A. Merritt, for respondent. *R. A. Parmenter*, for appellant.

DANFORTH, J. The true question was tried, and the proof was not different from the issue. The defendant concedes that he accomplished his purpose; the jury have found that the girl was debauched without her father's consent. The result was a loss to him of his daughter's service. This answered the fiction of the common law, and whether it was preceded by much or little, or no persuasion, but simply force, is a question with which an appellate court has no concern. Whether the defendant prevailed by false promises or artifice, by flattery or violence, a cause of action was made out. The plaintiff was, therefore, entitled to have his damages assessed by the jury according to their estimate, upon circumstances of which they alone could judge. No error was committed by the trial court in submitting the case to them.

It follows that the judgment appealed from should be affirmed.

All concur.

GERMANIA LIFE INS. CO. v. RAE.

June 26, 1885.

MORTGAGE—SURPLUS MONEYS—EVIDENCE—RES GESTÆ.

The court will not destroy a mortgage upon the foundation of a guess and in the absence of satisfactory evidence impeaching it.

In an action involving the validity of a mortgage the mortgagor's declarations at the time of the delivery of the mortgage as to the purpose of such delivery are elements of the *res gestæ*. The death of the mortgagor does not preclude the book-keeper of the mortgagee from testifying to such declarations, he not being a party to the action, or interested in its event.

Appeal from an order of the general term modifying an order of the special term confirming referee's report as to distribution of surplus moneys. K. held an unrecorded mortgage on the property, and a note for \$500 against the mortgagor, which, it was claimed, the mortgage was given to secure. D. held a judgment which was a lien on the property, recovered subsequent to the execution of K.'s mortgage. D. claimed there was nothing due on K.'s mortgage.

Oliver M. Benedict, for appellant. *William McDermott*, for respondent.

FINCH, J. It is impossible upon this record to determine what the real facts are, as it respects the lien and validity of the Kirk mortgage, or to ascertain with certainty where the justice of the case lies. Not only is the evidence imperfect and unsatisfactory, but documents to which the referee had access are not before us, and we are left to guess at the contents and conditions of the Kirk mortgage, the date and terms and indorsements of the White note, and the judgment-roll in the action thereon against Rae. These exhibits are omitted from the printed case, and we are left to search for the truth without their aid. What we do know

* See Moak's Underhill on Torts, 335; 29 Eng. Rep. 659; 53 Mich. 166; 31 Minn. 54; 20 S. C. 477; 102 Penn. St. 408.—Ed.

certainly is that Kirk held a \$6,000 mortgage upon the property sold, prior in its apparent lien to the Dater judgment. The bond and mortgage were admitted in evidence without objection. The amount claimed to be due upon them was stated by Kirk himself as \$1,855.17. To that amount he was clearly entitled to have the surplus in preference to the owners of the Dater judgment, unless in some manner that mortgage was shown to be invalid, or without consideration, or fully paid. *Prima facie*, the bond and mortgage established Kirk's right to the extent which he claimed, and the burden fell upon the other parties of destroying its effect. Kirk's statement of what the bond and mortgage were given for were stricken from the evidence without any exception to the ruling, because Rae, the mortgagor, was dead, and such statement involved a personal transaction with him. Then on cross-examination Kirk was asked if Rae owed him any thing at the date of the mortgage, and he answered "my impression is that he did." One thing further appeared. On the same cross-examination we have the following questions and answers: "Q. Look at note now shown you and state whether the sum now claimed to be due is not the sum due on that note? A. Yes, sir; so I understand it to be. Q. Do you claim that note to be covered or secured by the mortgage above referred to? A. Yes; I consider the mortgage security for the note." As has been said, we have no copy of the note; we do not know its date; and not having the mortgage before us we cannot at all say that the witness testified untruly, or that his claim was unfounded, or that the note was not the debt, or one form of the debt, which the mortgage was given to secure. The majority of the general term thought otherwise. They seem to have believed that no debt existed at the date of the mortgage, and that it could not have covered the White note, because that originated later. But there is no proof of these facts. At the most there is only ground for suspicion. If we destroy the mortgage it must be upon the foundation of a guess, and that in hostility to the finding of the referee, who had before him the exhibits withheld on the appeal. Kirk did say that the mortgage was given to secure future advances, but that evidence was stricken out, and there is no other. Indeed Kirk offered to show by his book-keeper the declarations of Rae made at the time of the delivery of the mortgage, and showing what it was given for. This evidence was excluded by the referee, and, we think, improperly, since the witness was not a party to the action, nor interested in its event, and the mortgagor's declarations at the delivery of the mortgage expressing the very purpose of such delivery were elements of the *res gestæ*. But Kirk could not complain of this exclusion since the report of the referee was in his favor, and so the possibility of adequate explanation was shut out without his fault. Kirk's declarations that but \$400 or \$500 was due upon the mortgage were also proved and put in evidence by his adversaries, but he denied making such statements, and the referee credited his denial. We deem it entirely unsafe to destroy this mortgage upon such a state of facts, and, in the absence of satisfactory proof, impeaching it, and so are constrained to disapprove the order appealed from, so far as it set aside the order of the special term. In view of the uncertainty as to the amount due upon the Kirk mortgage and the very meagre information furnished by the proofs, the general term might justly have reversed the action of the special term and sent the case back for a rehearing, as was indeed advised by the dissenting member of the court. We think it our duty to make that disposition of the appeal.

Order of the general term, so far as it awards priority in the surplus to the Dater judgment, reversed and case sent back to the referee for a rehearing, costs to abide the event.

All concur.

PEOPLE, *ex rel.* SWIFT, *v.* POLICE COMMISSIONERS.

June 26, 1885.

BOARD OF POLICE COMMISSIONERS — MAJORITY OF THE BOARD SUFFICIENT TO ACT ON CHARGES AGAINST MEMBERS OF THE FORCE.

The rules of the police department provided that in case testimony taken upon complaints made against any member of the force should be heard by less than three commissioners, it should be laid before and examined by the several commissioners before judgment thereon.

Held sufficient to answer the requirements of the rule, that the evidence be laid before and examined by the several commissioners constituting the board at a regular meeting thereof, to-wit, a majority of the whole board.

Appeal from an order of the general term affirming the proceedings of the board of police commissioners of New York in dismissing the relator from the police force. The facts are stated in the opinion.

D. C. Calvin, for appellant. *D. J. Dean*, for respondent.

EARL, J. The police department was authorized to make rules for the government and discipline of the department, and one of the rules provided that in case testimony upon complaints made against any member of the police force should be heard by less than three commissioners, it should be "laid before and examined by the several commissioners before judgment thereon." In this case the evidence was taken before one of the commissioners, and thereafter at a regular meeting of the board when three only of the four commissioners were present it was presented to and considered by them, and they adopted a resolution that the charges against the relator were true, and that he be removed from the police force. This decision was affirmed at general term and the relator has appealed to this court, and claims that his removal from the police force was without jurisdiction, and wholly void, because the evidence was not considered and action thereon taken by all the commissioners. He claims that the rule of the police department referred to required that the evidence should be laid before and examined by the several commissioners, to-wit: All the commissioners. It was held by the general term that it was sufficient to answer the requirement of this rule that the evidence was laid before and examined by the several commissioners constituting the board at a regular meeting thereof; and we are constrained to adopt that construction. We can perceive no reason for supposing that it was intended by the rule to deprive the board at any of its regular meetings of jurisdiction to act upon such evidence, or that it was intended that all the commissioners should severally examine the evidence while a majority of them, at any regular meeting, were vested with power by the statute to perform any act within the jurisdiction of the board. We think the language of the rule is satisfied with the construction given at the general term, and that the interpretation of the rule by the board which made it as evidenced by its practice thereunder should have some weight.

It is also claimed by the learned counsel for the relator, that as the board of police commissioners consisted of four members, it was necessary that they should all be present at a meeting in order to give jurisdiction for any action whatever under section 27, 2 R. S. 555, which provides that, "whenever any power, duty or authority, is confided by law to three or more persons, and whenever three or more persons or officers are authorized or required by law to perform any act, such act may be done, and such power, authority or duty may be exercised and performed by a majority of such persons or officers upon a meeting of all the persons or officers so intrusted or empowered, unless special provision is otherwise made." But that section was amended by chapter 321 of the Laws of 1874, so as to authorize action by a majority at a meeting properly held, of which all have had notice. It is also specially provided in the Consolidation Act — chapter 410 of the Laws of 1882, § 46 — that "a majority of the members of a board in any department of the city government, and also of the board for the revision and correction of assessments, shall constitute a quorum to fully perform and discharge any act or duty authorized, possessed by or imposed upon any department or any board aforesaid, and with the same legal effect as if any member of any such board aforesaid had

been present, except as herein otherwise specially provided." And there is no special provision requiring all the police commissioners to be present upon the trial of any member of the force upon any charges presented against him. Therefore, it was competent for the three commissioners constituting a majority of the whole board, at any regular meeting, to take action upon the complaint made against the relator, and the evidence relating thereto.

We have carefully considered the evidence, and find it sufficient to justify the action of the commissioners, and we cannot, therefore, interfere with their determination.

The order should be affirmed, with costs.

All concur.

Petition of SMITH to vacate, etc.

June 26, 1885.

ASSESSMENT — REPAVEMENT OF STREET — SPECIAL REMEDY TO VACATE.

An additional width of flagging ordered by the city to be laid on a sidewalk already paved is a repavement within the rule requiring a petition of a majority of the property owners along the line of improvement; and this is so, although the existing width is left undisturbed.

The special remedy given to property owners for illegal assessments by the act, chapter 838, Laws of 1858, is by chapter 550 of the Laws of 1880, restricted to reducing the assessment to the fair value of the actual improvement made. But the property owner may still challenge the validity of the assessment whenever his property is seized under it, or it is made the foundation of proceedings against him.

Appeal from an order of the general term, affirming an order of the special term, denying petitioner's motion to vacate an assessment. The assessment was for an additional course of flagging, ordered by the common council, along the street in front of the petitioner's property. One course of flagging had been previously laid and paid for in accordance with the ordinances then in force.

Truman H. Baldwin, for appellant. *D. J. Dean*, for respondent.

FINCH, J. The additional width of sidewalk for which this assessment was laid was a re-pavement within the construction heretofore adopted. *In re Garvey*, 77 N. Y. 523. That the existing width was left undisturbed, and a new strip added, making the flagging eight feet wide instead of four as originally laid, does not alter the result. The sidewalk had been once paved, upon a plan and of a width at the time deemed suitable, and that act exhausted the authority given, and left any new paving of the same walk to be governed by the statute, which required as a condition precedent a petition of a majority of the property owners along the line of the improvement. Laws of 1882, chap. 410. The decision in the *Matter of Grube*, 81 N. Y. 139, did not hold the contrary. There, the roadway had never been paved at all, on any plan or of any width, and the ruling was that there was no re-pavement of the roadway because the sidewalks had been flagged.

It follows that there was no authority for this assessment, since the property owners rested contented with the pavement as originally laid and made no petition for a change, or for the additional width, and the petitioner would be entitled to have the assessment vacated but for another and peremptory enactment which forbids.

The petitioner is pursuing his remedy under the provisions of the act of 1858—chap. 838—and its amendments. That is a special remedy. It was given in addition to and in excess of the usual and ordinary remedies of the citizen in repelling an unlawful levy and resisting an illegal claim. It was speedy and summary; confined to one locality, and designed to remedy evils peculiar to that locality. It was a remedy which the legislature might give or refuse; and having given, might modify or limit at its pleasure. Originally very broad and covering a large class of cases, it was at a later period very much narrowed and restricted. Laws of 1880, chap. 550, § 12. That restriction took the form of a positive prohibition. It forbade any interference with assessments through the operation of the special remedy as to all such confirmed after June 9, 1880, for any improve-

ment completed after the date of the enactment, and whether such assessments were "in fact or apparent," "void or voidable," except that they might be reduced to the fair value of the actual improvement made. For all assessments back of June, 1880, the special remedy remained unchanged, but from that time forward its sole possible application was to cases where the complaint could be redressed by reducing the assessment to the level of the just value of the improvement.

It is argued that this amendment did not repeal and was not intended to repeal the act which forbids a repavement without the consent of a majority of the property owners adjoining. That is true undoubtedly. The amendment does not validate an illegal assessment, but it does narrow a special remedy so that it no longer covers that particular wrong and remits the injured party to the ordinary remedies of the citizens generally, except that a bill in equity to vacate the assessment or remove it as a cloud on title is forbidden. Laws of 1882, chap. 410, § 897. The property owner may still challenge the validity of the assessment whenever his property is seized under it, or it is made the foundation of proceedings against him.

It is again argued that the amendment was intended to reach and must be construed to cover only cases of irregularity or fraud, in which an original authority to make the assessment existed, and not those in which there was no such authority. The language of the section does not permit such a construction. When it describes the assessments to which it applies not only as existing "in fact" but as merely "apparent," and not only as "voidable" but as "void," it carefully shuts the door upon any such limited construction; and lest the meaning should even then be doubtful, it adds that "in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement with interest from the date of confirmation, be disturbed for any cause." The emergency which led to the act of 1858 is well understood. It was deemed to be of an exceptional nature, and for which a new and summary remedy was needed. The applications to vacate became numerous and crowded the appropriate tribunals. In 1880 when the restrictive amendment was adopted, a local tribunal was established — §§ 906, 907, 908, 909, 910, 911 — empowered wherever substantial injustice had been done by assessments confirmed before June of that year, to revise, modify or vacate the same; the evident purpose being to mainly concentrate in the local tribunal the class of litigation provided for, and leave the special remedy confided to the court narrowed to the single case of assessments exceeding the honest and just value of the improvement.

The courts below were, therefore, right in determining that the special remedy invoked by the petitioner had no application to the case which he presented.

The order should be affirmed, with costs.

All concur.

ITHACA FIRE DEPARTMENT v. BEECHER.

June 26, 1885.

FIRE INSURANCE — NON-RESIDENT COMPANY — PENALTY ON FAILURE TO GIVE BOND — PLACE OF TRIAL.

The defendants were agents of a fire insurance company not incorporated within this State, and issued two policies of insurance on property situated in the village of Ithaca, without giving the bond required in such cases by chapter 465, Laws of 1875. The contracts of insurance were signed and the policies delivered in the city of New York. An action was commenced by the fire department of Ithaca to recover the penalty imposed by that statute for failure to give the bond. On a motion to change the venue to New York county,—

Held, that under section 983 of the Code the action should be tried in Tompkins county.

Appeal from an order of the general term, affirming an order of the special term changing the place of trial from Tompkins to New York county. The action was brought to recover the penalty imposed by section 3, chapter 465, Laws of 1875, upon agents of insurance companies, not incorporated within this State, for effecting insurance upon property situated in any city or incorporated village of the

State without first having given the bond required by that act. The policies in question were delivered in the city of New York, where the contracts of insurance were signed, upon property situated in the village of Ithaca, Tompkins county.

Bradford Almy, for appellant. *W. C. Beecher*, for respondents.

EARL J. It is provided by chapter 465 of the Laws of 1875, as amended by chapter 859 of the Laws of 1876, and chapter 153 of the Laws of 1879, as follows: "SECTION 1. There shall be paid to the treasurer of the fire department of every city or incorporated village of this State by every person who shall act as agent for or on behalf of any individual or association of individuals not incorporated by or under the laws of this State, to effect insurance against loss or injury by fire upon property in this State, although such individual or association may be incorporated for that purpose by any other State or country, the sum of two dollars upon the hundred dollars, and at that rate upon the amount of all premiums which, during the year or part of the year ending on the last preceding first day of September, shall have been received by such agent or person, or received by any other person for him, or shall have been agreed to be paid for any insurance effected or agreed to be effected, or promised by him as such agent, or otherwise to be effected, against loss or injury by fire upon property situate within the corporate limits of such city or village."

"§ 2. No person shall as agent or otherwise for any individual, individuals or association, effect or agree to effect any insurance upon any property situate in any city or incorporated village of this State upon which the above duty is required to be paid, or as agent or otherwise procure such insurance to be effected until he shall have executed and delivered to the treasurer of the fire department of the city or village in which the property insured is situated..... a bond to such fire department in the penal sum of five hundred dollars, with such sureties as such treasurer shall approve, with a condition that he will annually render to said treasurer on the first day of November in each year a just and true account verified by his oath that the same is true of all premiums which, during the year ending on the first day of September preceding such report, shall have been received by him or by any other person for him, or agreed to be paid for any insurance against loss or injury by fire upon property situate in such city or village which shall have been effected, or procured by him to be effected, for any individual, individuals or association not incorporated by the laws of this State, as aforesaid, and that he will annually on the first day of November in each year pay to the said treasurer two dollars upon every hundred dollars, and at that rate upon the amount of such premiums."

"§ 3. Every person who shall effect, agree to effect, promise or procure any insurance specified in the preceding sections of this act without having executed and delivered the bond required by the preceding section, shall for each offense forfeit two hundred dollars for the use and benefit of the fire department of such city or village, and such penalty of two hundred dollars shall be collected by and in the name of the fire department of the city or village in which the property insured or agreed to be insured is situated."

This action was brought to recover two penalties under section 3, and the place of trial named in the summons was Tompkins county. Defendants claiming that the place of trial should be changed to the city of New York, demanded such change, and upon refusal, made a motion to the court at special term and it changed the place of trial to that city; and from that order the plaintiff appealed to the general term, and from affirmance there to this court. The provision of the Code under which the order was made is section 983, which among other things provides, that an action to recover a penalty or forfeiture imposed by statute shall be tried in the county "where the cause of action or some part thereof arose." The defendants claim that no part of this cause of action arose in the county of Tompkins, but that it arose wholly in the city of New York, and that, therefore, the place of trial was properly changed to that city.

It is frequently difficult to define or to precisely specify in what a cause of action consists, or to determine where it arose. These defendants as agents of

foreign insurance companies were, under section 1 above cited, bound to pay to the treasurer of the fire department of Ithaca \$2 upon every \$100 received by them for insurances effected upon property situated in that village. By section 2 they were prohibited from effecting any insurance upon any property situated there until they should have executed and delivered to the treasurer of the fire department a bond conditioned to account for, and pay the sums required by the first section to be paid. Under section 3 they became liable for a penalty for effecting insurance upon property there without having first executed and delivered the bond required by section 2.

We think the whole cause of action arose in the village of Ithaca. The percentage of premiums was required to be paid there; the bond was required to be given there; the penalty was payable there, and the insurance was effected upon property situated there. Out of some or all of these facts the cause of action arose. It matters not where the contracts of insurance were actually signed. They took effect upon property in the village of Ithaca.

The construction contended for by the defendants would allow the agents of foreign insurance companies, provided they issued policies outside of the State, to carry on their operations within the State without incurring any penalty under the statute, as it can operate only within the State. A construction which would lead to such a result should not be adopted unless a fair construction of the law and the facts requires it.

We are, therefore, of opinion that the orders of the general and special terms should be reversed and the motion denied, with costs.

All concur.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

TOWN OF LEOMINSTER v. CONANT.

June 25, 1885.

ASSESSMENT—SEWER—PUBLIC RECORDS, AMENDMENT OF—SELECTMEN OF TOWN, POWER TO PROVIDE FOR SEWERS—WARRANT FOR SALE OF PROPERTY.

While no particular form of words is made necessary by the statute to be used by the authorities in laying out a sewer, yet there must be such a laying out before any assessment therefor can be made; and this must be done with sufficient precision to show what the sewer is, or is to be, for which parties are liable to be assessed, or for the construction of which their estates may receive damage.

The authority of the selectmen of a town to keep a record of their proceedings carries with it the right to amend such record at a subsequent date, where the proceedings at the time had been defectively recorded.

While, ordinarily, the laying out of a sewer by the town authorities should be made before any work is done, yet if a sewer be actually constructed and completed without a formal previous order, there is no reason why it may not then be formally laid out and appropriate proceedings be had thereafter in regard to assessments. No previous notice to parties in interest is required in order to lay out a sewer.

The town laid out and built a sewer in the street on which defendant's property was situated, and subsequently, but before any assessment was laid, adopted a general system of sewerage. The expense of the sewer first constructed was included in the cost of the general system, which increased defendant's assessment beyond his proportional share of the cost of the first sewer.

Held, that the action of the town was lawful, no assessment having been laid for the particular sewer, at the time of adopting the general system.

A warrant, by virtue of which real estate is sold for an assessment, is not invalid because it fails to direct the collector how to dispose of the money when received.

Writ of entry to recover possession of premises in Leominster, sold by the collector of taxes for Leominster for the non-payment of an assessment made for the construction of a sewer.

The case was heard upon an agreed statement of facts. Judgment was entered for the defendant in the superior court, and the demandant appealed.

H. Mayo, for demandant. *G. A. Torrey* and *C. W. Carter*, for defendant.

DEVENS, J. The plaintiffs seek to recover certain demanded premises which were sold by the collector of taxes for Leominster, for the non-payment of an assessment, laid thereon by the selectmen of Leominster, for the construction of a sewer. Their title depends upon the validity of this assessment and of the proceedings had to enforce the same. While no particular form of words is made necessary by the statute to be used by the authorities in laying out a sewer, yet there must be such a laying out before any assessment therefor can be made, and this must be done with sufficient precision to show what the sewer is, or is to be, for which parties are liable to be assessed, or from the construction of which their estates may, to some extent, receive damage. *Bennett v. New Bedford*, 110 Mass. 433; *Sheehan v. Fitchburg*, 131 id. 525. There can be no doubt but the record accurately states the action of the selectmen at their meeting on July 29, 1880, and had it been actually made on the date which it bears it would have constituted a sufficient laying out of the sewer in question. It was, in fact, recorded at a subsequent date, by the authority of the selectmen who had passed it, who still continued in office and had the custody of the records, although some seven months had elapsed. An accident, such as occurred by the failure to record the vote at the time, should not deprive the town of its rights, when the means existed of correcting it and were within the reach of the tribunal, whose proceedings were defectively recorded. The authority to keep a record carries with it the right to amend it, otherwise the rule which excludes evidence to control a record would often work great injustice. It has, therefore, been often exercised after a great lapse of time. *Batty v. Fitch*, 11 Gray, 184; *Winchester v. Thayer*, 120 Mass. 129; *Halleck v. Boylston*, 117 id. 469. Nor could the rights of the land-owner have been in any way prejudiced, so far as the assessment made upon him was concerned. All his right to contest the assessment were preserved, if he was dissatisfied therewith. He was entitled to appeal to a jury for a revision of the assessment within three months after receiving notice of it, and such notice was not given until a long time after the actual laying out. Pub. Stat., chap. 50, § 6. But, if the vote of July 29, 1880, be held defective, either from failure to then record the same, or for any other reason, the laying out, of February 21, 1881, actually established it. On that day, which was the day when the record was actually made, and undoubtedly with the view, should their former proceedings prove defective, of remedying the defect, the selectmen passed a vote, which was recorded, laying it out as then actually constructed. While ordinarily a laying out should be made before any work is done and sometimes necessarily so, where incidental injury is liable to be done to abutting estates for the protection of the selectmen or their servants, yet, if a sewer be actually constructed and completed without a formal previous order, there is no reason why it may not then be formally laid out and appropriate proceedings be had thereafter in regard to assessments upon those who receive benefit therefrom, or damages to those whose estates are injured thereby. These may often be ascertained at that time most conveniently and accurately, and no previous notice to parties in interest is required in order to lay out a sewer. *Allen v. Charleston*, 111 Mass. 123.

Assuming that there was a valid laying out of the sewer, we must consider whether there was a valid assessment upon the defendant, as the owner of an estate abutting on the street through which it passed. The town had not, when the sewer was laid out, whether by the earlier or later order, or when it was built, adopted any system of sewerage, although it was then authorized to do so. Stat. 1878, chap. 232, § 3; Stat. 1879, chap. 55; Pub. Stat., chap. 50, § 7. Before any assessment was laid, it did adopt such a system under the existing statute, which provided, that assessments might be made upon the owners of estates within the territory for which the system was adopted, by a fixed uniform rate, based upon the estimated average cost of all the sewers therein, according to the frontage of such estates on any street or way where a sewer is constructed. The sum assessed to those whose estates abutted on this sewer was more than the cost of this particular sewer, and the assessment was made under the system thus adopted. It was not for a proportional part of the sewer, which had been constructed, but according

to the uniform rate which had been determined upon for the sewerage territory. It is the contention of the defendant that this could not properly have been done; that the liability to which his estate was subjected when the laying out took place was an incumbrance thereon for its proportional share of the expense of constructing that particular sewer, under Pub. Stat., chap. 50, § 4; Gen. Stat., chap. 48, § 4; Stat. 1878, chap. 231, § 2, which could not thereafter be increased or differently assessed, by including it in a sewerage territory by a system subsequently adopted. The liability to assessment is certainly an incumbrance upon the abutting estate, where the sewer is laid out, although its amount cannot be ascertained. *Carr v. Dooley*, 119 Mass. 294. As the law existed, the town might lawfully provide for a system of sewerage and prescribe the territory to which it should be applicable. It could incorporate therein this sewer and make the expense of constructing it a part of the expense to be provided for under that system. If, before any assessment was made, it determined to adopt a general system, it might properly do so. Whatever system it might lawfully adopt the defendant's estate was subjected to it. It is suggested that Pub. Stat., chap. 50, § 7, which accurately restates Stat. 1878, chap. 232, § 3, and Stat. 1879, chap. 55, applies only to those persons described in Pub. Stat., chap. 50, § 4, who enter their drains into the sewer, or by more remote means receive benefit thereby. But its meaning is, that assessments such as are made under section 4 shall be made upon the owners of estates within the sewerage territory, according to fixed uniform rates, as are therein provided for. The last clause of section 7, which provides that no assessment shall be made where "by reason of its grade, level or for any other cause," it is impossible to drain an estate into the sewer, sufficiently shows that in all other cases, the assessment is to be laid.

It is further contended by the defendant that, even if the system of sewerage might have been adopted by the town subsequently to the laying out of this sewer, and an assessment made thereunder for its cost, this assessment does not appear to have been laid in accordance with this system. In form the order states that the assessment is laid upon the abutters, "as their proportional part of the charges of making and repairing the main drain and common sewer, constructed by said town in Main street." These assessments, when added together, exceed the whole cost of the particular sewer. The order sufficiently shows that the assessment is based on the estimated average cost of all the sewers in the territory, according to the number of feet of frontage of their estates thereon, and that it was for the defendants' proportional part, as thus ascertained, that the assessment was made upon his estate. The defendant further contends that the warrant of the collector, by virtue of which he sold this estate, was informal, illegal, and did not authorize him to sell the estate. Chapter 50, section 5, prescribes that the sale of an estate "shall be conducted in like manner as sales for the payment of taxes." The warrant should properly state what the collector is to do, and the preliminary steps to be taken by him in the collection of the assessment. Pub. Stat., chap. 11, § 63. The assessment was made by the selectmen, on July 19, 1881, and the warrant issued, and signed by the selectmen, referring to a copy of it, simply directs the collector to collect it, according to law. But while the warrant is thus brief, every preliminary step, as well as the sale itself, was made in conformity with that which was the legal power and duty of the collector. The defendant does not suggest a failure in any respect. Its defects were those of omission. *King v. Whitcomb*, 1 Metc. 328; *Barnard v. Graves*, 18 id. 85. Nor is the warrant, in the case at bar, invalid, because it failed to direct the collector how to dispose of the money when he received it. He executed the warrant as a valid process, received the money under it, by virtue of his office, and he cannot deny his liability to the town for it.

Judgment for demandant.

LEARY v. BOSTON AND ALBANY RAILROAD CO.

June 25, 1885.

NEGLECT — MASTER AND SERVANT — RISKS INCIDENT TO EMPLOYMENT.

Where an employer knows of the danger to which his servant will be exposed in the performance of any labor to which he assigns him, and does not give him sufficient and reasonable notice thereof, its dangers not being obvious, and the servant, without negligence on his own part, through inexperience or reliance on the directions given, fails to perceive or understand the risk and is injured, the employer is responsible. But the servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take them.

When one assumes an employment, if an additional and more dangerous duty is added to his original labor, and he knowingly, although unwillingly, accepts it, he accepts its incidental risks, and cannot recover for an injury which occurs only from his own inexperience.

Action of tort for personal injuries. At the trial in the superior court, it appeared that the plaintiff was in the employment of the defendant and was working, temporarily, as a fireman on a locomotive in defendant's freight yard, and, in attempting to get off the locomotive, fell, or was thrown under the wheel, and lost a leg. The superior court ruled upon all the evidence that the plaintiff could not maintain the action, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. A. Maxwell, for plaintiff. *A. L. Soule*, for defendant.

DEVENS, J. Where an employer knows of the danger to which his servant will be exposed in the performance of any labor to which he assigns him, and does not give him sufficient and reasonable notice thereof, its dangers not being obvious, and the servant, without negligence on his own part, through inexperience or reliance on the directions given, fails to perceive or understand the risk and is injured, the employer is responsible. But the servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take them. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Sullivan v. India Co.*, 113 id. 396. There was in the case at bar no defect in the roadway, the engine or other appliances, nor any negligence in the management of them. There was no evidence tending to show that the defendant was hurt by reason of any incapacity to understand the character of the employment in which he was engaged. He was a man of full age, of ordinary intelligence and, although he had been brought up on a farm and had ridden but six times in the railroad cars, had been in the employ of the defendant three years, loading and unloading cars in their yard and shifting freight in their warehouse. Nor was there any peculiar danger which required to be pointed out to an inexperienced person. That of getting off the engine when it was in motion, or of standing in such a position as to be exposed to be thrown off by its jolting, were entirely obvious, and that the engine was liable to jolt in crossing the frogs and switches which were numerous in the freight yard, where alone this engine was used for the purpose of moving freight, making up trains, etc., were known to the plaintiff. That the plaintiff must have had full knowledge of all the danger he incurred, while acting as a fireman on the engine, is fully shown by the fact that he had acted as fireman about twenty times, and from one to three hours each time; and although he testified "that he never got off the engine at any other time, when it was in motion, except when it was at a stand-still," he must have been aware of the danger of being thrown off, or which would attend the attempt to leave it. Upon these facts, it would be correct to rule that the plaintiff could not maintain the action, as no fault or negligence was shown on the part of the defendant.

The facts present one other inquiry, which heretofore it has not been necessary to

decide in this Commonwealth. It is the contention of the plaintiff, that if a servant who is hired for work of a simpler character, as in the case at bar, is required by his employer to perform other duties more dangerous and complicated, and, although at first and constantly objecting thereto, assents, makes the attempt and doing his best is injured by reason of his ignorance and inexperience, he may maintain an action against his employer by reason of the negligence of the employer, in setting him to work in a dangerous place, even if plaintiff was aware of the danger and might, under some circumstances, be held to have incurred the risks of the employment. The following cases, cited by the plaintiff, are here reviewed: *O'Connor v. Adams*, 120 Mass. 427; *Railway Co. v. Fort*, 17 Wall. 553; *Ialor, Adm'r, v. C., B. and Q. R. R.*, 52 Ill. 401; *Jones v. Railway*, 49 Mich. 573; *Chicago and N. W. R. R. Co. v. Bayfield*, 37 id. 205; *Woodley v. Met. Railway*, 46 L. J. Exch. 521.

To morally coerce a servant to an employment, the risk of which he does not wish to encounter, by threatening otherwise to deprive him of an employment he can readily and safely perform, may sometimes be harsh, but when one has assumed an employment, if an additional and more dangerous duty is added to his original labor, he may accept or refuse it. If he has an executory contract for the original service, he may refuse the additional and more dangerous service, and if, for that reason, he is discharged, may avail himself of his remedy on his contract. If he has no such contract and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks, and while he may require of the employer to perform his duty, he cannot recover for an injury which occurs only from his own inexperience. The employer is not necessarily unjust because he wishes in his employ a servant who can from time to time relieve a skilled workman, while his ordinary duties will be those of a mere laborer. It must certainly be his right to engage a servant, who, while his ordinary duties will be simple and expose him to no danger, is willing as a part of his service, from time to time, to assume duties which, in order to be safely performed, require a higher degree of skill and which expose him to a certain degree of danger.

Exceptions overruled.

[See Moak's Underhill on Torts, 52 *et seq.*]

PRATT v. STREET COMMISSIONERS OF BOSTON.

June 25, 1885.

PUBLIC STATUTES; CONSTRUCTION OF — TAXATION — STOCK IN CORPORATION — EXEMPTION.

The public statutes were intended to be only a consolidation and arrangement of the statutes as they were then in force, without changing any existing rights. When the law, as expressed in the public statutes, is ambiguous or doubtful, or susceptible of two constructions, it is then most proper to examine the statutes as they previously existed to aid in their construction.

Under Public Statutes, chap. 11, § 4, and chap. 13, §§ 46, 57, etc., the shares of stock in corporations formed for building foreign railroads, are subject to the excise tax of one-tenth of one per cent, the same as before the enactment of the public statutes.

Petition for a writ of *certiorari*, to abate a tax, assessed by the city of Boston upon shares of the Mexican Central Railway Company, owned by the petitioner. The question presented was whether such stock was legally taxable by the city of Boston. The case was reserved by a single justice for the consideration of the full court.

F. Morison, for petitioner. *T. M. Babson*, for defendants.

DEVENS, J. Previous to the enactment of the public statutes, three modes of taxing corporate franchises and privileges and the shares into which corporate property is divided, existed. Most of the corporations chartered by the State and formed under its general laws paid annually a tax upon their corporate franchise, at a valuation equal to the aggregate value of the shares in the capital stock at the market price, as ascertained by the tax commissioners, and the individual holder of shares was not taxable after the corporations had paid this tax upon their franchises. Stat. 1865, chap. 283, §§ 3, 4, 5. A second class, which origi-

nally included corporations, chartered by the Commonwealth or under its general laws, for mining or owning, purchasing or sinking mines, on lands without the State, and also all such companies, incorporated elsewhere, as had an office or place of business within the Commonwealth, for the direction of their officers or the transfer of their shares, paid usually a tax of one-tenth of one per cent upon its capital stock, at the par value thereof. Stat. 1865, chap. 283, § 8. All these corporations were required, by subsequent provisions, to make a report of their property, receipts and expenditures, products of their business, etc. From which report, or otherwise, the tax commissioner was to ascertain the net profits or gains of each, and assess a tax of four per cent thereon to the corporation. Stat. 1865, chap. 283, §§ 9-11. The act of 1879, chap. 274, provided for the formation of corporations to construct and operate railroads and telegraphs, in foreign countries, and it is within this class that the petitioner is included. "For the purposes of taxation" such corporations were made "subject to the provisions of section 8, chapter 293, of the acts of the year 1865; but no other provisions of said act, relating to the assessment of taxes upon corporations or the shareholders therein, shall apply thereto." Stat. 1879, chap. 274, § 6. They were thus made subject to the franchise tax of one-tenth of one per cent annually on their stock, at its par value, which was a strictly arbitrary imposition in the nature of an excise. Although by the same section they were required to render annually to the tax commissioner a complete list of their stockholders, with their places of residence, the number of shares held by each, the amount of the capital stock and the par and market value of the shares, they were not subject to the tax upon profits imposed upon the corporation described in Stat. 1865, chap. 283, § 8, nor were the provisions for ascertaining them, found in that chapter, made applicable to them. The position of the petitioner is, that whatever may have been the law at any previous time, since the enactment of the public statutes, which repealed the Stat. of 1879, chap. 274, and 1865, chap. 283, no tax can now be levied by the city of Boston, or other place where the owner thereof may reside, on his shares in the stock of a corporation, such as the Mexican Central railway.

The public statutes were intended to be only a consolidation and arrangement of the statutes as they were then in force, and it was the effort of the commissioners to condense them into as concise a form as was consistent with clear expression of the will of the legislature, as embodied in them, and to express them so that no existing rights should be changed. Some amendments were made by the commissioners at the suggestion of the special commissioners of the legislature, by the special commissioners and by the legislature itself—commissioners' preface. It will be observed, also, that in consolidating and arranging statutes a construction thereof must necessarily sometimes be made. Even if this might not agree with what judicially they would have received, when put into the form of an enactment, it must be accepted as controlling. When, therefore, the language of the public statutes is distinct, clear, and admitting of but one possible interpretation, it must be followed, although it assumes the law to have been as we should not have held it, and although we are not able to ascertain from the reports of the legislature, its committees or otherwise, that there was any intention to amend or change it. When the law, as expressed in the public statutes, is ambiguous or doubtful, or susceptible of two constructions, it is then most proper to examine the statutes as they previously existed, in order that it may be construed in the light afforded by them. In determining, also, what is the meaning properly attributable to any language, we are, also, to consider the other language used in relation to the same subject, and whether if that found in the public statutes apparently varies from that used in the earlier statutes, the re-enactment of those provisions therein, associated with it, does not indicate the absence of any intention to make a change of meaning. The petitioner's contention is that the city is expressly prohibited from assessing any tax upon his shares in the Mexican Central railway, by the following proviso of section 4, chapter 11, Pub. Stat., which section states the proper subjects of taxation as personal property: "Provided that no taxes shall be assessed in any city or town for State, county or town purposes, upon the shares in the capital stock of a corporation organized or chartered in the Commonwealth, paying a tax on its corporate franchises, under the provisions of chapter 13, for any year in which it pays such tax." If the proviso stood

alone and was to be construed without careful examination of the provisions of chapter 13, to which it refers, it would seem to justify the petitioner's construction, although its effect would be to change the law as it previously existed, and make, without apparent reason, corporations for building foreign railroads the only class which do not, in some form, pay taxes on the market value of their stock or the profits made thereby. The section 57, chapter 13, is especially to be considered in connection with the proviso, "No taxes shall be assessed in any city or town, for State, county or town purposes, upon the shares in the capital stock of corporations, companies, copartnerships or associations, taxable under sections 40, 42, 45, 47, 50 and 52, for any year for which they pay to the treasurer the tax on their corporate franchises or property under said sections." All corporations for business and profit, except banks, whose shares are otherwise taxed under chapter 13, and except the class to which petitioner belongs, are included, and the inference is inevitable that, under this section, the shares of such companies are left for taxation in the ordinary mode.

The reason why the stock of the corporations, referred to in sections 40, 42, 45, 47, 50 and 52, is exempted from further taxation for State purposes is obvious, and an examination of the chapter 13 discloses that much of what they pay nominally upon their corporate franchises, but really upon the market value or profits of their stock, is divided between the towns of residence of their stockholders. The reason why the shares in the capital stock of companies paying under sections 43 and 45 are not exempted is equally clear. All the corporations paying, under section 43, the excise tax of one-tenth of one per cent pay, also, on the profits of their business, under section 45, except those described in section 46. The whole class described in section 43 is, therefore, exempted from further taxation on their stock by the terms of section 57, with the exception of the companies formed to build railroads in foreign countries, which is the class described in section 46. It appears quite clear that the construction of section 57 requires that the shares of such companies should continue to be taxed as they had theretofore been. Section 46 subjects each corporation formed in this State for the purposes of constructing railroads in foreign countries to the provisions of section 43 for the purpose of taxation, "but no other provisions of this chapter relating to the assessment of taxes on corporations or the stockholders therein shall apply thereto." They are not, therefore, subject to the taxes on their gains and profits, which the succeeding sections impose on the other corporations named in section 43, but only to the excise tax of one-tenth of one per cent. But the concluding clause of section 46 requires them to make a return of their stockholders, their places of residence, the par and market value of their stock, etc., all which returns would be meaningless unless there is a tax to be assessed on the shares. It is to be observed also that the Railroad Act—chap. 112, Pub. Stat.—which provides for the formation of companies of this class, and their administration in the two hundred and twenty-ninth section, subjects them to the section 46 of chapter 13.

Section 57 appears to have been intended to deal with the whole subject of the exemption of shares of those business corporations from taxation; it followed in so doing previously existing laws.

The proviso at the end of the section 4, chapter 11, may perhaps have been superfluous, but its purpose was to show that, while the general description of taxable property, which preceded it, included shares of stock, it was not intended that those which were exempted by other provisions of the statute should seem, by any language therein used, to be subjected to taxation. Its object was not to enlarge exemptions beyond those of previously existing laws, or those provided for in such portions of the statute as dealt with the subject. In spite of the generality of the language, the corporations that are meant by the proviso—chap. 11, § 4—are to be sought in section 57, chapter 13. These sections are not otherwise capable of being reconciled and, as this construction brings the statute in harmony with previously existing laws, we are the more ready to adopt it. The words in the proviso "paying a tax on its corporate franchise under the provisions of chapter 13," are thus, in our view, limited by the provisions of section 57 of that chapter, which state explicitly the shares which are not to be taxed for State, county or town purposes.

Petition dismissed.

JUDGE OF PROBATE v. DUGGAN.

June 24, 1885.

BOND—SURETIES—DELIVERY OF BOND.

The authority to deliver a bond, merely, may be given by parol.

When a probate bond is signed by the sureties with the penal sum left blank, and intrusted by them to the principal to be filled up for a certain amount and delivered, the probability of his being required by the probate judge to insert a penal sum larger than the sureties directed, and of his doing so, is so obvious that the sureties must be held to take the risk of their principal's conduct, and they are bound by the instrument as delivered, provided the obligee has no notice of the breach of orders.

Action against the principal and sureties on a probate bond. At the trial, before a single justice, the court directed the jury to bring in a verdict for the plaintiff, in the penal sum named in the bond, and the defendants alleged exceptions to rulings of the court.

Wiggin & Fernald, for plaintiff. *J. E. Cotter* and *J. L. Eldridge*, for certain defendants. *E. G. Pratt*, for other defendants.

HOLMES, J. This was an action on a probate bond. The following facts are relied on as a defense by the sureties. Having signed another bond, which turned out to be wrong in form, they signed this one in blank, at their principal's request, and upon his representations that the penal sum of the former bond (\$2,000) was satisfactory, and that the new bond was to be for the same amount. The principal filled out the blank with a larger penal sum and delivered the bond, but subsequently told the sureties that it was in the penal sum of \$2,000, which they believed until this action was brought. It does not appear, in terms, that the representation, that the penal sum of the former bond was satisfactory, was false, or that the judge of probate did not require the larger sum, for the first time, when the second bond was offered. And if the bill of exceptions should be taken at all strictly against the defendants, it would seem that, whatever expectations they may have mentioned as to the action of the probate court, when they handed the blank bond over to the principal, they handed it to him to be filled in as the probate court might require, being chargeable with knowledge that the time for final action upon the matter had not yet come. In this view of the facts the only question would be whether the case was governed by *Burns v. Lynde*, 6 Allen, 305, and more especially *Basford v. Pearson*, 9 id. 387. And we are of opinion that it is not. At all events, when the grantee or obligee is ignorant of the order in which the several parts of the instrument are written and the delivery to him is duly authorized, he is entitled to assume that the instrument was so written as to bind the grantor or obligor from whose control it comes. We should add that in this Commonwealth, at least, we cannot question, for one instant, that the authority to deliver, merely, may be given by parol. *Basford v. Pearson*, 9 Allen, 387; *Parker v. Hill*, 8 Metc. 447; *Foster v. Mansfield*, 3 id. 412. If we are to interpret the bill of exceptions more favorably for the defendants than we have done thus far, and to take it that they only authorized the bond to be filled in with a penal sum of \$2,000, and even if we take the further step of assuming that limitation to have carried with it the understanding between them and the principal that they assented to a delivery, if the bond was filled in as they expected it to be, we are still of opinion that no defense is made out. We are aware that there are a number of cases more or less opposed to our conclusion. *People v. Bostwick*, 32 N. Y. 445; *Ohio v. Boring*, 15 Ohio, 507; *United States v. Nelson*, 2 Brock. 64; *Preston v. Hull*, 23 Gratt. 600, and cases cited. But we think that the prevailing tendency, both in this State and elsewhere, has been in the direction we have taken. *Thomas v. Bleakie*, 136 Mass. 568; *Butler v. United States*, 21 Wall. 272; *Dair v. United States* 16 id. 1; *South Berowick v. Huntress*, 53 Me. 89; *State v. Peck*, id. 284; *State v. Pepper*, 31 Ind. 76; *Millett v. Parker*, 2 Metc. (Ky.) 608. These decisions are generally put on the ground of estoppels. *Swan v. North British Australian Co.*, 2 Hurlst. & Colt. 175; *Taylor v. Great Indian Peninsular Ry. Co.*, 4 De G. & J. 559, 574. But if the case is properly put on that ground,

then as was pointed out in *Cousin v. Pierce*, 138 Mass. 165, the differences between intent and negligence in a legal sense is ordinarily nothing, but the difference in the probability under the circumstances known to the actor and according to common experience, that a certain consequence or class of consequences will follow from a certain act, and it follows that the question, when an estoppel will arise, is simply one of degree. If on the other hand the true question is one of scope of the principal's authority to deliver the bond, bearing in mind that an authorized delivery will cure defects in the writing of the bond, that the authority to deliver may be by parol, and that the scope of authority may be greater than is wished by the obligor, ostensible authority being actual authority, then the question is equally one of degree, depending on the particular circumstances just as the same question is in tort.

We are of opinion that when a bond such as this is intrusted to the principal for his use, to fill it up and deliver it, the possibility of his being required by the probate judge to insert a penal sum larger than the surety directed, and of his doing so, is so obvious and so near that the surety must be held to take the risk of his principal's conduct; and is bound by the instrument as delivered, although delivered in disobedience of orders, if as here the obligee has no notice from the face of the bond, or otherwise, of the breach of orders.

Exceptions overruled.

BYAM v. BICKFORD.

June 25, 1885.

TENANTS IN COMMON — DEED OF REAL ESTATE TO ASSOCIATION NOT AUTHORIZED TO HOLD — ERECTIONS MADE ON COMMON LAND WITHOUT CO-TENANT'S CONSENT — ADVERSE POSSESSION.

A deed of real estate to a well-known association, all of whose members can be ascertained, but which is not authorized to take and hold real estate, may properly be considered as a grant of the estate to those who are described by its title, making the persons associated in the society tenants in common of the land conveyed.

A structure wrongfully placed upon common property by a part of the tenants in common, and which excludes other tenants from full possession and enjoyment, and tends to establish a title adverse to them, may be removed by such other tenants, they not having given their consent to its erection.

Action of tort in the first count to recover for the conversion of certain lumber and other materials, and in a second count to recover damages for entering upon premises, owned by the plaintiffs and defendant as tenants in common, and removing certain buildings, and committing strip and waste thereon. The case was heard by the superior court upon agreed facts. Judgment was entered for the plaintiffs for triple damages, assessed in the sum of \$45, and the defendant appealed.

F. T. Greenhalge, for plaintiffs. *J. W. Reed*, for defendant.

DEVENS, J. The plaintiffs and defendant are members of a voluntary unincorporated association, known as the South Chelmsford Hall Association, acting under certain by-laws and articles, for the purpose of erecting a hall. A deed was made of a parcel of land, adapted to the purpose, by two members of the association, John and Arthur Scoboria, which purported to be to the "South Chelmsford Hall Associates," by which it is agreed that the South Chelmsford Hall Association was meant. While there are certain unincorporated societies, which may, as such, take and hold real estate by statute, this society does not belong to that class. Gen. Stat., chap. 30, § 24; Pub. Stat., chap. 39, § 9. The general rule, therefore, applies to it and it is not qualified to take, as such, real estate, as grantee. *Bartlett v. King*, 12 Mass. 537; *Hamblett v. Bennett*, 6 Allen, 140; *Tucker v. Seaman's Society*, 7 Metc. 188. But the South Chelmsford Association was a body, well known, all the members of which could be ascertained, and as it could not take as a corporation, the deed may properly be construed as a grant of the estate, to those who were properly described by this title, especially as the grant is to the "Associates," as a term deemed by the grantors to mean same as association. The persons associated, in the society, were thus tenants in common of the land conveyed. The effect of the

deed made by the grantors must have been either to reserve to themselves the proportional part to which they would be entitled, as tenants in common, as they were described and included among the grantors, or to vest the whole estate in the other members of the association, depriving themselves of all interest in the premises. Whether the share of the tenants in common, bringing this suit, is larger or smaller is not important to its determination. If the co-tenants of the plaintiffs should have been joined in this suit, the objection on that account was available only in abatement. *Sherman v. Fall River Iron Works*, 2 Allen, 524. And under Pub. Stat., chap. 179, § 7, upon which the plaintiff relies, it was the right of one or more of the co-tenants to bring an action of tort in the case there contemplated, without naming any one except themselves. The association was formed by signing an agreement to associate together to purchase land and erect a hall thereon for public purposes, which was to be carried out by the subscribers, through a committee, the location, quantity of land, dimensions and cost of building to be determined by the subscribers, each of whom agreed to pay the amount of money set against his name and no more. The subscribers agreed that a treasurer should be chosen, who was empowered to borrow a limited amount of money. This voluntary association, thereafter, adopted by-laws, reciting the object of their association to be the erection of this hall, providing for the election of officers, the calling of future meetings and the number which should constitute a quorum thereat. In the early part of 1878, the land being purchased as heretofore stated, the hall was erected and has been used for public purposes since. In January, 1883, the association commenced considering the subject of erecting an addition thereto, to which defendant and others objected, but nothing was done at the meeting when the subject was first discussed. A meeting of the association was held on March 3, 1883, at which the erection of the addition was voted, and acting under which, every thing was done thereafter, an agreement being then made between the association and one Parker, one of its members. There is no evidence that this meeting was called in accordance with the by-laws, or that defendant had any knowledge of it, and there is evidence that he was not present. Whatever might be the effect of a meeting regularly called, and whether the defendant's rights would in any manner be affected thereby, the plaintiffs on this state of facts can have no higher rights than those which ordinarily belong to tenants in common. Without considering whether the addition, in its incomplete state, was the property of Parker, and treating it as that of the plaintiffs in accordance with their construction, the question remains whether another tenant in common, who had not assented to its erection, might remove it, doing no unnecessary damage thereto by taking it down. The defendant did no unnecessary damage to the materials or the structure, nor did he take possession of the materials, or in any way appropriate them to his own use. He tore down the structure, doing as little damage as possible. The shed, which formed part of it, obstructed the light of his store and dwelling-house, on his own land, and the privy would have been immediately under his windows. The structure, thus being erected by some of the co-tenants upon the common land, not merely impeded and obstructed him in the use of it, but actually excluded him from that portion of the common property. The withholding possession of the common property by one co-tenant from his companion is an ouster, to the extent to which possession is thus withheld, for which trespass might be maintained. *Silloway v. Brown*, 12 Allen, 80; *Marcy v. Marcy*, 6 Metc. 880. A structure erected by one co-tenant on the common land, and excluding the other therefrom, would afford, if sufficiently long maintained, evidence of adverse possession, sufficient to establish title against him. *Bennett v. Clemence*, 6 Allen, 10; *Ingalls v. Newhall* (May, 1885).

In removing it the defendant was not guilty of a trespass. He simply thus prevented others from ousting him from the common property, and no action of trespass can be maintained against him. Nor can the plaintiffs maintain this action under the Pub. Stat., chap. 179, §§ 6, 7. This statute is highly penal and intended to protect real estate from waste or trespass. The sixth section by providing that if any tenant in common, etc., shall destroy or remove timber, stone, etc., or commit any other strip or waste thereon, without thirty days' notice to his co-tenants of his intention to enter and improve the land, or does any simi-

lar acts while a petition for partition is pending, shall forfeit three times the amount of damages, has reference solely to injuries to the common property. It certainly cannot refer to the removal of a structure, wrongfully placed on the land by a part of the tenants, which exclude the others from their full possession and tends to establish a title adverse to them, in which also plaintiffs and defendant have no common property.

Judgment for defendant.

JEWETT v. TUCKER.

June 25, 1885.

MORTGAGE — FICTITIOUS AMOUNT — ILLEGAL PREFERENCE — RIGHT OF CREDITORS TO REDEEM — NOTE UNDER SEAL — NOTICE TO TAKER — TRUSTEES NOT PURCHASERS FOR VALUE.

Where property is sold for a fictitious value, and a mortgage given back to secure the purchase-price, in order to cover up and conceal the mortgagor's property by preferring the mortgage for the amount expressed in the mortgage, the mortgage itself is not invalid as a preference of a pre-existing debt under the insolvent law, the mortgage not having been given for a pre-existing debt, but for a debt arising contemporaneous with the transaction.

Where the contract price of land and a mortgage given to secure the same have been grossly exaggerated as a part of a fraudulent scheme in which all the parties connected therewith participated, the assignees of the mortgagor, acting in the interest of all his creditors, may redeem the property by paying the sum found to be justly due thereon.

A note under seal purporting to be secured by a recorded mortgage, and the note and mortgage referring respectively to each other, the taker of either must take according to the title of him who transfers it as such title appears upon a proper examination.

The assignment of securities to trustees for the purpose of paying the assignor's indebtedness transfers no greater rights to the trustees than the assignor himself possessed, and if the securities were assailable in the hands of the assignor, they are none the less so in the hands of one to whom he has transferred them for the purpose of paying his debts. The acceptance of such a trust does not make the trustees purchasers for value.

Bill in equity, brought by the assignees in insolvency of Franklin O. Nash, to cancel a mortgage of real estate given by said Nash to Nathaniel Tucker, or to redeem the land from the mortgage, and meanwhile to restrain the sale of the land under a power of sale contained in the mortgage. The case was heard by C. ALLEN, J., who found the following facts to be proved:

Nathaniel Tucker was the owner of a tract of land in Dorchester containing about one hundred thousand feet, and his son-in-law, T. M. Rhodes, was his business manager and agent in relation to this and other property. Early in 1883 Rhodes formed a plan for the improvement and disposal of this property in this manner: Nash, who before this time had taken a similar part in other transactions in land owned by Tucker, was to enter into a contract with one Blazo, a builder, by which Blazo was to build houses upon this land, and be paid in installments from time to time, partly in cash, partly in notes, the payments being guaranteed and the notes being indorsed by Rhodes; and at some time later Nash was to take a deed of the land from Tucker and immediately mortgage the same back to Tucker to secure the whole of the nominal purchase-money. In pursuance of this plan, the following things were done: On the 15th of March, 1883, Nash entered into a written contract with Blazo, the terms of which were fixed by Rhodes and Blazo, for the construction of six houses upon the land for the sum of \$33,000, payable from time to time as the work went on, partly in cash and partly in notes, and Rhodes in writing agreed to guarantee the payments and to indorse the notes. The houses were to be finished by June 25, 1883. This contract was assigned by Blazo to the Glendon Company, and the work was proceeded with by Blazo and the Glendon Company, and payments were made from time to time by Rhodes furnishing money to Nash, who deposited it in his own name in bank and drew his own checks for the payments, and by notes signed by Nash and indorsed by Rhodes. Nash advanced no money of his own of any considerable amount under the contract.

There was no distinct agreement between Rhodes and Nash as to the price at which the land should be sold. Rhodes told Nash that Tucker's price was fifty cents a foot, but that perhaps it might be put at forty-seven and a half cents, or even at forty-five cents. There was no distinct agreement as to a division of any

profits that might be made out of the transaction, or as to any compensation that Nash or Rhodes should receive; but it was understood between Nash and Rhodes. that Nash should act as a party to the contracts for the benefit of Rhodes and Tucker, and Nash was not expected to advance any money himself in carrying out the transaction, but the management and the profits were to be in the control of Rhodes, and Nash expected in some way to derive some profit or compensation from the transaction, though no distinct agreement upon the subject was made, and it was left to be determined by Rhodes how much, or to a subsequent agreement. Nash was engaged in a commission boot and shoe business as one of the firm of W. O. Nash & Co., had but slight means, was entirely unable to carry out the contract, and his want of means was well understood by Rhodes.

Rhodes was himself heavily indebted and was insolvent, but was at the time in good credit, and was supposed by others to be amply responsible upon his contracts; but there was nothing to show that he sustained losses afterward, or that he was himself ignorant of his financial condition; and accordingly I find that he was aware of it. The purpose of Rhodes was to give an inflated value to the land by means of an apparent sale to Nash at a fictitious price, to use Nash as an ostensible party to take the title and become responsible upon the building contract, to avoid a direct liability of Tucker upon the building contract, and to secure to Tucker the benefit of the improvements upon the land. Tucker was absent at the West from October, 1882, till May, 1883, and had no direct communication with Nash upon these matters till July 3, 1883, at which time, knowing of what had been done, and sharing in the plan and purpose of Rhodes, he asked that the transaction be completed by the execution of the deed and mortgage and mortgage note in respect to eighty-six thousand four hundred and ninety-four and one-half feet of the land, the remainder meanwhile having been sold to the city of Boston.

There was a talk as to the price at which the land should be put, and Tucker at the outset insisted that it should be put at fifty cents a foot. Nash made some remonstrance, urging that, at that rate, there could be no profit upon a sale of the houses; and finally, on July 5, 1883, it was agreed that the price should be reckoned at fifty cents a foot; that no interest should be reckoned till July 1, 1883; that an indorsement of \$300 should be made upon the note, and that the papers should be passed. Accordingly a deed was drawn up and executed from Tucker to Nash, dated March 15, 1883; a mortgage back from Nash to Tucker, reciting the consideration to be \$43,247.25, and a note for that amount payable in five years with interest semi-annually, guaranteed by Rhodes, and with an indorsement of interest paid to July 1, 1883, and of \$300 on the principal, both mortgage and note being dated March 15, 1883; the deed and mortgage were acknowledged on the 5th of July, 1883, and put on record the same day.

At this time considerable work had been done upon the houses, but they were not finished, and Nash was heavily indebted upon notes given by him and indorsed by Rhodes in pursuance of the building contract, and was insolvent, and knew himself to be so, and Rhodes and Tucker knew or had reason to believe him to be so. The real value of that portion of the land which was conveyed to Nash, with-out the buildings, was about \$20,000, and this was understood by Rhodes and Tucker to be about the value of the land, and Nash's estimate of its value was not much higher. Nash was adjudged to be an insolvent debtor on December 19, 1883, and among his creditors are the holders of the notes given under the building contract, and the plaintiffs were duly chosen assignees. Rhodes was adjudged to be an insolvent debtor on November 9, 1883. Tucker assigned Nash's note and mortgage with other property on September 28, 1883, to the defendants James Tucker and Isaac Fenno, in trust for the benefit of his creditors.

Upon consideration of the evidence, arguments and facts found to be proved, it was ordered, adjudged and decreed, that an injunction issue enjoining and commanding said James Tucker and Isaac Fenno, their agents, attorneys and counselors, and each and every of them, to desist and refrain from disposing of said mortgage given by said Nash to said Nathaniel Tucker, dated March 15, 1883, and assigned to said James Tucker and Isaac Fenno upon land in Boston, and from selling and foreclosing the same under the power contained in

said mortgage, until the further order of this court or some justice thereof; and that it be referred to _____, one of the masters of this court, to take an account of what is due to the defendant Nathaniel Tucker for principal and interest on his said mortgage, assuming the principal to be the sum of \$20,000, which I find to be the amount justly due thereon as of March 15, 1883, with interest thereafter at the rate of six per cent per annum; and also to take an account of all sums of money laid out and expended by said Nathaniel Tucker, or on his behalf, for betterments and improvements on the premises in pursuance of any agreement or understanding with said Franklin O. Nash, or for necessary repairs and lasting improvements on the premises since said 15th day of March, 1883; and also to take an account of the rents and profits of the said mortgaged premises received by the said Nathaniel Tucker, or any other person by his order or for his use since said date, or which without his willful default might have been received; and in case the master shall find that said Nathaniel Tucker, or any other person holding under him, has been in the occupation thereof, then the said master is to set a rent thereon and take the accounts accordingly; and to make a statement of account showing what on the whole, making such allowances of interest as should be allowed on either side of the account, shall be found to be due to the said defendant Nathaniel Tucker as secured by said mortgage. And what upon the balance of the said account shall be certified due to the said defendant Nathaniel Tucker, with the costs of this suit, to be taxed by the clerk. It is ordered and decreed, that the plaintiffs do pay unto the said defendants James Tucker and Isaac Fenno, with interest, within two calendar months after the said master shall have made his report (or in case of exceptions thereto, then within two calendar months after said report shall be confirmed or the amount due otherwise ascertained and decreed by this court), at such place as the master shall appoint, and that thereupon all said defendants do surrender, reconvey and re-assign the said mortgaged premises to the plaintiffs free and clear of all incumbrances due by them or any persons claiming by, from or under them. But in default of the said plaintiffs' paying unto the said defendants James Tucker and Isaac Fenno what shall be so certified or decreed by this court as balance due upon the indebtedness secured by said mortgage, within such term and at such place as aforesaid, it is ordered that the said plaintiffs' bill do from thenceforth stand dismissed out of this court, with costs to be taxed by the clerk.

From this decree the defendants appealed.

R. M. Morse, Jr., and G. W. Estabrooks, for plaintiffs. *W. Gaston and F. D. Allen*, for Nathaniel Tucker. *R. D. Smith and F. D. Allen*, for James Tucker and Fenno, trustees.

DEVENS, J. After carefully examining the evidence reported, we deem that the conclusions of fact reached by the judge who presided, and which are embodied by him in the first portion of the decree rendered, to be well sustained by it. The bill proceeds upon two grounds: First, that Nash, the bankrupt, was indebted to Nathaniel Tucker, on July 5, 1883, was then insolvent, and that the mortgage was made to Tucker in fraud of the insolvent laws, and, as a preference, Tucker knowing, or having reason to know, the premises. Upon this ground the bill cannot be maintained. On July 3, 1883, when the deed of Tucker was made to Nash, and the mortgage back by Nash to Tucker, no debt was owing by Nash to Tucker, except that then created by the purchase of the land. There had been an oral agreement by Nash for the purchase of Tucker's land, at a price not fixed, or an understanding rather with Tucker's agent that he would and could purchase. Nash had been permitted to enter on the land and, by virtue of contracts made in his name, buildings had been erected thereon, which were then partially completed, but he did not, on this account, owe any thing to Tucker. When Tucker conveyed the land to him, and he made the mortgage back, he gave security, not for a pre-existing debt, but for a debt which arose contemporaneously with the transaction. If the mortgage, as made, expressed more than the price of the land, which he had fairly agreed to pay, it might be invalid as an attempt to cover up, conceal or prevent property from coming to his creditors;

but it would not be so as a preference of a pre-existing debt, under the insolvent law.

The bill also proceeds upon the ground that the mortgage was not void, but that there was something due upon it, prays for an account, and offers to pay what shall be found due. It is the contention of the defendants that the assignees of Nash, who bring this bill for the benefit of his creditors, cannot avoid the mortgage debt in part and redeem the balance. But, even if the assignees might avoid the mortgage entirely, as having been fraudulently made to defeat the creditors of Nash, and secure to Tucker the benefit of improvements which had been placed upon the land with his fraudulent concurrence, the fact that they are content that the assignees of Tucker should receive the amount fairly due, according to its value, for the property which Tucker transferred, in pursuance of the scheme, works the defendant no injury. It is found that the purpose of Rhodes, who was Tucker's agent, and who had previously carried through similar schemes for the disposition of Tucker's lands, was to give an inflated value to the land, by means of an apparent sale of land at a fictitious price; that Nash was a person of small means; that building contracts were made by Rhodes, in the name of Nash, as an ostensible party to avoid a direct liability by Tucker upon the building contract, and to secure to him the benefit of the improvements on the land. In this scheme Nash concurred, on a promise of a profit to himself, the amount of which was not fixed. It is further found that Tucker knew of what had been done, shared in the purpose and plans of Rhodes, and completed the transaction by the execution of the deed, receiving back the mortgage and mortgage note. The defendants contend that if Nash's assignees desire to set aside any portion of this transaction, they cannot keep its benefits and throw off its burdens, and, therefore, that the court will not hold Tucker to have made an effectual conveyance of the property to Nash and yet reduce the mortgage below the contract price. But the contract price is found to have been grossly exaggerated, and an element in the scheme of fraud in which Nash, Rhodes and Tucker participated. Whether Nash himself could, or could not have availed himself of this fraud to have reduced the nominal amount of the mortgage to the real value of the estate, or the sum he ought properly to have paid, when his assignees, who represent the rights of his creditors, seek to redeem from the mortgage, all that they should be compelled to pay is the sum justly due from him. *Martin v. Root*, 17 Mass. 228; *Gibbens v. Peeler*, 8 Pick. 254; Pub. Stat., chap. 157, § 46.

The defendants contend that if one has made an oral contract to convey his land at a fixed price, say at fifty cents a foot, and has permitted his proposed vendee, relying on the oral contract, to build on the property, the court of equity may, in certain cases, compel the owner to convey at the contract price, but contend that it will never compel him to convey, at less than the contract price, even at what the property is worth, for that is making a man, perforce, sell his property without any profit and depriving him of the benefit of his contract. This the defendants submit is what the decree appealed from does, in effect. We have no occasion to controvert this proposition. In the case at bar, the scheme has so far progressed, that the proposed vendee has the title to the land, and as against the vendor, who participated in it, the creditors of the vendee should be allowed to recover the value of the improvements. This can be done in no fairer way, where both parties apparently are insolvent, and the contest is between their respective creditors, than by allowing to the creditors of Tucker the fair original value of the land, while those of Nash retain the value of the addition of any improvements they may have put upon it.

Before this bill was brought Nathaniel Tucker had assigned the mortgage in question with the note and other securities, to James Tucker and Isaac Fenno, as trustees to secure the payment of his indebtedness on the paper of Rhodes and also all his unsecured creditors. Whether as against Nathaniel Tucker, the plaintiffs could or could not assert a right to redeem the property mortgaged on payment of the value thereof, the trustees contend that this right cannot be asserted as against them, that the matter is to be considered as if an indorsement of a promissory note, not yet due, had been made directly to the creditors as collateral security for their respective debts, and that the law of Massachusetts allows the

indorser of a promissory note to whom the same is transferred in payment of, or as collateral security for, a pre-existing debt, to enforce payment of the same against the maker, irrespective of the equities existing between original parties. *Blanchard v. Stevens*, 3 Cush. 162; *Stoddard v. Kimball*, 6 id. 469; *Culver v. Benedict*, 13 Gray, 7; *Fisher v. Fisher*, 98 Mass. 303.

The note here in question was an instrument under seal; it appeared distinctly to be secured by mortgage, recorded in the Suffolk registry of deeds. There is certainly authority for holding that, when a note and mortgage refer respectively to each other, the taker of either must take according to the true title of him who transfers it, as such title appears upon a proper examination. *Strong v. Jackson*, 123 Mass. 60. Notwithstanding the language of the note, if the indorsers are charged with knowledge of the contents of the mortgage, as note and mortgage are to be construed together, it would have been seen that the promise lacked one element essential to a negotiable note, that is, being payable absolutely and at a fixed time. *Way v. Smith*, 111 Mass. 523; *Studley v. Silva*, 119 id. 187. The creditors were not parties to the assignment made to the trustees, although they had a beneficial interest thereunder. The conveyance cannot be treated as transferring greater rights to the trustees than the assignor himself possessed. If the note and mortgage in question were assailable in the possession of Tucker, they are not less so in the hands of one to whom he has transferred them, for the purpose of paying his debts and afterward paying to himself the balance, provided they can be sold "without shrinking" them, which must mean for their face value. The acceptance of such a trust would not make the trustees purchasers for value. *Holland v. Craft*, 20 Pick. 321; *Clark v. Flint*, 22 id. 231; *Glidden v. Hunt*, 24 id. 221.

There remains only the question of parties, which may be, without doubt, insisted on in the appellate court, when it appears that those whose presence is necessary to a proper decision are not before it. *Sears v. Hardy*, 120 Mass. 531; *Palmer v. Stevens*, 100 id. 461. So far as the matter is discretionary it is settled by the court below. After the case had been transferred to the full court, an application was made (which was afterward heard by a single judge) on behalf of the beneficiaries mentioned in the trust deed, that they should be made parties. At the hearing it was ruled by the presiding judge, that it was not necessary, nor at that stage of the proceedings expedient, to join them. It has been said by Lord REDESDALE, as a general rule, that where any persons are made trustees for the payment of debts and legacies they may sustain a suit, either as plaintiff or defendants, without necessarily bringing before the court the creditors or legatees, which, in many cases, would be impossible. Mitf. Eq. Pl. 174; Story's Eq. Pl. 150. In the case at bar the trustees had every interest to defend the claims of the beneficiaries to the property in dispute, and had done so, until the case had reached its final stage. The securities were in their possession, and the beneficiaries, who must have, most of them, been aware of the controversy, had been content to confide its management to them. It was, therefore, properly ruled, in the discretion of the presiding judge, that it was not advisable to admit them as parties. *Ashton v. Atlantic Bank*, 3 Allen, 217; *Stevenson v. Austin*, 8 Metc. 474.

At the supplemental hearing referred to, it was suggested by the counsel for the beneficiaries that Rhodes, or his assignees, should be made parties, but the presiding judge did not deem that question before him, presumably because he held that which was before him was only the application referred to him by the full court. It is not accompanied by any application on behalf of either Rhodes or his assignees. That they are fully aware of the pendency of litigation is not to be doubted, as Rhodes was himself one of the principal witnesses at the hearing of the evidence more than a year since. It is, therefore, a question whether the court shall of its own motion decline on this account to proceed to a final decree. The matter has not been brought to our attention by demurrer, plea, or answer, which is the mode of taking advantage of such defect. 1 Dan. Ch. 334; Story's Eq. Pl., § 236. Nor is any formal application now made that Rhodes shall be made a party upon any ground from which it appears that the defendant will sustain any injury if he is not. In the enterprise of building, Rhodes was a partner with Nash, the business being conducted and the contracts made in the name of

Nash. Such ready money as the scheme required was furnished almost wholly by Rhodes, and the profits made in the transaction were to be in Rhodes' control, the notes given, on which Nash is heavily indebted, were on the contract made by him, and indorsed by Rhodes. The general rule that all parties interested in the object of an equity suit are to be made parties is well settled. 1 Dan. Ch. 240, 489; *Homer v. Abbe*, 16 Gray, 548. It would certainly have been advisable that Rhodes and his assignees should have been joined in this suit, and had the suggestion been earlier made the court might, of its own motion perhaps, have so ordered. But when it has been postponed until after the final hearing upon the merits, and even after the first hearing in this appellate court if it is found that entire justice can be done to all parties now before the court, and without prejudice to any of their rights, and that conflicting interests, if there be any between Rhodes and Nash, or their respective creditors or assignees, may hereafter be adjusted, the objection should not now prevail. Story's Eq. Pl., § 237. As between Nathaniel Tucker and his trustees on the one hand, and Rhodes and his assignees, the matter may here be finally settled, as Nash alone, even if acting for himself and Rhodes, made the contract with Tucker, and with those who placed improvements upon the land. If, as between Nash and Rhodes, or their respective assignees, there is a right on the part of Rhodes, or his creditors, that the amount which may be recovered or the advantage which may be derived under the decree, should be availed of to diminish the amount due from Rhodes on his indorsement of Nash's notes or to yield him or his creditors any other benefit that may be hereafter considered in a proceeding between them when they have not sought to interfere in this suit, the fact that such a right may exist should not prevent us from determining the cause as it is now presented.

Decree affirmed.

MCKIM v. BLAKE.

June 29, 1885.

TRUSTEE OF TRUST FUND — ACCOUNTS KEPT BY — EVIDENCE — SURETIES — SECURITIES — INTEREST
The dealings of a trustee of trust funds and the acts done by him in the performance of his duty as trustee while the surety remains liable on his bond, are admissible in evidence against the surety in an action upon the bond.

It is the duty of a trustee to keep accounts of the trust estate, and the accounts kept by him, although kept in a firm register of a company of which the trustee was a member, are admissible in evidence as acts done by him in the performance of his duties.

Where securities forming a part of the trust estate have been wrongfully sold by the trustee, at a price below their original cost, and the proceeds converted by him, his sureties are only chargeable with the value of the bonds at the time of their unlawful sale and conversion in the absence of any evidence of a subsequent increase in their value.

In determining the amount for which execution should issue in such a case, interest should be computed upon the amount converted by the trustee from the date it is found to be due up to the date of issuing the execution, without costs.

Action of contract against the executor of the will of George Baty Blake, upon a probate bond, signed by him as surety. The case was referred to an assessor to determine the amount of damages, and exceptions were taken by both plaintiff and defendants, to the report of the assessor. The case was heard by a single justice, who overruled the exceptions of both parties, and, at their request, reported the case for the consideration of the full court.

H. G. Parker and *J. C. Davis*, for plaintiff. *J. D. Ball*, for defendants.

MORTON, C. J. This is an action against the executors of George B. Blake, upon a joint and several bond, signed by him as one of the sureties of Howe, the principal obligor. After the decision, reported in 132 Mass. 343, the case was referred to an assessor to determine the amount, for which execution should be awarded, and comes before us upon exceptions by both parties to the assessor. Most of the defendants' exceptions, which raise any questions of law, relate to the admission in evidence by the assessor of facts and statements, made by the principal, tending to show defaults by him, during the time the said Blake was liable, as surety upon the bond. It is well settled that the dealings of the trustee with

the trust fund and the acts done by him in the performance of his duty as trustee, while the surety remains liable, are admissible in evidence against the surety. *Williamsburgh Ins. Co. v. Frothingham*, 122 Mass. 391; *Choate v. Arrington*, 116 id. 552; *Bank of Brighton v. Smith*, 12 Allen, 243. All the evidence admitted by the assessors falls within this rule. It was the duty of the trustee to keep accounts of the trust estate, and the accounts kept by him, upon the ledger of J. M. Howe & Co., being the only accounts kept by him during the time they cover, were properly admitted, as acts done by him in the performance of his duty. The account, in the form of a probate account, and the semi-annual accounts, rendered by Howe to the *cestui que trust*, with the explanatory letters in regard to them, were competent evidence. The defendant contends that these accounts are not competent because it is shown and found by the assessor that they were falsified, and that the trustee had disposed of the property with which such accounts charge him. But this does not render them inadmissible. They tend to show that he had, at some time, in his hands, such property as a part of the trust estate, and that the conversion to his own use was fraudulent. All the acts of the trustee, which the assessor admitted in evidence against the surety, were acts in the performance of his office of trustee, done while the surety remained liable, upon the bond, and we are of opinion that the defendants' exceptions to such ruling were properly overruled by the presiding justice who heard the case.

The fifth exception of the defendants is to the admission of testimony of William S. Howe, that he deposited the amount of \$4,000, the proceeds of Michigan Central bonds, in the bank to the account of James Murray, Howe & Co. The testimony is not open to the objection that it attempts to control written by parol testimony. The witness testified to an act of deposit performed by himself, within his knowledge, and it would be admissible if the books of the bank contradicted him.

The defendants contend that the assessor could not lawfully charge him with the sum of \$214.71, being a part of the balance found by him to be due. This sum was a part of the income received by the trustee which has not been paid over to the beneficiaries, but which he, in fact, applied to make up a deficiency in the investment of capital, and which has thus been added to the principal. But this was money which the trustee received as a part of the trust fund under the will, which he has not paid either to the *cestui que trust*, or to his successors, and he and his sureties are responsible for it, whether he treats it in his accounts as capital or as income not distributed.

All the other exceptions of the defendants are exceptions to findings of the assessor upon matters of fact, and are not to be set aside unless clearly erroneous. *Paddock v. Commercial Insurance Company*, 104 Mass. 521. It would serve no useful purpose to discuss the evidence upon the various questions of fact passed upon by the assessor. Upon a careful revision of the testimony, his conclusions do not seem to be erroneous, but his findings are established by a fair preponderance of the testimony. It follows that the exceptions of the defendants to the report of the assessor were properly overruled.

The only exception of the plaintiff upon which he now insists is an exception to the finding of the assessor in regard to the \$5,000 Hartford city bond, and the \$4,000 Louis city bond, which were sold by the trustee at a price less than their original cost and the proceeds fraudulently appropriated by him. The plaintiff contended that the trustee and his sureties should be charged with the original cost of the bonds, but the assessor found that they were chargeable with the value of bonds at the time of their unlawful sale and conversion. There is no evidence of an increase in the value of the bonds, and there is nothing to show that the rule adopted by the assessor does not furnish a complete indemnity to the trust estate. The plaintiff's exceptions are, therefore, properly overruled.

At the hearing before this court, a question arose as to the proper mode of computing interest in determining the amount for which execution should issue. The plaintiff contended that interest upon the principal found by the assessor to be due should be computed to the date of judgment, and the amount then due thus ascertained, and that interest upon that amount should be computed to the day of issuing execution. This would be allowing interest upon interest, con-

trary to the general rule in this Commonwealth, and we are of opinion that the presiding justice rightly ruled that interest on the amount, converted by the trustee, should be computed from the day the assessor found it to be due up to the day of issuing the execution, without costs.

Execution to issue accordingly.

COSTELLO v. CROWELL.

June 29, 1885.

FORGERY — EVIDENCE — HANDWRITING — CORPUS DELICTI.

When writing is offered as a standard of comparison, it is for the presiding judge to determine whether it is shown by clear testimony that it is the genuine handwriting of the party sought to be charged, and unless his finding is founded upon error of law, or upon evidence which is as matter of law insufficient to justify the finding, this court will not reverse it upon exceptions.

Defendant asked a witness whether he knew of plaintiff's making imitations of notes by tracing, and had informed him how it could be done. The evidence was objected to, and defendant stated it was offered, not for the purpose of proving a distinct offense, but as showing the plaintiff had the skill and ability to forge the note in suit.

Held, that the evidence was properly excluded.

Where a person is accused of a crime, it is not competent to show as evidence of the *corpus delicti* that he has committed similar offenses, or that he is of bad character, or that he has the capacity and means of committing the crime.

Memoranda, made in a diary kept by defendant's intestate, are not admissible in evidence.

Contract upon a promissory note, signed by Thomas Corey, of whose estate the defendant was administrator. At the trial in the superior court, the jury found for the plaintiff, and the defendant alleged exceptions to rulings of the presiding justice as to the admission or rejection of certain evidence.

H. E. Swasey and G. R. Swasey, for plaintiff. *J. G. Abbott and R. D. Smith*, for defendant.

MORTON, C. J. This is an action of contract upon a promissory note, the defense being that it was forged.

1. When any writing is offered as a standard of comparison, it is for the presiding judge to determine whether it is shown, by clear testimony, that it is the genuine handwriting of the party sought to be charged. Unless his finding is founded upon error of law, or upon evidence, which is, as matter of law, insufficient to justify the finding, this court will not reverse it upon exceptions. *Comm. v. Coe*, 115 Mass. 481; *Costello v. Crowell*, 133 id. 352. We are of opinion that the evidence in this case was sufficient to prove the genuineness of the signatures of the defendant, which were offered as standards, and that the presiding justice might properly admit them as standards.

2. The defendant asked a witness whether he knew any thing about the plaintiff's making imitations of notes by tracing, whether the plaintiff had told him any thing about making such imitations, and whether the plaintiff showed him how he would make such imitations by means of a lamp and table. The defendant disclaimed any intention of proving a distinct offense, but offered the evidence as showing that the plaintiff had the capacity, skill and appliances which would enable him to forge the note in suit. We are of opinion that the court rightly rejected this evidence.

In cases where a person is accused of a crime, it is not competent to show, as evidence of the *corpus delicti*, that he has committed similar offenses, or that he is of bad character, or that he has the capacity and the means of committing the crime. The argument in favor of admitting such evidence is plausible. It might aid the jury, if they could know the character of the defendant, whether he is a man morally and physically able and liable to commit the offense; but the law excludes such evidence upon ground of public policy, to prevent the multiplication of issues in a case, and to protect a party from the injustice of being called, upon without notice, to explain the acts of his life, not shown to be committed with the offense with which he is charged.

There are many cases where the fact that a defendant has the means of commit-

ting a crime has been admitted in evidence against him, but it will be found that in such cases the evidence is not admitted as proof of the *corpus delicti*, but for the purpose of showing a guilty intent, or knowledge, on the part of the defendant, or of identifying him as the person who committed the offense. *Comm. v. Stone*, 4 Metc. 43; *Comm. v. Bigelow*, 8 id. 235.

In the case at bar, the question whether the plaintiff forged the note in suit is not in issue. The sole issue is, whether the note was forged; if it was, it is immaterial by whom it was forged. The evidence was offered to prove the forgery, the *corpus delicti*; and for this purpose, we think, it was inadmissible. *Hollingham v. Head*, 4 C. B. (N. S.) 388; *Griffits v. Payne*, 11 Ad. & El. 131; *State v. Corbin*, 56 N. Y. 363; *State v. Hopkins*, 50 Vt. 316; *Dodge v. Haskell*, 69 Me. 429; *Comm. v. Jackson*, 133 Mass. 16.

3. The court rightly excluded the entries made by Corey, during his life-time, in the diary kept by him. This was not an account-book, but a mere memorandum-book, and has no weight beyond any memorandum in writing, made by him. The case of *Watts v. Howard*, 7 Metc. 478, is decisive against its competency.

Exceptions overruled.

MORSE v. CITY OF WORCESTER.

June 29, 1885.

NUISANCE — SEWER — DUTY OF CITY IN CONSTRUCTING.

When the legislature authorizes a city or town to construct sewers, or to use a natural stream as a sewer, it is not to be assumed that it intends that it may be done in such a way as to create a nuisance, unless this is the necessary result of the powers granted; and if it is practicable to do the work authorized without creating a nuisance, it is to be presumed that the legislature intended it should be done so. This, however, does not imply the duty of the city to adopt an extensive system of purification independent of the construction of the sewers, or require the taking of large tracts of land not authorized by statute for that purpose.

Bill in equity praying that the defendant may be required to abate a nuisance, caused by the emptying its sewers into Mill brook and adopt reasonable and proper precautions and methods for the purification of the waters discharged from Mill brook into Blackstone river. The defendant demurred to the bill. The case was heard by a single justice and reserved for the consideration of the full court upon the bill and demurrer.

R. M. Morse, Jr., and *J. Hopkins*, for plaintiff. *E. R. Hoar* and *F. P. Goulding*, for defendant.

MORTON, C. J. The statute of 1867, chapter 106, authorized the city of Worcester to fix the boundaries of several brooks, named therein, one of which is Mill brook, an actual stream, emptying into the Blackstone river, and to alter, change, widen, straighten and deepen the channels of said brooks and remove obstructions therefrom, and to use and appropriate such brooks, cover them, frame and inclose them, in retaining walls, so far as they shall adjudge necessary for purposes of sewerage, drainage and the public health. The bill alleges that the city, acting under this statute, has changed, widened and deepened the channel of Mill brook and now uses it for the purpose of the sewerage and drainage of the city, having constructed a great number of sewers and drains emptying into it; that the whole sewage of the city is discharged into it and through it into the Blackstone river; that a nuisance is thereby created, by which the plaintiff, who is the owner of a mill-site on the Blackstone river, is greatly injured; that the city could and should have so constructed said sewers and drains, and should have so properly purified the sewage passing through them, as not to create a nuisance; and that it "carelessly, negligently and unnecessarily so constructed said sewers and drains, and carelessly, negligently and unnecessarily so destroyed the waters therefrom and so negligently omitted to take reasonable and proper precautions and methods in the construction of said sewers and drains, and purification of said waters" that the nuisance complained of is created.

The defendant demurs to the bill and, therefore, for the purposes of this hear-

ing, we must take all the facts alleged to be true. The question of the rights and duties of the city in the use of Mill brook as a sewer has been before this court in several previous cases. *Merrifield v. Worcester*, 110 Mass. 216; *Washburn and Moen Manufacturing Co. v. Worcester*, 116 id. 458.

When the legislature authorized a city or town to construct sewers, or to use a natural stream as a sewer, it is not to be assumed that it intends to authorize the city or town so to construct its sewers, or so to use the stream, as to create a nuisance, unless this is the necessary result of the powers granted. On the contrary, if it is practicable to do the work authorized without creating a nuisance, it is to be presumed that the legislature intended that it should be so done. This principle has been recognized and applied in many cases. *Haskell v. New Bedford*, 108 Mass. 208; *Brayton v. Fall River*, 118 id. 218; *Boston Rolling Mills v. Cambridge*, 117 id. 396; *Stainton v. Metropolitan Board of Works*, 23 Beav. 225; *Mersey Docks Trustees v. Gibbs*, L. R., 1 H. of L. 93; *Atty.-Gen. v. Colney Hatch Lunatic Asylum*, L. R., 4 Ch. 147; *Atty.-Gen. v. Leeds Corporation*, L. R., 5 Ch. 583.

The English cases we have cited were decided under statutes differing from ours, but they are instructive for their statements and discussions of the general principles applying in such cases, irrespective of the particular provisions of their statutes. In the case at bar, the legislature authorized the city of Worcester to use Mill brook as a sewer; by necessary implication the statute authorized it to empty its sewage into Blackstone river, but we cannot presume that it was the intention of the legislature to exempt the city from the obligation to use due care in the construction and management of its works, so as not to cause any unnecessary, injurious consequences to the rights of others. If it is practicable to use any methods of constructing the sewer, and, as a part of the construction, of purifying the sewer at its mouth, at an expense which is reasonable, having regard to the nature of the work and the magnitude, and importance of the interests involved, it is the duty of the city to adopt such methods. The bill alleges negligence in constructing the sewer and in failing to use reasonable caution to purify the sewage. Negligence in this, as in most other cases, is largely a question of degree. If the plaintiff shows that in constructing the sewer, or in adapting the brook to its use as a sewer, the defendant did the work in an improper manner, his bill can be maintained. So, if he proves that the defendant, in constructing the sewer, could have adopted, at an expense, which is reasonable, a system of cess-pools, or some other methods of purification, at the mouth of the brook, it may be that his bill can be maintained. We cannot say, in advance, that some such methods may not be practicable and within the duty of the defendant, to use reasonable precautions, in doing the work authorized by the statute, to prevent a nuisance. The allegations of the bill are so broad, that the demurrer cannot be sustained. The question whether, upon the existing facts and conditions, the defendant has been guilty of any negligence cannot be determined until such facts are developed by the evidence at the hearing. This is all that is necessary for the decision of this case.

But to prevent misunderstanding we add, that, if the only mode of preventing the pollution of the river is found to be by the adoption of an extensive system of purification, independent of the construction of the sewer, requiring the taking of large tracts of land, we must not be understood as implying that it is within the duty or the power of the defendant to do this. The power to convert the brook into a sewer carries, by implication, the power to expend money for any plan of work, which is an incident, or part of the main work, authorized by the statute, but it would seem that the statute does not give the defendant power to take lands or expend money for an independent system of sewage purification. If such system is rendered necessary by the construction of the sewer, the remedy must be sought from the legislature, which can best adjust and settle the conflicting rights and interests of the public and the riparian owners upon the river. The bill further alleges, as an independent ground of relief, that the defendant has, within six years past, changed the outlet or mouth of Mill river, so that it empties into the river at a point much nearer the plaintiff's mill than the original mouth was. We are of opinion that this was within the power given by the statute to alter and change the channels of the brooks. This power embraced the

whole brook and gave the right to make a change in its mouth, as well as in any other part of the brook. *Woodward v. Worcester*, 121 Mass. 245. There are no allegations to show that the city, before doing this, had exhausted its powers under the statute, or that for any reason the act was illegal.

Demurrer overruled.

PHELPS v. SULLIVAN.

June 29, 1885.

MORTGAGE — ASSIGNMENT — AGENT — PAROL AUTHORITY.

Authority to deliver a deed or other specialty may be by parol.

Where the name of a grantee is filled in by an agent acting under the parol authority of his principal, and there is nothing in the papers to disclose that fact, and the party taking an assignment of the instrument does not know that the party from whom he received it acted as agent, except for the purpose of delivering the assignment, the transaction is not invalid because the agent's authority was not under seal.

Writ of entry to foreclose a mortgage. Demandant claimed under a mortgage, purporting to have been given by James Sullivan to Nathan P. Pratt, which mortgage the tenant alleged James Sullivan never gave. At the trial in the superior court, the tenant asked the court to rule that upon the evidence the defendant could not maintain his action. The court so ruled and ordered judgment for the tenant and the demandant alleged exceptions.

G. H. Stevens, for demandant. *S. Bancroft*, for tenant.

MORTON, C. J. The demandant claims under a mortgage from Sullivan to Nathan P. Pratt and an assignment thereof by said Pratt. It appeared, at the trial, that said Pratt executed and acknowledged the assignment, in blank and orally authorized his son, when he could find a person to purchase the mortgage, to write in the name of such person, as the grantee, and to deliver the assignment. The son negotiated the mortgage to one Simonds, filed in his name as grantee, and then delivered to him the assignment. He afterward reported what he had done to Nathan P. Pratt, who replied, "it is all right." The only question presented by the bill of exceptions is, whether upon these facts there was a valid assignment to Simonds. The tenant contends that the assignment was invalid, relying upon the rule of the common law, that an authority to an agent to execute a deed or specialty must be under seal. But we do not think the case is governed by this rule. Where a deed purports to be executed by an agent, or where the person, with whom an agent, is dealing, knows that he is acting as agent, it may be that such person must see to it, at his own peril, that the agent has legal authority. But, in this case, the assignment did not disclose and Simonds did not know that the son was acting as agent, in any respect, except to deliver the assignment. It is settled that an authority to deliver a deed or other specialty may be by parol. *Parker v. Hill*, 8 Metc. 447. A deed takes effect from its delivery and it may well be held, that the authority to deliver, which may be oral, is an authority to deliver the deed in the condition in which it is when delivered, if there are no circumstances of suspicion to put the grantee on inquiry. When a grantor signs and seals a deed, leaving unfilled blanks and gives it to an agent, with authority to fill the blanks and deliver it, if the agent fills the blanks as authorized, and delivers it to an innocent grantee without knowledge, we think the grantor is estopped from denying that the deed, as delivered, was his deed. Otherwise he may, by his voluntary act, enable his agent to commit a fraud upon an innocent party. To hold that such deeds are invalid, because the authority to fill the blanks is not under seal, would tend to unsettle titles and would be mischievous in its results. It would be very dangerous to allow titles to be defeated by parol proof, that a deed, without suspicion on its face, duly signed and sealed by the grantor, which he authorized to be delivered, was, in fact, written in some part after he executed it by an agent having only oral authority. We think a person taking such a deed in good faith has a right to rely upon it, and that the grantor cannot be permitted to aver

that it is not his deed. *White v. Duggan*,* *ante*; the cases of *Burns v. Lynde*, 6 Allen, 305, and *Basford v. Pearson*, 9 id. 387, are distinguishable from this case. Upon the facts presented in the bill of exceptions, we are of opinion that the assignment to Simonds was valid, and, therefore, that the ruling ordering judgment for the tenant was erroneous.

Exception sustained.

SUPREME COURT OF RHODE ISLAND.

STATE v. HOXSIE.

April 4, 1885.

CRIMINAL LAW — LIQUORS — JUROR CONTRIBUTED MONEY TO PROSECUTE.

At the trial of one indicted for keeping a liquor nuisance the presiding justice commits no error in refusing to allow a juror to be asked on his *voir dire* whether he has contributed money for the prosecution of persons generally who are charged with keeping such nuisances.

TRIAL — CHARGE OF COURT — DEFENDANT MUST PRODUCE LICENSE.

On such a trial a request to charge the jury "that the sale of intoxicating liquor on divers occasions at a place or tenement is not conclusive evidence that the sale was illegal unless the State prove that the defendant at the time of said sales had no license," was rightly refused. The guilt of the defendant is to be established not conclusively but beyond a reasonable doubt. A statute makes the keeping for sale evidence that the sale or keeping is illegal, and it is for the defendant to produce his license.

TRIAL — CHARGE OF COURT.

On such trial a request to charge the jury "that the notorious character of the defendant's premises or the notoriously bad or intemperate character of persons visiting the same, or the keeping of the implements or appurtenances usually appertaining to grog-shops, tippling-shops and places where intoxicating liquors are sold is not *prima facie* evidence that such premises are nuisances," was rightly refused, because ambiguous and misleading.

WITNESSES — CREDIBILITY — "SPOTTER" NOT ACCOMPLICE.

The credibility of witnesses is a question for the jury, and a "spotter" or informer is not in contemplation of law an accomplice.

NUISANCE — ALL WHO ASSIST GUILTY.

Two persons may be convicted for maintaining the same nuisance if both take part in the maintenance, though one be merely an assistant of the other.

A place may be a liquor nuisance if liquor selling is carried on as an incidental or subordinate purpose of the place, not as a main purpose.

Exceptions to the court of common pleas.

Benjamin M. Bosworth, assistant attorney-general, for plaintiff. *Crafts & Tillinghast*, for defendants.

DURFEE, C. J. This case comes up on exceptions from the court of common pleas. It is an indictment for nuisance under Pub. Stat. R. I., chap. 80. The indictment was found and tried at the May term, 1884.

The first exception is for the refusal of the court below to allow the defendants to ask one of the jurors, called to sit in the trial, on his *voir dire*, "whether he had contributed money for the purpose of prosecuting persons charged with keeping liquor nuisances and having them bound over to the court of common pleas for indictment at said May term." The contention is that the juror was open to challenge if he had so contributed. It will be noticed that the question was not whether the juror had contributed money for the purpose of having the defendants prosecuted and bound over; the record does not show in fact that the defendants had been bound over; but whether the juror had contributed for the prosecution of persons generally who were charged with keeping nuisances. If the question had been allowed and had been answered affirmatively the answer would show, not any personal hostility to the defendants, but only that the juror was an earnest temperance man, who had demonstrated his zeal in the cause by giving of his means to aid in the enforcement of the law against the illegal sale

* This case was sent for publication on August 22.

of intoxicating liquors. The fact that he had given money would not affect him with any pecuniary interest in the conviction of the defendants. We do not see, therefore, how he could be challenged off the jury unless every strong temperance man is liable to be challenged off simply because he is a strong temperance man, anxious to have the law enforced. In *Commonwealth v. O'Neil*, 6 Gray, 343, it was held that members of an association for the prosecution of a certain class of offenses, who had subscribed to the funds of the association, were not incompetent to sit as jurors on the trial of a prosecution of an offense of that class commenced by the agent of the association and carried on at its expense, inasmuch as it did not appear but that they had paid their subscription before the prosecution was commenced, though the court remarked that it might have been well if the presiding judge had in his discretion excused the jurors. The case is much stronger than the case made here. And to the same or like effect, see *State v. Wilson*, 8 Iowa, 407; *Musick v. People*, 40 Ill. 268; *Boyle v. People*, 4 Col. 176; *Commonwealth v. Thrasher*, 11 Gray, 55; *Thomp. & Mer. on Juries*, § 181. The first exception must be overruled.

The other exceptions are for refusals by the presiding judge to give certain instructions to the jury as requested by the defendants. We do not think the court is bound, even when instructions requested are proper, to give them in the language of the requests; for the language, though perfectly correct, may be such that a jury would not readily understand it. One of the instructions requested and refused was "that the sale of intoxicating liquor on divers occasions at a place or tenement is not conclusive evidence that the sale was illegal, unless the State prove that the defendants at the time of said sales had no license." The language implies that it was necessary for the State, for the purpose of convicting the defendants, to establish their guilt conclusively and not simply beyond a reasonable doubt. We think, therefore, that the instruction was rightly refused. The statute — Pub. Stat. R. I., chap. 80, § 3 — provides that "evidence of the sale or keeping of intoxicating liquors for sale in any building, place or tenement, shall be evidence that the sale or keeping is illegal," and we see no reason why a jury might not be satisfied beyond a reasonable doubt by the mere proof of the sale that the sale was illegal, since it would be unnatural, not to say unreasonable, for the accused, if he had a license, not to produce it. And see *State v. Higgins*, 13 R. I. 330; *State v. Mellor*, id. 666.

The bill of exceptions sets forth that at the trial, testimony was introduced by the State going to show that during the time covered by the indictment, intemperate persons were in the habit of resorting to the shop complained of, and that the implements and appurtenances which are usual in a grog-shop or tipping-shop were there. The defendants requested the presiding judge to charge the jury that "the notorious character of the defendants' premises, or the notoriously bad or intemperate character of the persons visiting the same, or the keeping of the implements or appurtenances usually appertaining to grog-shops, tipping-shops and places where intoxicating liquors are sold, is not *prima facie* evidence that such premises are nuisances." The judge refused on the ground that the request was inapplicable, and did instruct the jury that they must be satisfied of the truth of the charge. The statute makes the matters mentioned in the request evidence of a nuisance, but not *prima facie* evidence. The objection to the request is that it is ambiguous. The defendants may have meant simply that the jury was not necessarily obliged, in the absence of counter evidence, to find the defendants guilty on such evidence. The request, so understood, would be proper enough, for unquestionably the jury ought to be satisfied of the guilt of the defendants beyond a reasonable doubt before returning a verdict against them. The request, however, may have been intended to have, or if given, might have been understood by the jury as having another meaning, namely, that proof of the matters mentioned would not be sufficient to throw upon the defendants the burden of defending themselves, or to warrant a conviction, even though the jury were satisfied by said matters beyond a reasonable doubt that the defendants were guilty as charged. The request, so understood, would be repugnant to the statute, and therefore the judge rightly refused to give it, leaving it to the jury to say on all the testimony, whether they were satisfied beyond a reasonable doubt of the guilt of the defendants.

The bill of exceptions shows that among the witnesses called by the government were witnesses who testified that they were employed at so much compensation a day in this and other cases, and that they made it their business to procure illegal sales of intoxicating liquors for the purpose of prosecuting the sellers. The defendants requested the judge to charge the jury in regard to these witnesses: "That the testimony of 'spotters' is to be received with great caution and distrust." But the judge refused and instructed the jury "that they must weigh all the testimony with caution, especially when they see any reason to doubt its truth or to discredit it." We do not see any error in this. The credibility of witnesses is a question for the jury. Counsel are always permitted to argue it to the jury as a matter peculiarly within their province. Without doubt it is proper for the court to direct the attention of the jury to any thing in the conduct or character of witnesses which affects their credibility; and we think the court below, though it might doubtless have expressed itself more pointedly without fault, did all that it was necessary for it to do. "A spotter" is not in contemplation of law an accomplice.

One of the witnesses called by the government testified that during the time covered by the indictment there was a sign over the shop complained of bearing the words "Geo. W. Hoxsie & Co.," and that George W. Hoxsie and Albert F. Hoxsie were members of the firm of Geo. W. Hoxsie & Co. The only other evidence going to show that said Albert F. Hoxsie was one of the firm, or one of the proprietors of the shop, was to the effect that said Albert and one Charles Hoxsie were seen in and about the shop making sales and acting as a clerk or proprietor would act. The shop was a country store containing dry goods, groceries, etc. The defendants requested the court below to instruct the jury "that a witness has no right to testify who were the members of a firm, that being a question of law, and that the testimony of a witness to that effect, unsupported by any facts or explanation, is entitled to no weight." The court refused on the ground that the instruction requested was inapplicable, and did instruct the jury to find whether one or both of the defendants kept and maintained the place, instructing them that it might have been kept or maintained by both even if they were not copartners. We do not see any error here. If the defendants had wished to object to the testimony they should have objected when the testimony was offered, for if they had objected then, the State could have required the witness to give the ground of it; and for any thing that appears the defendants themselves may have told him that they were carrying on the business as partners. The court moreover rested their refusal on the ground that the instruction requested was inapplicable; which we infer means that the government did not press for conviction on account of any copartnership, but asked for it only on the evidence that the two defendants were both actually and actively engaged in carrying on the business; and we think the instruction given was correct, namely: That both might be convicted if both took part in maintaining the nuisance, even though one simply assisted the other as agent or clerk. *Commonwealth v. Burke*, 114 Mass. 261; *Commonwealth v. Gamnett*, 1 Allen, 7; *Commonwealth v. Dowling*, 114 Mass. 259.

The defendants also requested the court to instruct the jury that proof that they, or either of them, kept intoxicating liquor for illegal sale during the time and at the place named was not conclusive evidence that they, or either of them, kept a nuisance; that the jury might, notwithstanding, acquit them if the jury were satisfied that the sale of liquors was not one of the main purposes of the place, but that the sales were isolated instances. The court refused so to charge, but did charge the jury that they must find that the defendants kept and maintained a place as described in the indictment. We do not think it was necessary for a conviction that the jury should be satisfied that the sale of liquors was one of the main purposes of the place complained of; on the contrary, we think it was enough if liquor selling was one of the purposes, though it may have been only an incidental or subordinate purposes, and manifested by only a few instances of sale. *Commonwealth v. Higgins*, 16 Gray, 19; *Commonwealth v. Gallagher*, 1 Allen, 592; *Commonwealth v. Cogan*, 107 Mass. 212. Whether a single sale would suffice, if no other was or ever had been intended, is a more debatable question, which we leave for decision when it shall be duly raised. Our conclusion is that the exceptions must be overruled and the case remitted for sentence.

Exceptions overruled.

STATE v. PALMER.

April 4, 1885.

RECOGNIZANCE — COSTS.

A statute required the complainant to give recognizance "to prosecute such complaint to final judgment with effect, or in default thereof to pay the costs which may accrue thereon, to the State, or to the person or persons accused."

The complainant gave recognizance "to prosecute the complaint with effect, or in default thereof, to pay all lawful costs which may accrue therefrom."

Held, that the difference was immaterial.

Exceptions to the court of common pleas.

Thomas H. Peabody, for plaintiff. *A. B. Crafts*, for defendant.

PER CURIAM. This is a criminal complaint for assault and battery. The complaint originated in a justice court, was carried to the court of common pleas by appeal, and is brought here on exceptions. In the justice court the defendant moved to dismiss the complaint for defect in the recognizance and renewed the motion in the court of common pleas. The motion was overruled, which is the error alleged in the exceptions. The statute requires that on a complaint for assault and battery the complainant shall, before the warrant issues, give recognizance with surety "to prosecute such complaint to final judgment with effect, or in default thereof, to pay the costs which may accrue thereon, to the State, or to the person or persons accused." Pub. Stat. R. I., chap. 197, §§ 4, 10. In this case recognizance was given "to prosecute the complaint with effect, or in default thereof, to pay all lawful costs which may accrue therefrom." The question is whether such a recognizance meets the requirement of the statute. Undoubtedly the justice taking the recognizance would have acted more wisely if he had followed the words of the statute in full, for if he had done so, the question would not have arisen. We think, however, the recognizance is, in legal effect the same as if the words had been used in full; for in our opinion to prosecute the complaint "with effect" means the same as to prosecute it to "final judgment with effect," and "to pay all lawful costs which may accrue therefrom" means the same as "to pay the costs that may accrue thereon to the State or to the person accused," since "all lawful costs" include all costs which can accrue either to the State or to the person accused. We do not think the case materially differs from *State v. McCarty*, 4 R. I. 82.

Exceptions overruled.

EDDY v. PROVIDENCE MACHINE CO.

April 25, 1885.

GARNISHMENT — LIABILITY OF GARNISHEE — NEGLECT TO MAKE AFFIDAVIT.

A. garnished in an action brought by B. against C., the writ being returnable to a justice court June 26, filed his sworn account headed "justice court, June 29." The justice court charged A. as trustee, the memorandum being "A. ch'd no aff't." Whereupon B., after obtaining judgment against C., sued A. for neglecting to file a sworn account.

Held, that the heading of the account formed no part of it, and that A. had filed his affidavit as garnishee.

Held, further, that the order of the justice court in charging A. as trustee did not have the force of the judgment.

Under the law of Rhode Island the charging a garnishee who does not appear has not the force of a judgment. The garnishee's liability is statutory, not fixed by the charging as by an adjudication.

Exceptions to the court of common pleas.

This action was trespass on the case brought in the court of common pleas against the defendant for neglect to file an account when garnished in a prior action brought by the plaintiff against one Willis H. Payson in the justice court of the city of Providence. The defendant in this action pleaded the general issue "not guilty," and the action was tried to the court upon an agreed statement of facts, jury trial being waived. After judgment for the defendant the plaintiff brought this bill of exceptions.

The facts involved are stated in the opinion of the court.

John J. Arnold, for plaintiff. *Dexter B. Potter*, for defendant.

STINNESS, J. The defendant is sued for neglecting to make an affidavit as garnishee in a suit by the plaintiff against Payson in the justice court of Providence. The return day of the writ in the justice court was June 26, 1882. The defendant, by its clerk upon whom the copy of the writ was served, made its affidavit, which was filed in the clerk's office of the justice court June 20, 1882. In the corner of the sheet, above the affidavit, were placed the words, "justice court, city of Providence, June 29, 1882." The plaintiff, therefore, claims that the affidavit could not apply to the original case. We think the date was no part of the affidavit. It was a mere memorandum placed above it for convenience in reference. It is not referred to in the affidavit nor made a part of it in any way, but, on the contrary, the case is therein accurately designated. The affidavit was duly made, duly filed and sufficiently described the case to which it referred. The insertion of an erroneous date above the affidavit could not change those facts. It does not appear that there was any other case between the parties named to which the affidavit could relate. The defendant did all that is required of a garnishee by law. But the defendant was charged as trustee of said Payson, by the justice court, the memorandum on the papers being: "Prov. Machine Co. chg'd. no aff't. Hence the plaintiff in this action claims that such charging is in the nature of a judgment which is conclusive upon this defendant.

As garnishment is a statutory proceeding, it is only by force of statute that the charging of a garnishee can, in any case, operate as a judgment. But, in those States where it has this effect, it is not conclusive as to the amount owing by the garnishee to the attachment defendant. *Barton v. Allbright*, 29 Ind. 489; *Drake on Attachment*, (4th ed.) § 707, and cases cited. If so, as between them, it cannot be conclusive as to whether any thing is owing. The conclusiveness of a finding against a garnishee applies only to the suit in which it is made. The statutes of this State do not treat the charging of a garnishee as a judgment. By Pub. Stat. R. I., chap. 208, § 13, if he makes a disclosure of funds in his hands, the plaintiff may sue for the amount, or so much as will satisfy his judgment against the defendant. The execution does not run against the garnishee, though by chapter 222, section 21, it runs against the fund, without providing any immediate remedy if the garnishee refuses to turn it over. Even after an execution issues he may avoid his liability altogether by making an affidavit under the provisions of section 22.

The only case in which the court acts judicially with reference to the garnishee is under chapter 213, section 10, to determine, in case he "*shall appear*," whether he "is properly chargeable as the trustee of the defendant, and, if chargeable, to what extent." There is no provision in the statute for the court to charge a garnishee upon his default to make an affidavit. His liability in that case is determined by chapter 208, section 18, and is the same that it was before the passage of the act authorizing the court to determine the liability after appearance. Provision is made, chapter 222, section 21, "if the trustee shall be charged by his default" that the execution shall run against "the personal estate of the said defendant in the hands and possession" of the garnishee, "charged as trustee of the said defendant by the default of the said trustee to file his affidavit in said action." But this charging must refer to the garnishee's statutory liability, for no express authority is given to the court to charge him by default. It is possible to infer such an authority from the words quoted above, but such an inference would enlarge a statute which can be more plainly satisfied by reference to the statutory liability. If, therefore, a garnishee, in case of default, becomes liable by force of statute, and not by an adjudication of the court, the fact that he is "charged by his default" cannot be regarded as a judgment. It follows that the defendant is not bound by the charging in the justice court, but may show, as he has done, that he duly filed his affidavit, and should not have been charged.

Exceptions overruled.

AMES, Trustee, v. AMES.

May 9, 1885.

WILL—TRUSTEE—FEE-SIMPLE—POWER OF SALE.

Testamentary disposition as follows:

"The remaining one-third part of said residuary (estate) I give, devise and bequeath unto my said nephew, William Ames, in trust for the uses and purposes following, that is to say: The said trustee shall collect and receive all the rents, dividends, profits and income that may arise or accrue from or out of said one-third part, and the same, from time to time, in his own discretion apply and appropriate for the sole use and benefit of my said sister, Candace C. Carrington, for and during the term of her natural life; hereby authorizing and empowering my said trustee in his discretion, and if he shall, at any time, deem it wise and expedient to apply and appropriate the whole or any portion of the body or capital of said one-third so held in trust as aforesaid, to the use and benefit of my said sister Candace during her life-time. And upon the decease of my said sister Candace, I hereby direct my said trustee to assign, transfer and convey the said one-third part of my residuary estate, or such portion thereof as shall remain in his hands, unto the children of my said sister Candace, or their descendants, in equal portions, share and share alike, to have and to hold the same unto them, their heirs and assigns forever."

Held, that Ames took as trustee a fee-simple, with power to sell and to convey the fee.

Bill in equity for specific performance.

The will of Sullivan Dorr, proved before the municipal court of the city of Providence, sitting as a court of probate December 9, 1884, contains the following provision:

"The remaining one-third part of said residuary (estate) I give, devise and bequeath unto my said nephew, William Ames, in trust for the uses and purposes following, that is to say: The said trustee shall collect and receive all the rents, dividends, profits and income that may arise or accrue from or out of said one-third part, and the same, from time to time, in his own discretion apply and appropriate for the sole use and benefit of my said sister Candace C. Carrington, for and during the term of her natural life; hereby authorizing and empowering my said trustee in his discretion, and if he shall at any time deem it wise and expedient, to apply and appropriate the whole or any portion of the body or capital of said one third so held in trust as aforesaid, to the use and benefit of my said sister Candace during her life-time. And upon the decease of my said sister Candace, I hereby direct my said trustee to assign, transfer and convey the said one-third part of my residuary estate, or such portion thereof as shall remain in his hands, unto the children of my said sister Candace, or their descendants, in equal portions, share and share alike, to have and to hold the same unto them, their heirs and assigns forever."

Ames, the trustee, contracted to sell to the respondent realty received under this provision, and this bill was filed to settle doubts as to the power of Ames, trustee, to convey a good title in fee-simple.

Nathan H. Truman, for complainant. *Samuel Ames, pro se ipso*.

STINESS, J. Under the will before us the trustee of Mrs. Carrington takes an estate in fee-simple. As stated in *Waterman v. Greene*, 12 R. I. 488, "It is well settled that words of inheritance are not necessary in a will to pass a fee, if an intent to pass it is otherwise evinced." Such an intent is clearly shown by the direction to the trustee, upon the decease of Mrs. Carrington "to assign, transfer and convey the said one-third part of my residuary estate, or such portion thereof as shall remain in his hands, unto the children of my said sister Candace, or their descendants, in equal portions, share and share alike, to have and to hold the same unto them, their heirs and assigns forever."

The estate thus to be conveyed by the trustee is an estate in fee-simple. He could not convey such an estate if he did not receive it. If he took only an estate for life of Mrs. Carrington with remainder vested in her descendants there would be no necessity for a conveyance from him to them.

In this case, as in *Waterman v. Greene*, Gen. Stat. R. I., chap. 171, § 5, went into effect after the execution of the will.

Has the trustee a power of sale under the will? He is authorized and empowered "in his discretion, and if he shall at any time deem it wise and ex-

pedient, to apply and appropriate the whole or any portion of the body or capital of said one-third so held in trust as aforesaid to the use and benefit of my said sister Candace during her life-time."

Express authority to sell is not here given to the trustee, but express authority is not requisite in cases where it is necessarily implied. The rule is clearly stated in 2 Perry on Trusts, § 766: "No particular form of words is necessary to create a power of sale. Any words which show an intention to create such a power, or any form of instrument which imposes duties upon a trustee that he cannot perform without a sale, will necessarily create a power of sale in the trustee." See, also, Hill, on Trustees, *471, and cases cited; 1 Sugden on Powers, *518.

Our inquiry, therefore, is, does this will impose duties upon the trustee which require a power of sale to enable him to perform them? We think it does. When he deems it wise or expedient, he is to "apply and appropriate the whole or any portion of the body and capital" of the trust estate to the use and benefit of Mrs. Carrington during her life. The defendant suggests that "body" and "capital" seem to be used synonymously, and that capital indicates personal rather than real estate. Undoubtedly the word "capital" is more frequently used with reference to personal property, *e. g.* with reference to the capital stock of a corporation or the business fund of a firm. Yet in either of these cases it may, and often does, include real estate. In *New Haven v. City Bank*, 31 Conn. 106, the term "capital stock" was held to include both real and personal estate. The word "capital" suggests personalty because it presents to the mind a sum of money which is the equivalent for other forms of property. We cannot restrict its meaning to this use, nor say that it so commonly means personalty that we must conclude that the testator so meant. The real and personal estate in this will are blended in the same residuary provision. If one can be sold, the other can, and *vice versa*. But how can the trustee "apply and appropriate the whole or any portion" of the trust estate to the use of the beneficiary without sale? As suggested by the complainant's counsel she cannot eat, drink or wear real estate or shares of stock, and in many cases the only way in which they could be appropriated to her use and benefit would be by turning them into some other kind of property, which, of itself, implies a power of sale. The direction to the trustee to convey to the children such portion of the trust estate "as shall remain in his hands," also indicates that the testator contemplated the sale of a part, or all, if necessary. We think the words "body or capital," as used in the will, mean the principal or substance of the estate, from which income may be derived, and that the authority to appropriate "the whole or any portion" of it means an authority to dispose of and to appropriate the whole or any part of the substance, in the form of real or personal property, when the income does not suffice. The language may be unusual to indicate a power of sale, but we think it is sufficient. A general authority to sell only implies a power to convey the fee.

No question is made as to the sufficiency of the personal estate to pay legacies; nor as to the good faith of the trustee in exercising this discretion; nor as to security for the application of the fund. Consequently, considering that the trustee has power to pass an estate in fee-simple, we see no reason why the contract should not be performed.

Decree accordingly.

ARNOLD, Receiver, v. PROVIDENCE LUMBER CO.

May 9, 1885.

INSOLVENCY — ASSIGNMENT PENDING PROCEEDINGS — RECEIVER — *LIS PENDENS*.

While proceedings were pending against A. and B. copartners, for the appointment of a receiver of their property under Pub. Stat. R. I., chap. 237, § 13, "Of proceedings in insolvency," A. made an assignment of his individual property to C. The receiver after his appointment petitioned the court for an order upon A. and C., requiring them to join in a conveyance to him of the assigned realty and to transfer to him the assigned personalty.

Held, that the assignment was subject to the doctrine of *lis pendens*, and that the petition of the receiver should be granted.*

*See 45 Am. Rep.

Petition for an order of the court. The facts involved are stated in the opinion *Frank S. Arnold, pro se ipso. Simon S. Lapham, for Providence Lumber Company. Miner & Roelker, for Eben Allen.*

TILLINGHAST, J. This is a petition filed by the receiver of the defendants, praying for a writ of attachment against Eben Allen, one of the defendants, for contempt of court in refusing to comply with a decree thereof in said case, and also praying that Harmon S. Babcock, Esq., the assignee of said Allen, be ordered to join in a deed of conveyance to said receiver of the real estate belonging to said Allen at the time of the making of his assignment to said Babcock, and also to deliver up possession to him of all the personal estate of every kind, including books of account, papers, evidences of property, debts and choses in action of said Allen.

The facts are as follows, viz.: On the 19th day of February, 1885, the plaintiffs filed a petition in equity against the defendants under Pub. Stat. R. I., chap. 237, § 13, known as the insolvency law, for the appointment of a receiver. This petition was subsequently granted and a decree entered therein on March 23, 1885, appointing Frank S. Arnold, Esq., receiver, "to take possession of all the property, evidences of property, books, papers, debts, choses in action and estate of every kind of said Providence Lumber Company, and of said Jesse Burdett and Eben Allen as copartners under the firm name and style of the Providence Lumber Company, and individually, including any estate and property attached or levied upon, within sixty days prior to the filing of said petition and remaining unsold, and including also all estate and property theretofore conveyed by said Providence Lumber Company, or by said Jesse Burdett and said Eben Allen, or either of them, in fraud of the rights of creditors or in violation of the provisions of chapter 237 of the Public Statutes,"..... following substantially the language of the statute, and closing as follows: "And said debtors and each of them are hereby ordered to turn over and deliver up possession of all their aforesaid property and estate of every kind unto said receiver, that is now in their possession."

After the filing, and during the pendency of said petition for the appointment of a receiver, the said Eben Allen, under the advice of counsel, made and executed an assignment of his individual property to said Harmon S. Babcock, for the purpose, as he claims, of dissolving certain attachments which had been made upon said property.

The defendants had made a voluntary assignment of all their partnership property and estate to Dexter B. Potter, before the commencement of the proceedings against them by the plaintiffs, and before any attachments had been placed upon their property.

The said Eben Allen had been served with the citation in said original proceedings before he made his individual assignment as aforesaid.

The plaintiffs contend, first, that the defendant Allen, by voluntarily disposing of his property by assignment pending said proceedings against them, has been guilty of contempt of court. The defendants contend that he had a right notwithstanding the pendency of said proceedings to convey his property in this, or in any other way that he saw fit; and that to hold to the contrary would result in a great hardship to the persons against whom such proceedings are commenced, by suspending all business transactions, and tying up all of their property until a final decree should be made in the proceedings.

If the defendants' position is tenable it is practically within the power of a defendant to render any proceedings against him, under this statute, entirely nugatory. For he has only to dispose of the property which the creditors are seeking to reach, by making some sort of conveyance thereof, pending the proceedings against him, and thereby leaves absolutely nothing for the final decree to operate upon. This would be, at once, a fraud, both upon the creditors and upon the law. It would be allowing creditors to pursue the shadow only, while the real thing sought would constantly elude their grasp.

We think that the position taken by the defendants is untenable, and that the doctrine of *lis pendens* is clearly applicable to the proceedings, namely: that the voluntary alienation of property pending a suit, by a defendant therein, is not permitted

to affect the rights of the parties to the suit. And also that every person purchasing *pendente lite* is treated as a purchaser with notice, and is subject to all the equities of the persons under whom he claims in privity. *Murray v. Lylburn*, 2 Johns. Ch. 441, 445; *Brightman v. Brightman*, 1 R. I. 112, 119; *Sedgwick v. Cleaveland*, 7 Paige, 287; *Norton v. Birge*, 85 Conn. 250, and cases cited; *Harmon v. Byram's Adm'r*, 11 W. Va. 511; *Murray v. Ballou*, 1 Johns. Ch. 566, 577, 581; *Lawrence v. Lane*, 9 Ill. 354; *Kern v. Haslerigg*, 11 Ind. 448. See, also, Story's Eq. Pl., §§ 156, 351; 1 Story's Eq. Jur., § 406.

The defendants also contend that even if the court shall hold that said conveyance was wrongful on the part of said Allen, and constituted a contempt of court, yet the court has no jurisdiction, under the proceedings instituted, to order said Babcock to join with said Allen in a deed of conveyance of said assigned property, to the receiver, said Babcock not being a party to said original proceedings; and further, because the property of the defendants not being especially described in the original proceedings the doctrine of *lis pendens* does not apply so as to bind him. They also urge that the proceedings against said Babcock should be by bill in equity or action at law, and not in the manner instituted.

We do not think that either of these positions is tenable. It is true that the assignee of said Allen has not been made a party to the original proceedings, nor is there any occasion that we can see for making him a party thereto, or filing a bill against him to compel a conveyance, for manifestly, if this were done, he could not be heard to urge any defense or equity whatever in his behalf, for he has none. Neither could he make any possible answer that would give him a moment's standing in a court of equity. He has been made a party to *this* proceeding and has appeared before the court and been heard as such; and he does not claim to have any interest in or right of control over the property conveyed, except by virtue of the said assignment made to him under the circumstances aforesaid.

Furthermore, it is not a case in which the title has been transferred *pendente lite*, by operation of law, as in bankruptcy proceedings, where the assignee must be made a party before the suit can proceed. But it is a case where, by the mere voluntary act of the defendant pending proceedings against him for the recovery of the very property in question, he has transferred that property to another, who also at the time knew of, though not a party to said proceedings. We think, therefore, that what has been said with regard to the debtor applies with equal force to the assignee who has been made such pending said proceedings against the insolvents. To allow him to take and hold possession of the debtor's property in this way, with power, as he manifestly would have, to again dispose of it, would defeat the main purpose and object of the law. For the person in possession of the property would have only to reassign or otherwise convey it, pending proceedings against him, and before final decree, and then say that it was beyond his power to turn it over to the receiver and thus keep the creditors in a fruitless chase after that which the law intends they shall have with the least possible delay.

As to the objection that the property was not sufficiently described in the original proceedings against the defendants, so as to affect it with the doctrine of *lis pendens*, we think it is enough to reply that although the defendants' property was not specifically described and itemized therein, yet from the very nature and object of the proceedings it must have been apparent to everybody that they were intended to include and cover all of the defendants' property of every sort and kind, and however described, except what was exempt by law; and we must hold that, after the filing of such a proceeding, all persons who deal with the insolvent debtors concerning any of their property do so at their own risk. "The principle of *lis pendens*," say the court in *Lewis v. Mew*. 1 Strob. Eq. 180, 183, "is that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril." We think that the property of the defendants was so pointed out by the original proceedings in this case. The prayer of the petition was "that a receiver of the property, books, papers, debts, choses in action and estate of every kind of said Burdett and Allen, both as copartners as aforesaid, and individually, may be appointed." This was sufficient, we think, to put all purchasers upon their guard, and *a fortiori* one who took a conveyance in the manner aforesaid.

The prayer of the petitioner in so far as it asks that said Allen and Babcock be ordered to join in a deed of the real estate to the receiver, and that said Babcock be ordered to deliver up to him the personal estate of said Allen now in the hands and possession of said Babcock, is granted.

The petitioner does not ask for any further relief at the present time.
Order accordingly.

YEAW v. WILLIAMS, Treasurer.

May 15, 1885.

NEGLIGENCE—DEFECT IN HIGHWAY.

On the concave side of a slight curve in a highway were three posts, the curve making the middle post stand out somewhat beyond the line of the other two posts. The horse of a traveler driving along the highway was frightened by a team behind, the traveler was injured by a collision with the middle post, and sued the town for damages, charging that the highway was left in a dangerous state by the town authorities.

Held, that whether the town was negligent in allowing the post to stand was a question for the jury.

Held, further, that though there might have been ample room in the roadway, yet if the post was so placed with reference to the general course of travel as to be dangerous, the town was liable.

Held, further, that the jury should decide as to concurring causes of accident under proper instructions from the court, which were presumably given.

EVIDENCE—CONDITION OF HIGHWAY—EXPERT TESTIMONY—SURVEYOR.

The surveyor of highways was called as a witness for the defense, and stated that he thought the position of the post did not make it dangerous. In cross-examination he was asked if he did not, after the accident, remove the post.

Held, that the question was admissible in cross-examination to show that his conduct was inconsistent with his expressed opinion.

Another highway surveyor was called for the defense, and asked whether, in his opinion as an expert, the highway was safe, convenient and in good repair.

Held, that his evidence was rightly excluded, the question of the highway defect being one of plain fact for the jury, not one of expert skill.*

Defendant's petition for a new trial.

The plaintiff, in this action, while driving along a highway, was injured by his wagon striking a post. He brought suit against the town in which the highway was situated, charging that the highway was dangerous owing to the negligence of the town authorities, and obtained a verdict.

The verdict then petitioned for a new trial on the grounds that the verdict was unsupported by the evidence, and that the presiding justice erred in his rulings at the trial.

Page & Owen, for plaintiff. *Dexter B. Potter*, for defendant.

DURFEE, C. J. *First*. We think the question whether the town was chargeable with culpable neglect in leaving the post where it was before the plaintiff was injured by it was a question of fact for the jury. Doubtless a hitching-post might be located near the traveled part of a road, and just out of it, in a position where it would be so unexposed or so protected that the town would evidently not be at fault for leaving it there, and that the court might properly so instruct the jury. The case at bar was not such a case. In the case at bar the plaintiff's testimony tended to show that the post complained of was the middle one of three, and stood eighteen inches further out into the road than the other two; that the road was level from fence to fence except a shallow gutter, and was traveled throughout its width except where the posts were; that the plaintiff was driving in the dark at night, keeping well to the right, *i. e.* the side of the posts, for fear of running into something; that a team coming up behind started his horse quickly, and that while he was engaged in reining in his horse he collided with the post. The plaintiff testified that he had long been familiar with the posts and had had to look out for them even in the day-time. On the other side, testimony was submitted to show that the posts stood on a portion of the highway intended for and used as a sidewalk, at the edge of which there was a gutter four or five inches deep; that the road curved a little at the posts which made the middle post appear to be further out than the other two; and that the wrought or traveled part of the road was about twenty-seven feet wide at the posts. In

* See 49 Am. Rep. 554.

view of this testimony, and especially in view of the testimony that the middle post was eighteen inches further out than the other two or on a curve where it would be more exposed, we are not prepared to say that the verdict was against the evidence. It is not enough that there was ample room for travel within the post if the post was so situated with reference to the general course of travel as to be dangerous and require unusual precaution. *Snow v. The Inhabitants of Adams*, 1 Cush. 448; *Chamberlain v. Enfield*, 48 N. H. 356; *Cassedy v. Stockbridge*, 21 Vt. 391; *Willey v. Portsmouth*, 35 N. H. 304. Indeed a post may be a dangerous defect even when it is entirely out of the limits of the highway. *Cogswell v. The Inhabitants of Lexington*, 4 Cush. 307; *Warner v. Holyoke*, 112 Mass. 362; *Hayden v. The Inhabitants of Attleborough*, 7 Gray, 338. In *Macomber v. City of Taunton*, 100 Mass. 255, cited for the town, it did not appear that the post which caused the accident protruded beyond the others, or that there was any bend in the road, and the court, moreover, which sustained the nonsuit, seems to have been a good deal influenced by a Massachusetts statute which expressly provided that in the towns the owners of adjoining land, and in the cities the municipal authorities might construct sidewalks, indicating their width by trees, posts or curbstones, set at reasonable distances apart, or by a railing erected thereto."

Second. The defendant contends that the post was only a concurring cause of the accident, the primary cause being the running of the plaintiff's horse, and that, therefore, the plaintiff ought not have recovered a verdict. The question of concurring causes was a question for the jury under proper instructions from the court, which we must presume were given. We, therefore, cannot set the verdict aside unless it is palpably against the evidence. We do not think it is so. It does not appear that the person who came up behind the plaintiff was in any fault or that the plaintiff was at fault in his driving, and the mere fact that the plaintiff's horse broke into a quiet trot, or even into a run, would not necessarily defeat the plaintiff's right to recover, if the horse did not escape his control or started from it only for the moment. *Stone v. The Inhabitants of Hubbardston*, 100 Mass. 49; *Babson & Hartwell v. The Inhabitants of Rockport*, 101 id. 98.

Third. The surveyor of the highway was called as a witness by the town, and testified in behalf of the town that in his opinion the situation of the post was not such as to make the highway unsafe or out of repair. In cross-examination he was asked if he did not order the post removed. The question was objected to, allowed and exception taken. The witness answered that he did. The object apparently was to discredit the witness by showing that his conduct was inconsistent with his testimony; for, as the matter would be put to the jury, if that witness honestly thought the post was no defect, why should he remove it. In this view we do not think the admission of the testimony affords ground for a new trial; though, if the testimony had been offered by the plaintiff as testimony in chief for the purpose of proving that the post was a dangerous defect, we think it should have properly been excluded. *Cramer v. City of Burlington*, 45 Iowa, 627.

Fourth. Another highway surveyor was called by the town to testify as an expert that in his opinion the highway was safe, convenient and in good repair at the place of the accident when the accident occurred. The testimony was objected to and rejected. We think it was rightly rejected. The question regarding the alleged defect was not a question of science or expert skill. It was a plain question of fact for the jury to decide, under instructions from the court, in view of the particular circumstances of the case.

Petition dismissed.

STATE v. MCGUIRE.

May 22, 1886.

CRIMINAL LAW — EVIDENCE — IMPEACHMENT OF DEFENDANT.

A defendant in proceedings, civil or criminal, who testifies in his own behalf may be impeached like any other witness by showing his previous conviction of a felony.

Exceptions to the court of common pleas.

Samuel P. Colt, attorney-general, for plaintiff. *George J. West*, for defendant.

PER CURIAM. The only question raised by the exceptions is whether, if a defendant on the trial of an indictment against him, testifies in his own behalf, it is competent for the State to introduce the record of his previous conviction of a felony to impeach his credibility as a witness. We think there can be no doubt that such testimony is admissible. At common law a person after such conviction was incompetent to testify, and upon production of the record was utterly excluded. Our statute modifies the common law by providing that such a person "shall be admitted to testify like any other witness, except that such conviction or sentence may be shown to affect his credibility." Pub. Stat. R. I., chap. 214, § 38. Under this provision the credibility of any ordinary witness who has been convicted of felony can be impeached by the production of the record of his conviction. The only question, therefore, is whether a defendant in a criminal or civil case who takes the witness stand in his own behalf is privileged beyond ordinary witnesses from impeachment in this manner. We can see no reason why he should be.

The enabling provision is simply "No respondent in a criminal prosecution, offering himself as a witness, shall be excluded from testifying because he is such respondent." Pub. Stat. R. I., chap. 214, § 39.

We think that when he testifies as a witness on his own offer, he becomes liable to impeachment like any other witness.

Exceptions overruled.

STATE v. SMITH.

May 28, 1885.

CRIMINAL LAW — INDICTMENT — HOUSE OF ILL-FAME.

At the trial of an indictment for keeping a house of ill-fame it appeared that the defendant owned the house, lived in it as its mistress, and let rooms to female lodgers who used them for purposes of prostitution. The presiding justice instructed the jury that the defendant was guilty if she let her rooms to prostitutes for prostitution, or knowingly permitted them to be used and resorted to for that purpose, though the occupants were merely boarders or lodgers and were not employed to ply their business by her as mistress of the house.

Held no error.

Exceptions to the court of common pleas.

Samuel P. Colt, attorney-general, for plaintiff; *George J. West*, for defendant.

DURFEE, C. J. The defendant was indicted in the court of common pleas for keeping and maintaining "a building, place and tenement used as a house of ill-fame, resorted to for prostitution and lewdness . . . and for the habitual resort of intemperate, idle, dissolute, noisy and disorderly persons." On the trial the government offered testimony tending to prove that dissolute women lodged and lived at the house of the defendant, and brought men with them to the house and solicited men on the streets for purposes of prostitution. The defendant offered testimony tending to prove that she let her rooms to female lodgers at \$3 per week, and that she did not know what the character of the lodgers was, and that no one to her knowledge resorted to her house for the purpose of prostitution. The jury found the defendant guilty. The case comes here on exceptions for alleged error in the charge of the court below.

The charge is reported *in extenso*. In the course of it, the court referred to testimony of the defendant to the effect that the house complained of was her house, and that to obtain a livelihood she took a few boarders and let her rooms occasionally as she had opportunity, and instructed the jury that the defendant had a right to let her rooms in a legitimate way, but that if she let her rooms to women for the purposes of prostitution, then she was as guilty as if she had herself employed the women for those purposes; and also that while it was not necessary for the State to prove specific acts of immorality, it was necessary for the State to satisfy the jury that such acts were committed in the rooms, and that the defendant knew or had reason to know they were committed there, or let her rooms to the end that they might be committed there, or that she knowingly permitted

her house to be used for the habitual resort of intemperate, idle, dissolute, noisy and disorderly persons. At the close of the charge, the defendant requested the court to instruct the jury that if they believed that the persons who frequented the house were boarders or visitors, the defendant was not responsible. The court refused to grant the request without modification. In making the modification the court used some expressions which, disconnected from the rest of the charge, might be understood to mean that the defendant, if she simply let her rooms to prostitutes, knowing them to be such, or if she suffered her house to be frequently visited by the disreputable classes of people mentioned in the indictment, might be convicted. If the court meant to be so understood, it was doubtless error. It is not a crime for a person to let his rooms to such women, simply as he would let them to reputable women, for quiet and decent occupation. Neither is it a crime for a person to suffer his house to be visited by disreputable people, if they only visit it for innocent and proper purposes. For instance the keeper of a restaurant would not be indictable for keeping and maintaining a building, place or tenement used for the habitual resort of intemperate, idle, dissolute, noisy, and disorderly persons, merely because such persons are accustomed to come to his restaurant to get their meals, if while there they behave in a proper manner. Taking the language in connection with the rest of the charge, however, we think the court did not intend the broader meaning. Doubtless what the court meant, and what it was understood to mean, was that the defendant was guilty if she let her rooms to prostitutes for prostitution, or knowingly permitted them to be used and resorted to for that purpose, though the occupants were merely boarders or lodgers, and were not employed to ply their business by her as mistress of the house. The question is, therefore, whether there is error in such an instruction, and this is the question which was argued by the counsel for the defendant.

The counsel, to show that there is error, cites *Regina v. Stannard*, Leigh & Cave's C. C. 349, and *Commonwealth v. Churchill*, 136 Mass. 148. These were cases in which the owners of the houses complained of leased them to tenants. In *Regina v. Stannard* the owner let his whole house in parts to women as weekly tenants, who, with his knowledge and assent used their respective rooms for the purposes of prostitution. The owner, however, retained no part of the house for himself, nor did he keep a key or reserve a right of entry. The house was left wholly in the control of the tenants. In *Commonwealth v. Churchill*, the owner had given a written lease of the house. The cases differ materially from the case at bar; for in the case at bar, the owner continued to live in her house as the mistress of it, the women who occupied her rooms being merely boarders or lodgers. She had power to eject them, at any time, if they were using her rooms for the purposes of prostitution. And see Pub. Stat. R. I., chap. 80, § 4, as follows: § 4. "If any person, being a tenant or occupant under any lawful title, of any building or tenement not owned by him, shall use such premises or any part thereof for any of the purposes enumerated in section one of this chapter, such use shall annul the lease or other title under which said occupant holds, and, without any act of the owner, shall cause the right of possession thereof to revert and vest in him, and said owner may make immediate entry thereon without process of law." We think, therefore, that if the defendant, while so living in her house and remaining the mistress of it, knew that her boarders or lodgers were using the rooms for the purposes of prostitution and continued to let them for such uses, she was properly convicted of keeping and maintaining a tenement used as a house of ill-fame, resorted to for prostitution and lewdness. She must be held to have kept her house for that purpose, when, remaining the mistress of it, she let her rooms to women who paid her for the use of them for that purpose, as much as if, instead of a stipulated price, they had paid her a percentage of their illicit gains.

The other exceptions were not pressed and are overruled.

Exceptions overruled.

UNION COMPANY v. WHITELEY.

May 28, 1885.

BOND—CONDITION—CONSTRUCTION.

The bond required by Pub. Stat., chap. 220, § 14, from a defendant who takes exceptions to the rulings of a special court of common pleas, conditioned to pay "all rent or other moneys due or which may become due pending the action, and such damages and costs as may be awarded against him," covers damages for wrongful occupation even where the relation of landlord and tenant has never existed.

Exceptions to the court of common pleas.

Charles H. Parkhurst & Rathbone Gardner, for plaintiff. *Andrew B. Patton*, for defendant.

DURFEE, C. J. This is an action of debt on a bond given by William Sprague and Inez Sprague, his wife, as principals, and by defendant as surety, in an action of trespass and ejectment brought by the plaintiff corporation against said William and Inez to recover possession of an estate occupied by them in the city of Providence. In the action of trespass and ejectment the plaintiff corporation recovered judgment for possession; but in the course of the trial, which was had in a special court of common pleas, the said William and Inez excepted to certain rulings of the special court and gave the bond in suit with a view to carrying the case into the supreme court on exceptions. Accordingly the case was carried into the supreme court, where the exceptions were overruled and the judgment of the special court was affirmed. The bond was given as required by Pub. Stat. R. I., chap. 220, and particularly by section 14 of chapter 220, which reads as follows, to-wit:

"§ 14. In case such right [i. e. the right to carry the case to the supreme court on exceptions] "be claimed by a defendant to an action in such special court, he shall, in addition to the ordinary bond to prosecute, within twenty-four hours as aforesaid, give bond to the plaintiff with sufficient surety or sureties to the satisfaction of such justice, in such sum as the justice may order, that he will pay *all rent or other moneys due or which may become due pending the action*, and such damages and costs as may be awarded against him."

The bond was given with condition in the language of section 14. The declaration in the case at bar sets forth the bond and condition and assigns breaches as follows, to-wit: "And the plaintiff avers that said William Sprague and Inez Sprague have not kept and performed the condition of said writing obligatory but have broken the same in this: that the said William Sprague and Inez Sprague, or either of them, or any other person for them, or either of them, have not paid the rent or any other moneys due to said plaintiff at the date of said writing obligatory, or any part thereof, or any rent or moneys which have become due to said plaintiff pending said action, or such damages and costs as have been awarded to said plaintiff, or any part of the same," etc. The defendant pleaded *nil debet*. The bill of exceptions shows that it appeared on the trial of the case at bar that the relation of landlord and tenant had never existed between the plaintiff corporation and William and Inez Sprague, but on the contrary, that William and Inez held the estate sued for in the special court action, adversely to the plaintiff corporation, claiming it in the right of Inez under an independent title, whereas the plaintiff corporation claimed as purchaser at a mortgagee's sale and prosecuted the action under the eighth clause of Pub. Stat. R. I., chap. 195, § 2, which confers on special courts jurisdiction "of all actions brought for the possession of lands, tenements and estates sold under mortgage." See *Union Company v. Sprague*, 14 R. I. 452. The defendant in the case at bar thereupon asked the court below, to charge the jury that the plaintiff, having failed to prove that the relation of landlord and tenant existed between the parties to the special court action, had failed to prove a breach of the bond. The court refused so to charge, but did instruct the jury to bring in a verdict for the plaintiff. The question raised by the exceptions is, whether the court erred. The defendant contends that the bond does not cover a claim to damages for wrongful occupation. The bond, being in the language of the statute, must be construed as the statute

should be construed. The question, therefore, is, whether the words "all rents or other moneys due or which may become due pending the action," as used in the statute, are broad enough in their meaning to cover damages incurred by wrongful occupation where the relation of landlord and tenant has never existed. Of course the word "rent" implies the relation of landlord and tenant, but the language is "rent or other moneys due or which may become due." The defendant argues that the phrase "money due, or which may become due," imports an obligation by contract, express or implied, and not a mere liability to damages for tort. It is doubtless true that we oftener use the phrase "moneys due" to signify an obligation to pay money under a contract, or for the breach of a contract, than we do to signify a liability to pay money by way of damages for tort; but nevertheless we do not think the phrase, if used with the latter signification, would be very much at fault, since an obligation to pay money may be incurred by tort as well as by contract. A statute should be construed if possible so as to make it effectual for the purposes for which it was enacted. The provision in question was manifestly intended for the security of parties plaintiff; for without it, a defendant in ejectment, especially if pecuniarily irresponsible, would be constantly resorting to exceptions for delay, so that pending the actions they might enjoy the use of the premises sued for. The provision ought, therefore, to be construed liberally to effectuate its intent; and so construing it we find no difficulty in holding that it covers damages for wrongful occupation or detention as well as rent. Indeed, if we were to hold that the provision covers only moneys due by contract, we should have to hold that it does not cover money for the use of a tenement sued for pending the action where the suit is by a landlord to eject a tenant holding over after the expiration of his term, for in such case the commencement of the action terminates the tenancy, and the subsequent occupation is a trespass. *Birch v. Wright*, 1 Term Rep. 378; *Featherstonhaugh v. Bradshaw*, 1 Wend. 184; *Jones v. Carter*, 15 M. & W. 718; *Russell v. Fabyan*, 84 N. H. 218. Evidently such a construction would conflict with the plain purpose and meaning of the act, and it, therefore, cannot be adopted.

The exceptions must be overruled and the judgment of the court below affirmed, with costs of the courts, and the case stand for chancery.

Exceptions overruled.

STATE v. McANDREWS.

May 28, 1885.

CRIMINAL LAW — LARCENY — INTENT.

At the trial of A. indicted for stealing from the person of B., it appeared that A., somewhat intoxicated, had been seen fumbling in the pockets of B. who was very drunk, taking money from them and putting it in his own. A. did not account for the possession of money found on him. B., after becoming sober denied, any acquaintance with A., and claimed to have had money, which was gone.

Held, that the question of A.'s intent was rightly left to the jury.

TRIAL — CHARGE OF COURT.

The presiding justice at the trial, when asked to instruct the jury that they must be satisfied, the name of the person on whom the larceny was committed was as charged in the indictment, B., did so, adding "but there is evidence tending to show the man's name was B." Evidence had been introduced that B. gave his name as B., that some one called at the police station, asked for "B.," recognized him, and paid a fine imposed on him.

Held no error.

Exceptions to the court of common pleas.

Samuel P. Colt, attorney-general, for plaintiff. *George J. West*, for defendant.

DURFEE, C. J. The defendant, who was indicted in the court of common pleas for stealing from the person of William H. Jennings and there tried and convicted, brings the case to this court for revision by bill of exceptions.

The first exception is because the court below, after the testimony for the State was in, refused to rule that the State had not made out a *prima facie* case and allowed the case to go to the jury. The testimony for the State was to the effect that the defendant and Jennings were first seen on a street in Providence together, Jennings very drunk, and the defendant somewhat in liquor; that the defendant

was searching Jennings' vest pockets; that the two then walked off, the defendant having Jennings by the arm; that while they were walking the defendant was seen to put his hand into Jennings' pantaloons pocket and take out a roll of bills and put it into his own; that Jennings was soon after arrested for intoxication; that the defendant was also arrested for stealing; that the defendant, being asked what he had been going to do with Jennings, said he had been going to take him to his home, but on being further questioned, didn't seem to know who Jennings was; that the two were taken to the police station; that the defendant being there searched, \$17 in a roll were found in his pocket; that Jennings stated in the defendant's presence that he had between \$17 and \$20; but when searched was found to have but ninety-six cents, no bills; that the defendant, on being asked where he got the money, said he didn't steal it, and repeated the statement several times, but could not seem to give any account of how he came by it, and that the next day Jennings, when perfectly sober, said in the defendant's presence that he did not know the defendant and had never seen him before. The testimony seems to have been entirely decisive except as to the felonious intent, and we think the court very clearly did not err in leaving the case to the jury on that point. Indeed, we do not see how the court could have found any pretext for taking it from the jury, or even how the jury, without some further explanation than appears to have been given by the defendant of his conduct, could fail to find the verdict which they returned.

The second exception is because the court below, in granting the defendant's request to charge the jury that they must be satisfied beyond a reasonable doubt that the name of the person on whom the larceny was committed was the name set forth in the indictment, added the remark, "but there is evidence tending to show the man's name was Jennings." The testimony for the State on this point was as follows, to-wit: The policeman who arrested the so called William H. Jennings testified that he gave his name as Jennings; and the sergeant of police testified: "He told me his name was William H. Jennings, and a lady came the next morning and asked for William H. Jennings and I took her into the cell and she recognized him as such and paid his fine. He was fined for drunkenness." This testimony was given without objection, and we think it warranted the remark to which exception was taken. We think, too, that the testimony was legitimate. Witnesses to prove a name seldom know more than that the person whose name is in question, answers to the name, or that others call him by it, or speak of him as having it. In *Rex v. Timmins*, 7 Car. & P. 499, on the trial of an indictment for manslaughter, a witness for the prosecution stated that the deceased stayed three days and nights at his inn, and that he asked the deceased his name, and that letters came directed in that name, which letters were delivered to the deceased and received by him. The court held that the witness might be asked what name was given by the deceased. The case was no stronger than the case at bar.

Exceptions overruled.

BURNS v. ALLEN.

May 28, 1885.

ATTORNEY — COLLECTING MONEY — SUMMARY PROCESS.

When an attorney at law, making collections for his client, so retains the whole of the sum collected, or so retains a large part thereof as to raise a presumption of bad faith on his part, the court will, by order, require him to make payment to his client.

An attorney collected by suit \$75 for his client, and held the whole as payment for services in the suit, and in other litigation as to officers' fees, which grew out of the suit, the client not being interested in this other litigation.

Held, that the court, in the circumstances, would allow the attorney to retain thirty per cent of the sum collected, and would order him to pay over the balance to his client.

Petition for an order of court requiring the respondent to pay over certain moneys collected by him as the petitioner's attorney.

John M. Brennan, for petitioner. *Nicholas Van Slyck*, for respondent.

STINESS, J. In *Orr v. Tanner*, 12 R. I. 94, the court recognized the liability of an attorney at law to summary process for the payment of money in his hands be-

longing to his client. See, also, *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489; *In re Fincke*, 6 Daly, 111; *In re Bleakley*, 5 Paige, 811; *In re Aitkin*, 4 B. & A. 47.

Proceedings of this kind, however, cannot be entertained when the case simply presents a difference of opinion as to the fair amount to be retained for services. The court cannot thus undertake to adjust accounts between counsel and client. But when an attorney withholds the whole, or a sum so much exceeding a proper or justifiable charge as to amount to a breach of his duty and to raise a presumption of bad faith, the court which admits him to the privilege of practicing at its bar should require of him the fulfillment of the obligations that attend the privilege. Such a process is not, as contended by the respondent, in contravention of his right of trial by jury. He is an officer of the court; he has taken an oath that he will demean himself as an attorney and counselor of the court, "uprightly and according to law." When the court undertakes to enforce this plain duty of its officer, it is doing that which a jury trial cannot do. It does not undertake, primarily, to settle the rights and credits of the parties, but only to require that its officers do not make illegal exactions nor deny to clients their indisputable rights. A jury is the tribunal to settle what is fairly due to the parties under their contract. Except incidentally, the court does not touch that matter in a proceeding like this, but simply acts with reference to an excess, so apparent as to amount to misconduct.

As stated by the court in *Bowling Green Savings Bank v. Todd*, *supra*, "The law is not guilty of the absurdity of holding that after a client has spent years in collecting through his attorney a lawful demand, he shall be put to spending as many more to collect it from his attorney, and, if that attorney should not pay, then try the same track again."

In this case the respondent attached property and obtained a judgment of \$75 and costs for the petitioner against the American Mills Company in the justice court of Warwick, in April, 1881. In November, 1881, a subsequent attaching creditor brought a bill in equity against the sheriff and deputy sheriff to review the taxation of costs and to restrain the sheriff from paying over the costs as taxed. As these costs were incident to judgments, the judgment plaintiffs were afterward made parties to the bill. But the only question at issue was the amount due to the officers and keepers, no question being made as to the judgment debt itself. The petitioner was in no way interested in the result; for, not having paid these costs, he would be under no obligation to pay them at all if they were decided to be illegal, and otherwise the sheriff would pay them, as he had received the money for that purpose. It was a matter in which only the officers were interested, although others were nominal parties to the bill. Numerous hearings were had, and after decision, another suit was brought against the sheriff in the circuit court of the United States, about the same matter, which is still pending; but to this suit, the petitioner and other judgment creditors are not parties. The respondent claims to hold the whole amount of the judgment for services rendered in these cases and hearings, and also in a suit which he brought against the sheriff in a special court of common pleas, without the knowledge or authority of the petitioner, and which was, under the circumstances, both unnecessary and fruitless. We do not think he is entitled to maintain such a claim. The only service rendered to the petitioner was the issuing of a writ, attaching property and obtaining a *nil dicit* judgment, followed by execution, on which, after considerable trouble it is true, the money was paid in full. The petitioner cannot be held to pay for defending the large allowance made to the officers for costs. The respondent charges, among other things, for going to Philadelphia, pending the bill in equity, to induce the petitioner not to sell his claim to other parties. But he cannot charge for doing that. If the petitioner was willing to sell his claim, subject to the lien for costs and service, it was no part of his counsel's duty to prevent it. On the contrary, if he was to be charged with all the litigation then in prospect, it would have been greatly to his advantage to sell and get what he could out of it, before the whole was consumed in expenses; and his counsel, if asked, should have so advised him.

The whole controversy was about the officers' fees and the defense to the litigation was solely to enable them to hold that which had been allowed to them.

No doubt the respondent thought that as plaintiffs' attorney in the justice court suits he was bound to defend the officers in the litigation that ensued, and that he had the right to make charges to his clients therefor, but he had not the right to think so. The fact that the cause of complaint against the officers happened to grow out of those suits did not cast upon the plaintiffs the burden of defending them. Moreover, it appears by the record in the Furbush case that in a week after the filing of the bill, the *ex parte* injunction, which had been granted to restrain the sheriff from paying out the funds in his hands, was dissolved as to the judgment debts and all costs, except those taxed for taking inventories and for keepers' fees. From that time, it cannot be claimed that the petitioner and other judgment creditors had any interest in the suit even though they were made parties to it for the purpose of reaching the officers, if possible. Upon motion the sheriff could have been ordered to pay over to them all but the costs in dispute, which in no event were to go to them, and, consequently, it is not to be presumed that they would have been held liable for costs, if the complainants had prevailed. The respondent must have understood the matter in this way for he did not, in that suit, enter an appearance for the petitioner or for any of the plaintiffs in the justice court suits, but only for the officers. Clearly he cannot charge the petitioner for services in matters where he did not appear for him. To withhold his money on that account is to withhold it without a legal right to do so.

Under the circumstances we think that thirty per cent of the judgment debt is, certainly, as much as could be claimed for all services that the respondent had the right to charge for, and that he should pay over all that he holds above that limit.

Order accordingly.

[See 13 Eng. Rep. 563.—Ed.]

REXROTH v. COON.

May 28, 1885.

ANIMALS — BEES — NO TITLE BY TRESPASS.

Bees are animals *feræ naturæ* and until reclaimed are only owned *ratione soli*.

In obtaining possession of an animal *feræ naturæ* no title is gained by one who when so obtaining possession is a trespasser.

A. without B.'s permission put upon a tree on B.'s land an empty box for bees to hive in. The box remained there more than two years, when C. took the box down, took out a swarm of bees and replaced the box. A. after demand upon C. brought trover against C. for the value of the bees, honey, and honey comb.

Held, that A. could not maintain his action against C.

Exceptions to the court of common pleas. The opinion states the facts.

TILLINGHAST, J. This is an action of the case in trover for the recovery of damages for the wrongful conversion of a hive of bees together with the honey and honeycomb, belonging, as is alleged, to the plaintiff. The case was originally brought and tried in the justice court of the town of Westerly, from whence it was carried by appeal to the court of common pleas. In the court of common pleas jury trial was waived and it was tried to the court upon the law and the facts. It comes here by bill of exceptions, the only exception taken being the ruling of the court, that, upon the facts which appeared in evidence, the plaintiff was not entitled to recover. Said facts are incorporated in the bill of exceptions and are a part of the record of the proceedings. They are substantially as follows, namely: In May, 1881, the plaintiff placed a small pine box called a bee hive in the crotch of a tree in the woods, on land of Samuel Green, in the town of Hopkinton. It remained in this position until about the 1st of September, 1883, when the defendant went upon the premises and took and carried away the hive together with a swarm of bees that was then in it; also the honey and honeycomb, and appropriated the same to his own use. The plaintiff had visited the hive about twice a year while it remained in its position, for the purpose of ascertaining whether any bees were in it or had been. He had found none. The plaintiff never had any express permission or license from the owner of the land to place or keep his hive in said tree.

The defendant never had any express condition or license from the owner of

the land to come upon it and take and carry away said property. Said hive was at some distance from any house, and no person knew where said bees came from into said hive, although a number of people kept bees in said town. There was evidence that for several years signs had been posted up by said Green on his premises forbidding all persons from trespassing thereon, and that one of said signs was within twenty rods of said line, but the plaintiff testified that he never saw any of them, and that he never had any notice to keep off said premises. The defendant split open said hive, took out its contents, and then nailed it together again and replaced it in said tree in as good condition as it was before he took it away. The defendant testified that he knew the owner of said land had forbidden all persons from trespassing thereon, but that said owner had told him that he did not put up said notice to keep off his neighbors, and had given him permission to go upon said land. Demand was made upon defendant in due form before the commencement of suit. After the suit was commenced the defendant turned over to said Green what then remained in his hands of said bees and honeycomb. The value of the property taken was variously estimated at from \$2.50 to \$10. Upon said facts the court ruled that the plaintiff was not entitled to recover and rendered judgment for the defendant for his costs, to which ruling the plaintiff duly excepted.

The only question, therefore, is whether said ruling was correct.

The plaintiff claims that he hived the bees, and that he thereby acquired at least a qualified property in them, notwithstanding they were upon the land of another, which was sufficient to enable him to maintain this action. We do not think the claim can be substantiated. The action is trover, and in order to recover, the plaintiff must prove title, some title, in himself, coupled with possession or the right of immediate possession. We do not think he has proved either.

Bees are *feræ naturæ*; and the only ownership in them until reclaimed and hived is *ratione soli*. This qualified ownership, however, although exceedingly precarious and of uncertain tenure, cannot be changed or terminated by the act of a mere trespasser. That is to say, the act of reducing a thing *feræ naturæ* into possession, where title is thereby created, must not be wrongful. And if such an act is effected by one who is at the moment a trespasser, no title to the property is created. *Blades v. Higgs*, 11 H. of L. 621. "Property *ratione soli*," said the lord chancellor in said case, "is the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may, from time to time, be found on his land, and as soon as this right is exercised the animal so killed, or caught, becomes the absolute property of the owner of the soil." It was further held in the same case that such animals when found, killed and taken by a mere trespasser, became also the property of the owner of the land, the same as if taken by him or his servants. See *Sutton v. Moody*, Ld. Raym. 250; *Earl of Lonsdale v. Rigg*, 11 Exch. 654; *Rigg v. Earl of Lonsdale*, 1 H. & N. 923.

We understand that the law in this country with regard to property in animals *feræ naturæ* is substantially in accord with that of England, excepting of course all game laws and statutory regulations which are now very numerous upon this subject. See *Idol v. Jones*, 2 Dev. 162.

In support of the plaintiff's position in the case at bar, he cites the following authorities, viz.: 1 Swift's Digest, 169; 2 Bl. Com. *393; 2 Kent's Com. *350; 2 Inst. 1, 14, 15; *Merrills v. Goodwin*, 1 Root, 209; *Gillett v. Mason*, 7 Johns. 16, and *Goff v. Kilts*, 15 Wend. 550. All of these authorities, in so far as they are pertinent, omitting of course the citations from the civil law, which is not in force here, tend in our judgment to support the defendant's position rather than that of the plaintiff.

The case of *Merrills v. Goodwin*, cited by the plaintiff, that a man's finding bees in a tree standing upon another man's land gives him no right either to the tree or the bees; and that a swarm of bees going from a hive, if they can be followed and identified, are not lost to the owner but may be reclaimed. That is to say, a man may pursue his property of this sort even upon the land of another and retake it; and this although the owner might be liable for a trespass in so doing.

Gillett v. Mason, 7 Johns. 16, cited by the plaintiff, also recognizes the

doctrine of a qualified ownership in bees, *ratione soli*; and while it decides that hiving or inclosing them gives property therein, and that he who first incloses them in a hive becomes their proprietor, yet it is clear, from the general tenor of the case as from the note which follows it, that it "must be understood with the restriction that a person could not come upon the land of another without his consent, for the purpose of taking bees, although unreclaimed."

The case of *Goff v. Kitta*, 15 Wend. 550, is clearly against the position taken by the plaintiff. It was trespass for taking and destroying a swarm of bees which was the property of the plaintiff, but which left the hive and flew off into a tree on land of another. The owner, however, kept the bees in sight, followed them, and marked the tree into which they entered. The court held that the plaintiff's qualified property in the bees continued so long as he could keep them in sight, and possessed the power to pursue them, and that even though he might be liable for trespass in following and retaking them upon the land of another, yet that the qualified property remained in him, and that no one else would be entitled to take them. With regard to obtaining the ownership in bees the court say: "According to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarm would be entitled to the property in it; but since the institution of civil society, and the regulation of the right of property by its positive laws, the forest as well as the cultivated field belong exclusively to the owner, who has acquired a title to it under those laws." "The natural right to the enjoyment of the sport of hunting and fowling, wherever animals *feræ naturæ* could be found, has given way, in the progress of society, to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the inclosure of another for that purpose. He would be a trespasser, and as such liable for the game taken." See, also, *Ferguson v. Miller*, 1 Cow. 243; *Adams v. Burton*, 43 Vt. 36, 38, and *Bennett's Farm Law*, 64.

In the case at bar the plaintiff was a trespasser upon the land of Green from the beginning. He had no right to place the box or hive in the tree; and by placing it there he acquired no title to the bees which subsequently occupied it, or to the honey which they produced. Neither is it material to the issue for us to inquire whether the defendant, by taking the bees and honey away without previous permission from the owner of the land, was also a trespasser; for even admitting that he was does not in any way aid the plaintiff in this suit. The fact that A. commits a trespass upon land of B. and carries away some of his personal property would hardly be considered a cause of action in favor of C.

As to the point raised by defendant's counsel that no exception can be taken to the judgment where the court below finds both as to the law and the facts, we have to say that we do not so construe the statute. It provides that "if such . . . party be aggrieved by any opinion, direction, ruling or judgment of the court of common pleas on any matter of law raised by the pleadings or by an agreed statement of facts, or apparent upon or brought upon the record by a bill of exceptions, shall be entitled to have such matter of law heard and decided by the supreme court," etc. Pub. Stat. R. I., chap. 220, § 10. The ruling complained of in this case was made upon a certain state of facts, first found by the court below, which facts are brought upon the record by a bill of exceptions. With regard to the finding of those facts we have nothing to do; but with regard to the law applicable to that state of facts we have to do upon proceedings of this sort. See *Providence Co. Savings Bank v. Phalen*, 12 R. I. 495; *Providence Gas Burner Co. v. Barney*, 14 id. 18; *Kenney v. Sweeney*, id. 581.

Exceptions overruled.

[See Moak's Underhill on Torts, 579 *et seq.*—Ed.]

HAMMOND v. HAMMOND.

June 5, 1885.

MARRIAGE—DIVORCE—"SUFFICIENT ABILITY TO PROVIDE"—HUSBAND IN PRISON.

On an application for a divorce under a statute which made "neglect or refusal on the part of the husband, being of sufficient ability, to provide necessaries for the subsistence of his wife"—Pub. Stat. of R. I., chap. 167, § 2—a cause for divorce, it appeared that the neglect to provide was caused by the committal of the husband to prison for a term of years under sentence for a felony.

Held, that while incarcerated he had not "sufficient ability" to provide.

Held, further, that in divorce proceedings the cause of the inability to provide on the part of the husband was immaterial, and that the petition for divorce must be dismissed.

Petition for divorce.

Charles F. Baldwin, for petitioner. *A. & A. D. Payne*, for respondent.

DURFEE, C. J. Two causes for divorce are assigned in the petition, namely, extreme cruelty and neglect or refusal to provide necessaries, the respondent being of sufficient ability. Extreme cruelty has not been proved. The only proof of neglect to provide is that, about a year and half before the preferring of the petition, the respondent was arrested in Albany, New York, for burglary in the third degree, so called, convicted and imprisoned in New York for two years. He was destitute of property of any sort, and of course could not, while in prison, have the fruit of his labor. Clearly, therefore, he did not have sufficient ability to provide necessaries for his wife, and we do not see how it can be said that the statutory cause has been proved. It is urged that the lack of ability ought not to avail the respondent, because he lost the ability by his own fault. We do not think any estoppel can be applied in a divorce case. The question of divorce is not a matter which is merely personal to the parties. The State has an interest in it, and has clearly specified the causes; one or more of which must be shown to exist to the satisfaction of the court before the divorce can be granted. We cannot hold that the respondent had sufficient ability, when it is clear that he did not have it, merely because he lost it by his own fault. The fact that the fault was also a crime makes no difference, in a legal point of view, for it is not the crime which the statute makes a cause for divorce, but neglect or refusal to provide, being of sufficient ability. If the divorce were grantable in this case, notwithstanding the husband's lack of ability, we do not see why it would not be grantable for a like reason if the husband had simply disabled himself by breaking an arm or a leg by assuming an unnecessary risk or by falling sick from a reckless exposure to contagious disease.

Petition dismissed.

OTIS v. VON STORCH.

June 13, 1885.

NEGOTIABLE INSTRUMENT—PAROL EVIDENCE—MAKER IN FACT SURETY—BENEFIT OF COLLATERALS.

When one of two debtors is surety for the other and the common creditor has taken security from the principal debtor, he must give the surety the benefit of the security either by way of payment or subrogation. If the creditor surrenders the security without the surety's consent the surety is *pro tanto* discharged. The surety may show the surrender in defense either at law or in equity.

If this relation of principal debtor and surety does not appear on the face of the obligation it may be shown by extrinsic evidence, as may also notice to the creditor of the relation.

But the surrender of the security to discharge the surety must be a surrender of property actually acquired by the creditor for security. Mere non-action on the creditor's part, or neglect to obtain possession of property for security, which with more effort he might have obtained, does not discharge the surety.

Defendant's petition for a new trial.

This action was *assumpsit* on a promissory note brought against the defendant as a joint and several maker thereof with one Charles H. Scott.

At the trial the defendant offered evidence to show that as between himself and

the plaintiff he was surety for the payment of the note. The defendant also called the plaintiff as a witness to show that the plaintiff had taken a mortgage from Scott to secure the note. The plaintiff testified to having received but a portion of the property covered by the mortgage.

On the objection of the plaintiff's counsel all this evidence was excluded by the court, the presiding justice ruling that the defendant was a joint and several maker, as such was liable on the note, and could not change this liability by parol evidence.

To this ruling the defendant excepted.

Robert W. Burbank, for plaintiff. *Simon S. Lapham*, for defendant.

DURFEE, C. J. We think it is well settled that where the relation of principal and surety exists between two debtors, it is the duty of the creditor, if he knows of the relation and has taken collateral security from the principal debtor, even though both are principals to him, either to enforce the security himself and apply the avails of it to the debt, or to preserve it for the surety, so that the surety paying the debt can have the benefit of it by way of subrogation, and that if the creditor, in violation of his duty, surrenders the security without the consent of the surety, the latter will be discharged either wholly or *pro tanto* according to the value of the security so surrendered, and that, according to modern decisions, the surety is entitled to show the surrender by way of defense at law as well as in equity. *Baker v. Briggs*, 8 Pick. 122; *Guild v. Butler*, 127 Mass. 386; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119; *Springer v. Toothaker*, 43 Me. 381; *Ferguson v. Turner*, 7 Mo. 497; *Kirkpatrick v. Howk*, 80 Ill. 122; *Rogers v. School Trustees*, 46 id. 428; *Neff's Appeal*, 9 Watts & Serg. 36; *Everly v. Rice*, 20 Penn. St. 297; *Mayhew v. Crickett*, 2 Swanst. 185. It is also well settled that the fact that one debtor is surety for the other is no part of the contract, but merely a collateral fact, which, if it does not appear on the face of the obligation, may be proved, together with the fact of notice thereof to the creditor, by extrinsic evidence. *Guild v. Butler*, 127 Mass. 386; *Hubbard v. Gurney*, 64 N. Y. 457. It follows that the ruling of the court at *nisi prius* was erroneous in point of law, and that the defendant is entitled to a new trial if he has been injured by it. The petition shows that the testimony of the plaintiff, introduced by the defendant, was that he took from the principal debtor, by way of collateral security, a mortgage of the debtor's household furniture, buggy and harness, and an assignment of bills or book accounts; that all that had been delivered to him under the mortgage was the buggy and harness which he had sold, netting by the sale the sum of \$21.80; that he had asked for a list of the bills or accounts but had never been able to get it and did not know who owned them, and that he had asked for the furniture, but the debtor had never delivered it and it was still where it was left by the debtor. It was at this point, while the defendant was pursuing the inquiry as to the furniture, that the counsel for the plaintiff interposed the objection which was sustained. The petition does not show and it is not claimed that the mortgage has ever been released or given up. Nor does it appear from the petition, as allowed with amendment by the court, that the defendant had any testimony other than that of the plaintiff to show what had become of the mortgage or assigned property, or any testimony to show that the plaintiff had been guilty of any other default or fault with regard to it than this, namely, that he had omitted to reduce it to possession when, with a little more effort, he might have done it. But if this was all he could show, the ruling did not harm him and a new trial could do him no good; for the surety is not exonerated, either wholly or in part, by mere non-action or passivity on the part of the creditor, so long as the security or any property or advantage actually taken or acquired under it is preserved unimpaired. *Colebrook on Collateral Securities*, § 241. We decide, therefore, that the petition must be dismissed unless the petitioner will satisfy us by affidavit, to be filed on or before the 20th inst., that he had good reason, stating the reason, to believe that but for the ruling he could have been able to show that the plaintiff came into the actual possession of property under the mortgage or assignment, and subsequently surrendered it.

Order accordingly.

Subsequently the affidavit above spoken of was filed and the petition for a new trial was granted.

[See 19 Eng. Rep. 301; 29 id. 224; 34 id. 236, 239; 28 id. 418; 37 Am. Rep. 602.—Ed.]

HERRESHOFF v. TRIPP.

July 9, 1885.

EJECTMENT — MESNE PROFITS.

In trespass for *mesne profits*, two leases offered in evidence by the plaintiff to show the rental value of the premises and the time when he obtained possession were excluded by the presiding justice.

The plaintiff petitioned for a new trial. The record of the ejectment suit had been put in. The lessee of one of the leases had testified as to his rent, and the petition did not set out the rent reserved in the other lease. *Held*, that the petition did not show that the plaintiff was injured by the exclusion of the deeds and should not be granted.

DAMAGES — COUNSEL FEES — STATUTE OF LIMITATIONS.

In trespass for *mesne profits* the plaintiff cannot recover counsel fees and expenses paid out in the ejectment suit. Punitive damages are allowed only when the defendant has shown malice or bad faith. Causes of action accrue when the trespasses are committed, and a recovery can only be had for such time as lies within the limits of the statute of limitations.

Plaintiffs' petition for a new trial.

Amasa M. Eaton, for plaintiffs. *Nicholas Van Slyck*, city solicitor, for defendant.

DURFEE, C. J. This is trespass for the *mesne profits* of land recovered in ejectment from the city of Providence. The case was tried in this court at the October term, 1884, the trial resulting in a verdict for the plaintiffs for \$675. The plaintiffs petition for a new trial for errors in rulings and on the ground that the verdict was against the evidence and the weight thereof.

First. The first error alleged, is the exclusion of two leases of the premises, the *mesne profits* of which were sued for, dated February 1, 1883, and given by the plaintiffs to former tenants of the city of Providence. The leases were offered to prove the rental value of the premises and the date at which the plaintiffs obtained possession. The lessee in one of the leases, however, had already testified to the rent which he paid, before the lease was offered in evidence, and the petition does not show what rent was reserved in the other lease. The petition, therefore, does not show that the plaintiffs have been injured in this respect by the exclusion. It does not appear that the date of the lease shows the time when the plaintiffs obtained possession, for possession may have been obtained sometime before the lease was given. The petition shows that the record in the ejectment suit, wherein the plaintiff recovered the premises, was put in, and also the accounts of the city showing the amounts and dates of all sums paid to the city by said lessees while they paid rent for the lots they occupied. One of the lessees, called as a witness by the plaintiffs, testified that he paid the city \$50 a year until the plaintiffs got possession of the premises. The time was, therefore, fixed independently of the lease. We do not think a new trial should be granted on this first ground.

Second. The second error alleged, is the exclusion of the testimony offered to prove the expenses incurred for counsel fees and for services of engineer in examining records and making plat, etc., in the ejectment suit. The English rule is that the plaintiff in trespass for *mesne profits* may recover, as part of his damages, the costs of the ejectment suit as taxed, but not beyond the taxation when they are taxed. *Doe v. Hare*, 2 Dowl. P. C. 245; *Doe v. Davis*, 1 Esp. 358; *Doe v. Fuller*, 18 M. & W. 47; Mayne on Damages, by Wood, *393. In *Alexander v. Herr*, 11 Penn. St. 537, GIBSON, C. J., said: "Costs of a previous action have doubtless been recovered, but it is by no means certain that counsel fees and compensation for expense and trouble have been treated as such. In England the costs of an attorney proper are different things; and if more was meant, the relaxation of the rule has gone to a fearful length. Clients would pay liberally out of the pockets of their adversaries, and jurors would not weigh their claims for trouble in golden scales. . . . A separate suit could not lie for the

trouble and expense of a previous one, and there is no reason why they should be component parts of a cause of action in common with something else." In *Doe v. Perkins*, 8 B. Monr. 198, cited by the plaintiffs, the court held that the plaintiff in trespass for *mesne profits* was entitled to recover as a part of his damages his reasonable counsel fees and expenses in the ejectment suit. The court cite no authority for their decision. Such an allowance may be just, but it is anomalous, for there is no reason for the recovery of the counsel fees and expenses of the ejectment suit which would not apply as well to any other suit. If the plaintiff is entitled to recover his counsel fees and expenses when he succeeds in the ejectment suit, why should not the defendant have the same measure of justice when he succeeds? We do not think the court erred in this matter.

Third. The third error alleged is the refusal of the court to instruct the jury that they might find exemplary damages. We do not think there was any error in this Courts which allow exemplary or vindictive damages allow them only when the defendant has acted maliciously or in bad faith. In the case at bar there was no evidence of malice or bad faith on the part of the city. The fact that the city prevented the plaintiffs from taking possession by its police does not show malice or bad faith any more than if it had done so by any other agent or servant. It was precisely what the city would do if it believed itself the rightful owner. The cases cited by the plaintiff do not show that a plaintiff in trespass for *mesne profits* is entitled to recover exemplary or vindictive damages as a matter of course, but only that the plaintiff in such a case is entitled to recover more than the profits actually received when the damages exceed such profits.

Fourth. The plaintiffs contend that the statute of limitations does not apply because they could not sue for the *mesne profits* before their recovery in the ejectment suit. We think, however, that the causes of action must be held to have accrued when the trespasses were committed, the possession relating back when recovered, and consequently that the statute of limitations must be held to be a bar except for the four years next before the suit. *Lynch v. Cox*, 23 Penn. St. 265; *Hill v. Meyers*, 46 id. 15; *Morgan v. Varick*, 8 Wend. 587; *Jackson v. Wood*, 24 id. 448.

We are not satisfied that the plaintiffs are entitled to a new trial on the ground that the verdict is against the evidence.

Petition dismissed.

[31 Eng. Rep. 724.]

McGRATH v. NEW YORK AND NEW ENGLAND RAILROAD CO.

July 9, 1885.

The decision of this court, heretofore given in *McGrath v. N. Y. & N. E. R. R. Co.*, 14 R. I. 357; 30 Alb. L. J. 237, affirmed.

Trespass on the case. Heard by the court, jury trial being waived.

Charles E. Gorman, for plaintiff. *William P. Sheffield & Frank S. Arnold*, for defendant.

DURFEE, C. J. This is the case in which we granted a new trial at a former term, on the ground that the verdict was against the evidence. 14 R. I. 357. The parties have waived a jury trial and now submit the case to us on the same evidence, the purpose of the plaintiff being to urge upon us certain considerations, not before urged, in regard to the statute under which the action was brought. Gen. Stat. R. I., chap. 193, § 16; Pub. Stat. R. I., chap. 204, § 15. The language of section 15 is: "If the life of any person, being a passenger in any stage coach or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroads or steamboats, . . . shall be lost by reason of negligence or carelessness of such common carrier, proprietor or proprietors, or by the unfitness or negligence or carelessness of their servants or agents, in this State, such common carriers, proprietor or proprietors, shall be liable to damages," etc. The plaintiff invites our attention particularly to the words, "whether a passenger or not," and contends that the provision extends, in the case of railroad and steam-

boat companies, to persons in their employ, as well as to persons simply in their "care," and consequently that such a company becomes liable under the statute, if the life of one of its servants or employees is lost by the carelessness of his fellow servants, though at common law a master is not liable to his servant for an injury resulting from the carelessness of a fellow servant, if he has used reasonable care in selecting his servants. The question raised by the argument is an important one, and when it becomes necessary to decide it, will merit a very careful consideration. We do not think it is necessary to decide it in this case. The ground on which we thought the plaintiff was not entitled to recover, when the case was before us on the motion for new trial, was not that intestate was a servant killed by the carelessness of a fellow servant, but that he had voluntarily assumed the risk of the accident by which his life was lost. If the statute does extend to servants as well as to passengers, it will not be contended that it imposes a greater liability for servants than for passengers, and we are very clearly of opinion that a railroad company would not be liable for the death of a passenger if the passenger voluntarily exposed himself to the casualty by which his life was lost. In such a case if the passenger were killed, his death would be attributable to his own fault rather than to the company's negligence, even if there were negligence on the part of the company. The intestate, as we stated in the former opinion, knew the risk he was running by riding on the hand car. The plaintiff contends that the intestate was under the foreman, and therefore it must be presumed that he rode on the car at the foreman's command for the purpose of returning the car. The testimony was that the intestate was one of a gang of men who were employed on Thanksgiving day to do a job of work, shoveling coal, which would take about half a day and have a full day's pay for it. The men had finished the job by about 11:15 o'clock, A. M. Soon afterward the foreman took out his watch and said: "It is twenty minutes past eleven. We have ample time to get home before the regular train leaves." The time for that train to leave was 11:40 A. M. The remark was not a command, but a suggestion, apparently put interrogatively, to ascertain if the men wanted to take the car without precautions before the passing of the regular train. The men took the car, so far as appears, without hesitation or objection, the intestate as willingly as the others. There is nothing to show that the foreman would have refused to take the proper precautions, *i. e.*, to leave a man with a red flag behind and send another before, if the men had wished him to do so; but it would have necessitated delay, and, according to the testimony, they were in a hurry to get home for Thanksgiving. Doubtless the intestate would have been permitted to walk if he had preferred to do so, but probably would have felt himself aggrieved if he had not been permitted to ride. The hand car was overtaken and run into, soon after starting, by a special train, which came as unexpectedly to the foreman as to the others, though both he and they knew that under the regulations such a train might come upon them unsignaled, and therefore that they ran that risk when they started without sending out the red flags. The foreman may have been more to blame than the others because he was foreman, but the carelessness was common to all. The case is not similar to *Mann v. Oriental Print Works*, 11 R. I. 152; for there an employee was suddenly called upon by his superior to do a dangerous work out of his sphere, without knowing the danger or how to guard against it. Being ignorant of the risk, he could not, under the circumstances, be held to have accepted it. This case, in respect of the principles which ought to govern it, is more like *Kelly v. Silver Spring Co.*, 12 R. I. 112.

Judgment for defendant for costs.

KNOWLES v. WHALEY.

July 9, 1885.

STATUTE OF LIMITATIONS — AS AGAINST EXECUTORS, ETC.

The statute of limitations limiting actions in *assumpsit* to six years — Pub. Stat. R. I. chap. 205, § 3 — begins to run in favor of executors and administrators as soon as they are qualified. Executors and administrators may reduce this time to three years — Pub. Stat. R. I., chap. 189, § 8; chap. 205, § 9 — by giving the notices provided in the last-named section. These notices are, however, not a condition precedent to the qualification of the executor or administrator.

Exceptions to the court of common pleas. The opinion states the case.

W. W. & S. T. Douglas, for plaintiff. *Charles Bradley & Walter F. Angell*, for defendant.

MATTESON, J. This is an action of *assumpsit* for moneys alleged to be due to the late firm of Knowles & Boyce, of which the plaintiff is surviving partner, for the funeral and burial expenses of the defendant's testator. The items in the account, filed with the declaration, bear date respectively, February 13 and May 2, 1872. The writ is dated July 7, 1884. The defendant pleads *first*, the general issue; and *second*, the statute of limitations, namely: that said supposed causes of action did not, nor did any of them, accrue within six years next before the commencement of the suit. The plaintiff joined issue upon the first plea, and replied to the second, that he ought not to be barred from maintaining his action, because the causes of action in his declaration set forth are for the recovery of the funeral expenses of the defendant's testator and accrued to the said firm since the death of the testator, and the defendant first gave notice of his appointment as administrator within less than three years before the bringing of the suit, to-wit, etc. To this replication the defendant rejoined that the plaintiff ought not, by reason of any thing therein contained, to have or maintain his action against him, because more than six years prior to the bringing of the suit, to-wit, on the 23d of April, 1872, Mary Tanner was appointed by the probate court of North Providence administratrix, with the will annexed, on the estate of the testator, and qualified herself and acted as such administratrix to the time of her death, to-wit, in January, 1882. To this rejoinder the plaintiff demurred.

The cause was heard in the court of common pleas, at the Dec. term, 1884, and the demurrer sustained. Thereupon judgment was rendered for the plaintiff. To the ruling sustaining the demurrer, the defendant excepted.

Pub. Stat. R. I., chap. 205, § 3, provides that an action of *assumpsit* "shall be commenced and sued within six years next after the cause of such action shall accrue and not after." Pub. Stat. R. I., chap. 189, § 8, and chap. 205, § 9, limit the period within which actions may be brought against executors or administrators to three years next after the will shall be proved or administration granted, *provided* the executor or administrator shall give notice of his appointment, by publishing the same in some public newspaper in this State nearest the place in which the deceased person last dwelt, or in such other manner as the court of probate shall direct. Pub. Stat. R. I., chap. 184, § 37, directs executors and administrators, as soon as may be after their appointment, to give notice thereof in the manner prescribed in the above recited provision.

It is conceded that the plaintiff's claim is barred by the general statute of limitations — Pub. Stat. R. I., chap. 205, § 3 — if that statute is applicable to this case. The plaintiff, however, contends, that it is not so applicable, but that the case is governed by the special statutes, relating to executors and administrators, mentioned above. He insists that inasmuch as Pub. Stat. R. I., chap. 184, § 37, requires executors and administrators to give notice of their appointment as set forth therein, and in the proviso above quoted, the three years limited, in which actions may be brought, do not begin to run till such notice has been given, hence the defendant's rejoinder, as it does not aver that the original administratrix, Mary Tanner, gave notice of her appointment as required by the statute, is insufficient.

We do not think these views correct. The general statute of limitations in its terms applies to all actions, and therefore to actions against executors and administrators as well as others. The notice prescribed by Pub. Stat., chap. 184, § 37, is nowhere made a condition precedent to the qualification of an executor or administrator. On the contrary, Pub. Stat., chap. 184, § 1, provides for the issuing of letters testamentary to the executor on the probate of the will, and section 12 provides that every executor or administrator, who has given bond as such, shall be qualified as executor or administrator according to his appointment. The general statute, therefore, begins to run as soon as the executor or administrator is qualified.

The special statutes of limitations in favor of executors and administrators were intended to promote the speedy settlement of estates. To obtain the benefit

of them, the executor or administrator must first bring himself within their provisions by giving the prescribed notice. *Bosworth v. Smith*, 9 R. I. 67. They do not exclude the operation of the general statute except in cases in which the prescribed notice has been given.

It follows that the general statute of limitations began to run against the claim of the plaintiff as soon as the original administratrix was qualified as such by the filing of her bond, and that at the expiration of six years the claim became barred. The rejoinder was, therefore, sufficient, and the demurrer thereto should have been overruled. The exceptions are sustained and the case is remitted to the court of common pleas for trial.

Exceptions sustained.

PAINE v. BAKER.

July 18, 1885.

MARRIED WOMAN'S DEED — ACKNOWLEDGMENT.

Under a statute which provided that in every case of a deed executed by husband and wife to convey the wife's realty, "the wife acknowledging such deed or instrument shall be examined privily and apart from her husband, and shall declare to the officer taking such acknowledgment that the deed or instrument shown and explained to her by such magistrate is her voluntary act, and that she doth not wish to retract the same," an acknowledgment was certified to as follows by the magistrate who took it: "Personally appeared S. A. J. and A. J., wife of said S. A. J., to the within and foregoing written instrument and severally acknowledged the same to be their free and voluntary act and deed, hand and seal, the said A. J. having acknowledged separate and apart from the said husband as the law directs, and that they do not wish to retract the same."

Held, that the acknowledgment was fatally defective. The statutory provision requiring the deed to be "shown and explained" to the married woman was mandatory, and that the omission from the magistrate's certificate of a statement that the deed had been "shown and explained" to the married woman was fatal. (*Note, p. .*)

FRAUD — SETTING ASIDE DEED FOR.

A. by fraud and deception obtained a deed of realty from B. B., after learning the deceit practiced, ignored the deed to A., and conveyed the same realty to C.

Held, that C. could maintain a bill in equity against A. to annul B.'s deed to A., without making B. party to the bill.

Bill in equity to set aside certain conveyances of realty as fraudulent, and for an injunction. On demurrer to the bill.

Miner & Roelker and *Henry B. Whitman*, for complainants. *James Tillinghast*, for respondent.

DURFEE, C. J. The case as made by the bill which is demurred to is as follows, to-wit: On November 8, 1825, Samuel A. Jacoy and Amey A. Jacoy, his wife, in her right, she being one of four children and heirs of Zuriel Waterman, deceased, gave to her brother Zuriel, jointly with the other heirs, except said Zuriel, a quit-claim deed of all her right, title and interest as heir in about one hundred and forty acres of land belonging to her father at his decease. The deed, however, was acknowledged as follows, to-wit: "WARWICK, November 12, 1825. Personally appeared Samuel A. Jacoy and Amey Jacoy, wife of said Samuel A. Jacoy, to the within and foregoing written instrument, and severally acknowledged the same to be their free and voluntary act and deed, hand and seal, the said Amey Jacoy having acknowledged separate and apart from the said husband as the law directs, and that they did not wish to retract the same. Before me," etc. Afterward Zuriel Waterman, the grantee in said deed, sold and conveyed said land to Philip Paine, grandfather of the complainants, who, after disposing of a portion of the land, died intestate in 1856, leaving Philip S. Paine, the father of the complainants, his only child and heir. Philip S. Paine, after selling portions of the land, died intestate August 10, 1870, leaving the complainants as his only heirs at law. Among the portions sold by Philip S. Paine was a lot of nearly three acres sold to Julius Baker, the father of the defendant. In 1874 the defendant, having succeeded to said lot, obtained from the heirs of Amey Jacoy, then deceased, quit-claim deeds of all their right, title and interest in said lot. Later, in 1875, the defendant obtained from the Jacoy heirs, for a nominal consideration, quit-claim deeds of all their right, title and interest in the entire tract

of land described in the deed to Zuriel Waterman. The bill charges that the defendant obtained the last-mentioned quit-claim deed from the Jacoy heirs by representing to them that, as he had bought lands included in the deed to Zuriel Waterman and claimed title thereunder, he desired to quiet the title to those then in actual possession, and to perfect his own title so that he might be enabled to borrow money on the security of his own title, and by expressly representing to them that it was not his purpose to disturb the heirs of Philip S. Paine in their occupation, and that but for these representations he would not have obtained the deeds, the only purpose of the Jacoy heirs being to confirm the title intended to be conveyed to Zuriel Waterman in 1825 by their ancestor, Amey A. Jacoy. The bill charges that the procuring of the deeds was fraudulently contrived by the defendant for the purpose of ousting the complainants from their possession, and that in pursuance of this purpose the defendant, on March 5, 1883, commenced an action of trespass and ejectment against the complainants in the supreme court in Providence county in the names of the Jacoy heirs, which action is still pending. The bill also alleges that the Jacoy heirs, when it came to their knowledge that the defendant had commenced said action in their names, repudiated the same, and thereupon conveyed by quit-claim deeds all their right, title and interest in the premises, described in the deed of 1825, to the complainant, Caleb H. Paine, who accepted said conveyance for the purpose of quieting and confirming the title of the complainants under said deed. The prayer of the bill is that the defendant may be enjoined from prosecuting his action at law; that the deeds last procured by him from the Jacoy heirs may be decreed to be fraudulent and void; that he may be compelled to release his interest under them to the complainants, and for general relief.

The right of the complainants to relief rests solely on the assumption that the deed from Samuel A. Jacoy and Amey A. Jacoy to Zuriel Waterman was ineffectual to pass the title of Amey A. Jacoy; for if her title passed, the deeds from the Jacoy heirs to the defendant were mere nullities, and this suit was wholly unnecessary. The first question, therefore, is whether the title of Amey A. Jacoy passed by the deed of Zuriel Waterman. The decision of this question depends on the sufficiency of the acknowledgment. Under the statute as it existed in 1825, it was competent for a man and his wife to convey her real estate by their joint deed, subject to the following provision, however, namely: "In every such case the wife acknowledging such deed or instrument shall be examined privily and apart from her husband, and shall declare to the officer taking such acknowledgment that the deed or instrument *shown and explained to her* by such magistrate is her voluntary act, and that she doth not wish to retract the same." The certificate of the acknowledgment of Amey A. Jacoy does not show that the deed was *shown and explained to her* by the magistrate. The question is, whether the omission is a fatal defect.

The question is one which has been much mooted at the bar. It has been once or twice presented to the court, but not decided. *Lippitt v. Huston*, 8 R. I. 415; *Kavanaugh v. Day*, 10 R. I. 393, 397. It is said the omission is of frequent occurrence, especially in the earlier deeds, and that if necessary we ought for the security of titles to apply the maxim, *communis error facit jus*. We are not convinced of that, though we have no doubt that the omission is common enough to make it our duty to be circumspect. There are a few cases under similar statutes which hold that it is not necessary for the certificate to show that the deed was shown and explained. *Gregory's Heirs v. Ford*, 5 B. Monr. 471, 481; *Nantz v. Bailey*, 3 Dana, 111; *Tod v. Baylor*, 4 Leigh, 498; *Chestnut v. Margaret Shanes's Lessee*, 16 Ohio, 599; *Stevens v. Doe dem. Henry*, 6 Blackf. 475. But in these cases the chief ground of decision was that the statutes, while they were express that the other matters should be certified, made no mention of this. Our statute does not expressly prescribe any certificate. It is well settled, however, that an acknowledgment to be good must be certified, and that in all other respects the certificate must show a complete compliance with the statute. Why must it not show it in this respect? Clearly it must show it unless there is some good reason why it may omit to show it. The complainants find such a reason in the manner in which the direction to show and explain is given, the direction being expressed,

as it were, incidentally, rather than in the shape of a direct command. They argue from this that it was not intended to be mandatory, but only directory, and therefore that a compliance with it is not indispensable. The argument is ingenious, but it is too obviously ingenious to be entirely satisfactory. The direction is clearly given, and, considering the purpose for which it is given, it seems to us that it is not safe to infer from the mere phrasing of it that it was not intended to be mandatory. Of what avail is it for the magistrate to go with the wife apart from her husband to take her acknowledgment, if she does not know what she is acknowledging? The first thing for him to do, therefore, is to make sure that she understands her act, for until she understands it she cannot truly say that it is her free and voluntary act, and, in these days, she is quite as likely to need protection from her own ignorance or from her blind trust in her husband and sometimes from downright imposition as from fear or coercion.

In Pennsylvania, under a statute which directed the magistrate to read the deed or otherwise make its contents known, it was decided that a certificate which did not show compliance with this direction was invalid. *Steele v. Thompson*, 14 Serg. & R. 84, 92; *Barnet v. Barnet*, 15 id. 72. To the same effect, see, also, *Pease v. Barbiers*, 10 Cal. 436; *Garrett et al. v. Moss*, 22 Ill. 363; *O'Ferrall v. Simplot*, 4 Greene (Iowa), 162; also 4 Iowa, 381. And as to the strictness of the law, see *Lessee of Watson and Wife v. Bailey*, 1 Binn. 470; *Watson v. Mercer*, 6 Serg. & R. 49. In Missouri a certificate which did not show that the wife had been made acquainted with the contents of the deed, as directed, was held to be insufficient. *Chauvin v. Wagner*, 18 Mo. 531; *Burnett v. McOluey*, 78 id. 676. In *Langton v. Marshall*, 59 Texas, 296, a certificate stating that the *feme* declared that she "fully understood the contents" of the deed was held to be an insufficient compliance with a statute requiring from the *feme* a declaration that "the said writing to be shown and explained to her" was her free act, and giving the form of a certificate in which compliance is stated in the words "having the same fully explained to her." See, also, *Ruleman v. Pritchett*, 56 Tex. 482. In Virginia the statute required the magistrate to certify in effect that the wife "being examined by me privily and apart from her husband and having said writing fully explained to her," declared, etc.; and, under this statute, it was held in *Hairston v. Randolphs*, 12 Leigh, 445, that a certificate which did not show such explanation was invalid. And see *Bolling v. Teel*, 76 Va. 487. And in West Virginia, which has the same statute, it has been decided that a certificate which stated that the deed was "read" to the wife instead of stating that it was "fully explained" to her, is insufficient. *Watson v. Michael*, 21 W. Va. 568.

These cases show the strictness of the law. It is true that some of them are cases under statutes which give a form of certificate, but it is not the form of words, but the fact that explanation was given as directed which the courts consider important. In *Hairston v. Randolphs*, the court in giving decision uses the following significant and instructive language: "There is good reason for requiring a substantial compliance with all the requisitions of the statute. The Statute of Fines, 18 Edw. I, provided that 'if a woman *covert* be one of the parties, then she must be examined by four of said justices, and if she doth not assent thereunto, the fine shall not be levied.' Coke in his commentary on this statute, 2 Inst. 514, says: 'The examination must be solely and secretly, and the effect thereof is whether she be content of her own free will, without any menace or threat, to levy a fine of these parcels, and name them unto her, every thing distinctly contained in the writ so as she perfectly understand what she doth.' This statute had received, therefore, a construction in practice which required an explanation to the wife, and her knowledge of the nature of the act done." The significance of the practice under the ancient method of conveyance by fine is that in the case of married women our modern acknowledgment is a substitute for it or a revival of its protective procedure in another form.

Our conclusion is that under our statute the direction to show and explain the deed is clearly given; that the direction, notwithstanding the oblique manner in which it is expressed, is mandatory, and, consequently, that it is as necessary for the certificate to show compliance with it as with any other direction or requirement of the statute.

This being so, the next question is, does the bill make a case for relief for the complainants? We think it does very clearly, for it shows a case of fraudulent representation and fraudulent practice by the defendant to and upon the Jacoy heirs. The defendant maintains that the Jacoy heirs are necessary parties. We do not think so. We are by no means clear that the complainants could not, without joining the Jacoy heirs, have the defendant decreed to hold as trustee for them, even if the Jacoy heirs had not conveyed their interest to Caleb H. Paine; but, in view of that conveyance, we do not think there can be a doubt that the complainants are entitled to full relief without joinder with them. The case of *Whitney v. Roberts*, 22 Ill. 381, cited by complainants, is fully in point. In that case the court held that when a person by fraud and deception obtained a conveyance, the grantors may disregard it and convey to a third party, who may establish the fraud in equity and have the same relief which the grantors but for their conveyance would have had.

Demurrer overruled.

[NOTE. — See 14 Eng. Rep. 499; 14 Abb. N. C. 447, 452, note; 15 id. 241; 34 Hun. 511; 26 Am. Rep. 287; 67 How. Pr. 351; 18 W. Dig. 461; 25 Alb. L. J. 16; 78 Mo. 482; 76 Ill. 611; 4 Am. Bar Ass'n Rep. 199, 202. — Ed.]

CONNECTICUT MUT. LIFE INS. CO. v. BALDWIN.

July 13, 1885.

INSURANCE — LIFE POLICY — PAYABLE TO WIFE AND CHILDREN — ASSIGNMENT TO CREDITOR — RIGHT OF PARTIES.

F. took out a life insurance policy payable to M. and the children of F. When the policy was taken out M. was his wife and he had four children living by a former wife. Subsequently a child was born to F. and M. Afterward F. and M. transferred their right, title and interest in the policy by an unsealed instrument signed by them, as collateral security for a debt of F., and the instrument and the policy were delivered to the creditor. No question was made as to the validity of the transfer.

On a bill of interpleader brought by the insuring company after the deaths of F. and M. *Held*, that the policy was an executed, irrevocable, voluntary settlement in favor of the wife and the children in being when it was taken out.

Held, further, that F. and M. could pledge or assign the policy to the extent of their interests in it.

Held, further, the policy being for \$5,000, that one-fifth of this amount was due to the creditor and one-fifth to each of the four children.

Held, further, one of the four children having died a minor before F., that the one-fifth due this child should be paid to his legal representative, if any, and if none, to the administrator of F., the child's father and next of kin.

Bill of interpleader. The opinion states the facts.

Bowditch & Champlin, for complainant. *Rollin Mathewson*, for respondent, the Fifth National Bank. *Charles F. Baldwin*, for the other respondents.

DURFEE, C. J. This is a bill of interpleader, the object of which is to ascertain the rights of the interpleading parties in the sum of \$5,000, insurance money, payable under a policy on the life of William S. Fifield. The policy was issued by the complainant, a Connecticut corporation, January 26, 1865. The premiums which were to be paid in ten years were all paid by William S. Fifield, the last on January 26, 1874. The agreement of the company was as follows, to-wit: "The said company do hereby promise and agree to and with the said assured, his executors, administrators and assigns, well and truly to pay or cause to be paid at the city of Hartford the said sum insured to the said assured, his executors, administrators and assigns, ninety days after due notice and proof is given of the death of the said William S. Fifield, for the benefit of, and payable to, Mary T. Fifield and the children of the said William S. Fifield, deducting therefrom all indebtedness for premiums unpaid at that date." At the time the policy issued, William S. Fifield had a wife, to-wit, Mary T. Fifield, named in the policy, and four children by a former wife. On March 17, 1867, a son was born to said William S. and Mary T. Fifield. On March 1, 1875, the said William S. and Mary T. delivered said policy to the Fifth National Bank under the following instrument, namely: "PROVIDENCE, March 1, 1875. In considera-

tion of the sum of one dollar to us in hand paid and for other valuable consideration, we hereby assign and set over all our right, title and interest in policy No. 42778 in the Connecticut Mutual Life Insurance Company of Hartford, to A. G. Stillwell, cashier of the Fifth National Bank of Providence, R. I." The instrument was signed by William S. and Mary T., but was not under seal. The instrument and policy were delivered as collateral security for an indebtedness of about \$8,000 from William S. to the bank by promissory notes, which were subsequently paid in part by said William S. No consideration moved to the separate estate of Mary T. One of the older children died July 22, 1877. Mary T. died intestate in August, 1884. William S. died October 18, 1884.

No question is made in regard to the validity of the contract. The principal question is, whether the bank is entitled to all or any part of the insurance money. We see no reason why it was not competent for William S. and Mary T. to pledge or assign the policy to the extent of their interests in it—see *Clark v. Allen*, 11 R. I. 439—nor why such pledge was not effected by the delivery of the policy and instrument, however it might have been if only the instrument had been delivered. The question then is, did the pledgors have any interest which passed by the pledge, and if so, what? On the one hand, the contention is that the entire policy passed, and if not, the interest of Mary T. at least. On the other hand, the claim is that only the interest of Mary T. could have passed in any event, but that, she having died before the assured, nothing passed, her interest being contingent on her surviving him. In support of the latter position the case of the *Connecticut Life Insurance Co. v. Burroughs*, 34 Conn. 305, is cited. But there the policy was by its terms payable to the wife, or, if she died before the insured, to her children. The intent was clearly contingent. The policy here contained no words of contingency. It is argued that it necessarily imports contingency because it was intended as a family provision. We do not think that is clear. The child that died might have died having children, in which event it could not have been intended that the surviving children of the assured should take all to their exclusion. The policy was expressed to be for the benefit of "Mary T. Fifield and my children." If the policy had been expressed to be for the benefit of "Mary T. Fifield and my four children," we think there can hardly be a doubt that Mary T. and the four children would have taken each a vested fifth, payable at the death of the assured. It is said, in *May on Insurance*; "If the policy when issued expressly designates a person as entitled to receive the insurance money, such designation is conclusive, unless some question arises as to the rights of the creditors of the person who paid the premium and procured the insurance." *May on Insurance*, § 317. It has been said of a policy similar to the policy here, that the taking of it "was in the nature of an irrevocable and executed voluntary settlement upon the wife and children." *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193, 196; S. C., 38 Am. Rep. 289. We think this is sound law. It follows, it seems to us, that the policy, when issued, vested in the wife and children then in being the \$5,000, to be paid at the death of the assured, *i. e.*, \$1,000 to each of them. This construction is open to the objection that it excludes the after-born child. Possibly, if the policy had been expressed to be for the benefit of the children only, the doctrine in respect of testamentary bequests to children payable *in futuro*, namely, that the bequests are payable to them as a class, and that the class will open to let in after-born children to participate in the bequests. 2 Jarman on Wills (5th Am. ed.), 704 and note 11. But even if this doctrine of the law of wills can ever be applied to this sort of family provision, we are not prepared to apply it here; for here the beneficiaries are not a single class, the children only, but the wife and the children, and the children, for any thing we can see, were intended to take *pari passu* with the wife. Construing the policy, then, as an executed and irrevocable voluntary settlement for the benefit of Mary T. Fifield and the children in being when it was issued, the question of what interest passed to the bank as pledgee is easily answered. The bank as pledgee is entitled to, and only to, the share of Mary T. Fifield, one-fifth of the insurance money, the other four-fifths being distributable as follows, to-wit, one-fifth to each of the three surviving children and the remaining fifth to the legal representative of the deceased child, if he has any legal representative, but if, on account of

his having died a minor, he has no legal representative, then to the administrator on the estate of William S. Fifield, his father, and next of kin. And see *Foster, Adm'r, v. Gile, Adm'r*, 50 Wisc. 608; *Baker, Trustee, v. Young*, 47 Mo. 458. Decree accordingly.

JOHNSON v. JOHNSON.

July 18, 1885.

WILL — INTESTACY — WHO ENTITLED TO ADMINISTRATION.

In granting letters of administration the interest of the estate is the main object to be kept in view. Hence, other things being equal, the person should be appointed administrator who is entitled to the residue of the estate after creditors have been paid.

A. died intestate leaving B. the widower of her bastard daughter, and two grandchildren, C. a son and D. a daughter of B. by his deceased wife, A.'s daughter.

Held, that C. rather than B. was entitled to administer the estate of A.

Appeal from the probate court of the town of Cranston.

James Tillinghast, for appellant. *James M. Ripley & Nathan W. Littlefield*, for appellee.

MATTESON, J. This is an appeal from a decree of the court of probate of Cranston appointing an administrator on the estate of Anna Johnson, deceased.

The intestate died in Cranston on the 17th day of January, 1885. At and for several years prior to her death, she had resided in Cranston, and in the family of Charles E. Johnson, the appellee, whose wife, also deceased, was her illegitimate daughter. The appellant, Walter H. Johnson, and his sister, Mary E. Seward, wife of Charles R. Seward, of Chicago, Illinois, are children of the said Charles E. Johnson by his said wife, and grandchildren of the intestate.

Both Charles E. Johnson and his son, the said Walter H. Johnson, made application to the court of probate to be appointed administrator. Mrs. Seward objected to the appointment of her brother and requested the appointment of her father. The court appointed the father and the son appealed.

The son claimed the appointment as next of kin of the intestate, under Pub. Stat. R. I., chap. 184, § 4, which is as follows: "Administration of the estate, both real and personal, of a person dying intestate, shall be granted to the widow or next of kin of the intestate, being suitable persons and of the age of twenty-one years, or to both, as the court of probate shall think fit."

On the part of the father it was argued that Pub. Stat. R. I., chap. 184, § 4, had no application, the son not being, in contemplation of law, next of kin of the intestate, because his mother, being the illegitimate daughter of the intestate, was not, at common law, of the kindred of the mother, though the same blood ran in their veins, and that while Pub. Stat. R. I., chap. 187, § 6, in these words: "Bastards shall be capable of inheriting and transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother," has so far changed the common law as to enable illegitimate children to take and transmit inheritances, collaterally, on the part of their mother, the statutes have nowhere made such illegitimate children kindred of their mother, and, consequently, as the mother of the appellant was not kindred of the intestate, her son is not.

If we concede the force of this argument and grant that the appellant is not in legal contemplation next of kin to the intestate, we, nevertheless, think that he is entitled to the appointment. If he is not to be regarded as such next of kin, then no application for letters of administration has been made within thirty days from the death of the intestate, and under Pub. Stat. R. I., chap. 184, § 5, it is competent for the court to commit administration to some suitable person of full age, not a member of the court. For aught that appeared at the hearing, the appellant answers these requirements of the statute. In granting administration, the primary object is the interest of the estate; hence, courts have deemed it their duty to place the administration in the hands of the person most likely to convert the property to the best advantage of those beneficially interested. Other things being equal, that person will be he who is entitled as distributee, in whole

or in part, to the residue of the estate after the claims of creditors have been satisfied, because of his interest. It is, therefore, an established principle governing courts exercising probate jurisdiction that the right to the administration of the effects of an intestate follows the property in them. In *the Goods of Gill*, 1 Hagg. Ecc. 341, 342; *Weldrill v. Wright*, 2 Phill. 243, 248; *Ellmaker's Estate*, 4 Watts, 34, 38; *Sneezeey v. Willis*, 1 Bradf. 495-497; *Hall v. Thayer*, 105 Mass. 219, 224; *Thornton v. Winston*, 4 Leigh, 152; *Clay v. Jackson*, T. U. P. Charlt. 71, 73; *Leverett v. Dismukes*, 10 Ga. 98, 99. In 1 Williams Executors, 436, the author remarks that both in the common-law and spiritual courts it has always been considered that the object of the statutes of administration, 31 Edw. III, chap. 11, and 21 Henry VIII, chap. 5, is to give the management of the property to the person who has the beneficial interest in it; and the inclination to effectuate this object has been so strong that in some instances not only the practice of the ecclesiastical court, but the decisions of the judges delegate have not scrupled to disregard the express words of the statute; and he cites the cases of *Bridges v. Duke of Newcastle*, cited by the court in *West v. Willby*, 3 Phill. 381, and *Young v. Peirce*, Freeman, 496. In the former, Lord Hollis had died intestate and Bridges claimed administration as next of kin. The effects were vested by act of parliament in the Duke of Newcastle to pay the debts of the deceased. The judge of the prerogative court, and afterward the delegates, held that the next of kin was excluded on the ground that he had no interest, and granted administration to the Duke of Newcastle. In the latter, administration was refused by the prerogative and the delegates to a next of kin on the ground that she had released her interest, and the letters were granted to the party beneficially entitled to the personal estate. And see, also, *Thornton v. Winston*, 4 Leigh, 152; *Leverett v. Dismukes*, 10 Ga. 98, 99.

Upon our statutes of descent and distribution — Pub. Stat. R. I., chap. 187, §§ 1, 5, 7, 9 — the appellant and his sister are the persons entitled to the surplus of the personal estate of the intestate after payment of her just debts, funeral charges and the expenses of settling her estate. It follows, therefore, that they are the persons who would, if competent, be entitled to the administration. Mrs. Seward, however, is not an applicant, and if she were, her coverture and non-residence would probably be regarded as sufficient disqualifications to prevent her appointment. If there was any good reason against appointing her brother, her wishes in regard to the appointment would be entitled to consideration, but in the absence of such reason we cannot permit them to operate to his exclusion, he being equally entitled with herself and both competent and desirous to act. *McBeth v. Hunt*, 2 Strobh. 335; *Estate of Heron*, 6 Phila. 87, 88; *Matter of Cresce*, 28 N. J. Eq. 236, 237; *Cobb v. Newcomb*, 19 Pick. 336.

The decree of the court below must be reversed, and letters of administration granted to the appellant.

Order accordingly.

MAKER v. SLATER MILL AND POWER CO.

July 18, 1885.

NEGLECTANCE — FIRE-ESCAPES — NEGLECTING TO PROVIDE — NO CRIMINAL LIABILITY.

The provisions relative to fire-escapes and stairways in the "Building Act for the city of Providence" — Pub. Laws R. I., chap. 688, of April 12, 1878 — are too indefinite and uncertain to impose a criminal liability upon the owner of a building for not furnishing either fire-escapes or stairways, as provided in the act, before the inspector of buildings has required them.

Hence an action cannot be maintained under Pub. Stat. R. I., chap. 204, § 21, arising from the crime or offense of not furnishing such fire-escapes or stairways.*

Trespass on the case. On demurrer to the declaration.

This is one of several cases brought against the defendant for neglecting to provide fire-escapes in alleged violation of Pub. Laws R. I., chap. 688, of April

* See *Taylor v. Lake Shore, etc., R. Co.*, 40 Am. Rep. 457; *Moak's Underhill*, 18 et seq.; 21 Eng. Rep. 541, 549 note.

12, 1878, in consequence of which the plaintiff was injured by a conflagration in the building in which he was employed. See *Grant v. Slater Mill and Power Co.*, 14 R. I. 380; S. C., 30 Alb. L. J. 310; *Baker v. Same*, 14 R. I. 531.

Spooner, Miller & Brown, for plaintiff. *Charles Hart, Benjamin T. Eames & Stephen A. Cooke, Jr.*, for defendant.

STINESS, J. Plaintiff sues under Pub. Stat. R. I., chap. 204, § 21, claiming that he has suffered an injury to his person by the commission of a "crime or offense" on the part of the defendant. The crime or offense consists in an alleged violation of the Building Act, so called. Pub. Laws R. I., chap. 688, of April 12, 1878. Since the decision of the court sustaining a demurrer to the declaration in *Baker v. Slater Mill and Power Co.*, 14 R. I. 531, complaint has been made against the defendant, pursuant to Pub. Stat. R. I., chap. 204, § 22, and process has issued thereon, which is duly averred in this declaration, but there is no averment of service of such process or of any proceedings thereon. A demurrer is filed to this declaration. Several grounds have been urged in support of the demurrer, which need not now be considered; *e. g.*, that the statute gave a right of action for injury sustained "by the commission of any crime or offense" does not include a mere neglect of duty or omission to comply with the requirements of law; that such a statute does not apply to a plaintiff to whom the defendant owed no duty outside of statutory requirements; that the terms "crime and offense" do not apply to a violation of the act in question, upon the ground that it is not a public statute, but a local police regulation; that the injury for which an action can be sustained must be the immediate and not the consequential result of the omission charged. Assuming all these points in favor of the plaintiff, the fundamental question remains, whether the defendant's omission to provide its building with fire-escapes or stairways, as required by chapter 688, is a "crime or offense." If, under the act, an owner of a building is not criminally liable for neglect to comply with its requirements, the foundation of the plaintiff's action fails. The penal provision in the act is in the general terms of section 37, "any person violating any provision of this act" shall be fined, etc. Our inquiry, then, is whether an owner, complained of for neglecting to provide fire-escapes or stairways, could be found guilty under the provisions of the act. The requirements of the act are minute and manifold. Some clearly pertain to the owner, some to the contractor or builder, some to tenants, and some to other persons; while in many cases it is by no means clear to whom the duty imposed by the act belongs. The duty to provide fire-escapes or stairways is explicit. The section reads as follows: "§ 28. Every building already built or hereafter to be erected, in which twenty-five or more operatives are employed in any of the stories above the second story, shall be provided with proper and sufficient strong and durable metallic fire-escapes or stairways, constructed as required in this act, unless exempted therefrom by the inspector of buildings, which shall be kept in good repair by the owner of such building, and no person shall at any time place any incumbrance upon any of such fire-escapes."

But upon whom does the duty rest; when is it to be performed, and what facts are necessary to constitute a violation of the duty?

The plaintiff claims that the reasonable construction of the act puts the duty upon the owner. He argues that, as there is an alternative between fire-escapes or stairways, the duty must be upon one and the same person, and that person the owner, because only he could provide stairways. We do not see that this is necessarily so. Of course, permanent or structural improvements are ordinarily made by an owner, but if a lessee takes a building as it stands and then lets into it twenty-five or more operatives, it is difficult to see why by his act a burden should be cast upon the owner, which may not have been expected or provided for when the contract was made. It is said that no one but the owner would have the right to put fire-escapes on a building; but on the other hand, if a building was under lease, what right would the owner have to enter and interfere with the lessee's occupation by erecting stairways, such as are required by the act. Moreover, if the duty is solely upon the owner, why should the act particularly specify that he should keep the stairways or escapes in repair? The plaintiff further

urges that the defendant in this case is liable, because it is both the owner and the party in control of the building. Without control over the number of persons which tenants may employ, the same unexpected burden might suddenly be cast upon the person in control of a building by the act of a tenant. Under the construction claimed, such person would be made criminally liable by the act of another person, which he had no power to prevent. But if an owner is to be held responsible by reason of his control, then it follows that a lessee must be held responsible when he is in control; and so the question recurs, Whose is the duty? In most cases it would not be an unreasonable construction to say that the duty of complying with a statute is upon the one who creates, and has the power to prevent, the necessity of complying with it. Under the present act, this might be the owner or tenant, and the very alternative which is given is possibly significant. It may have been thought that owners could make the permanent, structural provision of stairways, and that lessees or tenants, if they create the necessity, could provide the light, temporary and less expensive fire-escapes. A more troublesome question arises in the case of a building let out to tenants, when no one of them employs twenty-five persons, but when, all together, they exceed that number, thus bringing the building within the law in this respect. Undoubtedly it would be most natural to look to the owner for the provision, but the statute does not say whose the duty is, nor whose the responsibility for neglect. It is one of the omissions that frequently occur in legislation, but an omission that we do not think we can cure by construction. Suppose, however, we assume that the duty is upon the owner, having control of a building, the problem is by no means solved. The act does not say when or under what circumstances the duty is to be performed. The act went into effect in ten days after its passage, and it does not seem probable that it was intended to make all owners of buildings, already built, immediately responsible for its multitudinous provisions and liable to its penalties. Immediate compliance with the law in all respects would probably have necessitated changes in many, perhaps nearly all, of the buildings then built. But if the liability of an owner did not attach at once, when did it attach? If there were nothing in the act to indicate the contrary, all its provisions would take effect at the same time. But we think there are indications that the act did not contemplate an immediate compliance with reference to existing buildings. The inspector of buildings is charged with the enforcement of the act, but in the very section in question is given authority to exempt buildings from its requirements. Section 33 provides that, upon complaint, he shall examine buildings already erected, including any workshop having employees on any story above second story, and require such building to be provided with proper and sufficient fire-escapes, stairways and exits, constructed as described in the act. This section must relate to buildings where there are more than twenty-five employees, for no others are required to have fire-escapes, and taken in connection with the authority to exempt, indicates that the requirement is to be discretionary with the inspector, dependent, perhaps, upon his judgment of danger in a particular case or of other equivalent provisions for safety. It also indicates that the time for requiring the fire-escapes is when the inspector requires them. In regard to "buildings for public assembly already built, and also boiler-houses and rooms and their heating apparatus, now built," an express discretion is given to the inspector, namely: "If in his judgment the safety of the public requires it, he shall require that the same be made to conform to the provisions of this act." It is hardly probable that in respect to fire-escapes the act was intended to be more restrictive. If this is so, an owner would not be in default until after examination and notice by the inspector. To construe the provision otherwise, the inspector would be obliged to require only what the law itself had already required, and that, too, without pointing out how or from whom he should require it. In *Willy v. Mulledy*, 78 N. Y. 310; S. C., 34 Am. Rep. 536, the court said the defendant "was not permitted to wait until he should be directed to provide" a fire-escape by the commissioners. "He was bound to do it in such way as they should direct and approve, and it was for him to procure their direction and approval." But under the law in that case, there was no discretion in the commissioners whether to require a fire-escape or not. There was no power of exemp-

tion. The owner was bound to provide one in any event; the commissioners were simply to direct and approve the kind to be used. But under that act no penalty was to be imposed until after notice by the commissioners. The case was not based upon the "commission of a crime or offense," but upon a negligence of duty to the plaintiff as tenant of the defendant. With reference to our statute, it has already been decided, in *Grant v. Slater Mill & Power Co.*, 14 R. I. 380; S. C., 30 Alb. L. J. 310, that the act does not create a duty between an owner and the employees of his tenant, such as to give them a right of action for neglect. In *Parker v. Barnard*, 135 Mass. 116; S. C., 46 Am. Rep. 450, it was held that the plaintiff, having a license to enter a building, could maintain an action for neglect to protect the elevator well as required by statute. The court conclude their opinion, however, by saying: "We have not considered the respective duties of the owners and of the occupants of the building as to the protection of the elevator well. Upon this inquiry the case is not before us, and the facts are not reported."

There are many peculiarities and difficulties in the act as it stands, some of which have already been noticed by the court in previous cases; but upon this fundamental point we think it sufficiently appears that the provisions in regard to fire-escapes and stairways are too indefinite and uncertain to impose a criminal liability upon an owner of a building for not providing one or the other before the inspector required it. Penal statutes must be strictly construed and a duty must be clearly imposed upon a particular person before we can say that he has violated the law by neglecting it.

We do not think the plaintiff states a case against the defendant under the law, and therefore the demurrer to the declaration must be sustained.

Demurrer sustained.

MACKAY v. SAINT MARY'S CHURCH.

July 18, 1885.

EXECUTOR AND ADMINISTRATOR — CONFLICT OF LAWS — NOTE ASSIGNED BY FOREIGN ADMINISTRATOR.

A. died in Connecticut and letters of administration on his estate were taken out in Connecticut. There were no claims in Rhode Island against the estate of A. *Held*, that the Connecticut administrator could transfer and indorse a promissory note due the estate of A. so as to enable the indorsee to bring suit on the note in Rhode Island.

Promissory notes given to two joint administrators for a debt due to the estate of the intestate may be transferred and indorsed by one of the administrators.

B. and C. were appointed administrators of A.'s estate both in Connecticut and New York. *Held*, that the administrators could in New York make a good transfer of a note due the estate of the intestate, although by reason of the intestate's domicile they were liable to account in Connecticut for the proceeds of the transfer.

Two notes were given to B. and C., the administrators, by a debtor of A.'s estate in Rhode Island for the amount due the estate. After the notes became due the debtor made part payment to C. arranging to settle the whole debt thereafter. Then B. in New York transferred the notes to D. in payment of a debt due from the estate of A., and D. notified the Rhode Island debtor of the transfer. Subsequently the Rhode Island debtor made an additional payment to C. taking from him a general release under seal.

Held, that D. could recover in Rhode Island from the Rhode Island debtor the amount due on the notes when D. received them.

NEGOTIABLE INSTRUMENT — SEALED NOTE GIVEN BY CORPORATION.

A promissory note in the ordinary form given by a corporation had on it when produced in court, a paper seal. No vote of the corporation authorized the seal; the note did not purport to be under seal; the seal was not the corporate seal; and the treasurer of the corporation who was a witness in the case did not admit putting it on the note.

Held, that the seal must be disregarded as "mere excess."

Debt. Heard by the court, jury trial being waived.

W. W. & S. T. Douglas, for plaintiff. Gorman & Feely, for defendant.

STINESS, J. The plaintiff sues, as indorsee, upon two notes given by the defendant corporation to William H. Kelly and James Duffy, administrators upon the estate of William E. Duffy. It is admitted that William E. Duffy died in Connecticut; that these persons were appointed administrators in Connecticut and also in the State of New York, where both of them reside; and that the defendant corporation by its treasurer duly authorized, gave the notes in the settlement of a debt admitted to be due from the corporation to the estate of William E.

Duffy. April 8, 1881, after the notes were due, the defendant paid \$600 on account to James Duffy, one of the administrators, under an arrangement made with him to settle the whole indebtedness at a future time, for the face of the notes without interest. After this and before April 23, 1881, William H. Kelly, the other administrator, "for himself and James Duffy, administrators of estate William E. Duffy, deceased," indorsed one of the notes and delivered the other, which was made payable to the plaintiff as attorney and by him indorsed in blank, to plaintiff for his fees for legal service rendered in settlement of the estate, his bill having been subsequently allowed by the surrogate in New York, in Kelly's account, to the amount of \$3,000. Thereupon the plaintiff notified the defendant of his ownership of the notes and demanded payment. April 30, 1881, after such notice, the defendant paid to James Duffy, administrator, \$900 more, and took from him a general release, under seal, of all claims of the estate of William E. Duffy against the defendant and particularly of the notes in question; the balance, as agreed, to be paid when Duffy should obtain and surrender the notes.

Upon this state of facts several questions arise. *First*. Can an executor or administrator under the laws of one State indorse a note so as to enable the indorsee to sue in another State?

This question was fully examined and discussed in *Petersen v. Chemical Bank*, 32 N. Y. 21, the court sustaining such an indorsement. So also in *Riddick v. Moore*, 65 N. C. 382; and in *Barrett v. Barrett*, 8 Me. 353; *Hutchins, Adm'r*, v. *State Bank*, 12 Metc. 421, the same doctrine was sustained.

While there are cases which hold to the contrary, *e. g.*, *Thompson v. Wilson*, 2 N. H. 291; *Dial v. Gary*, 14 S. C. 578; S. C., 37 Am. Rep. 737; *Stearns v. Burnham*, 5 Me. 261, the underlying considerations on which such decisions rest, seem to be that an administrator's authority does not extend beyond the jurisdiction of the State in which he is appointed, and that to give effect to such an indorsement would really amount to administration in another State to the possible detriment of resident creditors. This last consideration does not apply in the case before us, for it does not appear that there are any creditors of William E. Duffy in this State.

Upon the other grounds, the cases which uphold the transfer, seem to us to stand upon the better reason. The title to a negotiable instrument passes by indorsement, and if indorsed by an administrator, who is the representative of the deceased owner, in the proper settlement of an estate, and without affecting the rights of other parties, why should its effect be limited to the boundaries of the State where the deceased lived? Not only would this limit the negotiability of the instrument, but it would cast upon an administrator the unnecessary burden of procuring letters of administration in another State simply to collect an admitted debt. Moreover, suppose the administrator, indorsee and maker lived in the same State at the time of the indorsement, but that the maker subsequently removed to another State, could it be claimed that the indorsee would be barred from suing in the second State because his title came through an administrator who would himself be incapable of bringing suit in that State? Yet the elements of title, in the case supposed, would be the same as in the case in question. We see no reason why the residence of the maker should affect or control the plaintiff's title or his right to sue. The right of action is transitory; the holder of a note must collect of the maker where he can find him. If, therefore, as against the maker, the holder's title to a note is good, his right of action should be good also. We, therefore, hold that in a case like this, in which no interests but those of the parties to the note are involved, and we say this without passing upon the effect of a transfer when there are creditors in this State, an administrator in another State may transfer a note upon which the indorsee may sue in this State.

Second. Can a note given to two joint administrators be transferred by one of them? There is no question that one of two executors or administrators may transfer notes held by the deceased, for the reason that the several persons are considered as holding one office, and, in the settlement of the estate, the act of one, is equivalent to the act of all; the power of the office may be fully exercised by one, for each takes the whole in his representative capacity, and not a moiety. *Stone v. Union Savings Bank*, 13 R. I. 25. When, therefore, administrators, in

collecting assets, take a note payable to themselves as administrators, though the form of the obligation be changed, its character is the same; it is still a debt due to the estate, not to them personally, and its proceeds are assets of the estate. We see no reason, therefore, why the same rule should not apply as though the obligation remained in its original form. The case is quite different from the ordinary case of joint payees, who may have adverse interests, and where each is entitled to hold his moiety of the obligation until he sees fit to part with it. In the ordinary cases of joint payees, excepting, of course, copartnerships, neither one represents the other; one alone, therefore, cannot transfer a note without the other. But where one represents the whole, as a partner or an administrator, the rule should follow the reason. And thus it has been held in *Bogert v. Hertell*, 4 Hill 492, where the cases upon this point were carefully examined. See, also, 1 Daniel Neg. Instr. § 268, and 1 Parsons Notes and Bills, 159. Most of the cases to which we have been referred by the defendant are cases of individual joint payees and cases of partners after dissolution. In *Sanders v. Blain's Administrators*, 6 J. J. Marsh. 446, the court said that the administrator and administratrix might have sued jointly or individually, but as the administrator had undertaken to act individually, not as administrator, he could not transfer the note without the other payee. *Smith v. Whiting*, 9 Mass. 334, is commented on in *Bogert v. Hertell*. In the present case the notes were given for different amounts, and in different tenor, for a debt due to the estate represented by the administrators. They were, therefore, assets of the estate, and as such we hold that they could be dealt with as other assets of the estate by either administrator.

Third. Could the administrators in New York transfer in that State a note on which, by reason of the domicile of the intestate, they were accountable in Connecticut? If the administrators in New York were not the same as the administrators in Connecticut, clearly they could not, for in that case the property in the notes would not have passed to them. But they were the same persons. Under their dual authority they had the whole of the estate. The transfer does not show in which capacity Kelly claimed to act. We do not think that the mere fact that he acted in New York, though he might ultimately be accountable in Connecticut, rendered his act invalid. The validity of an administrator's act depends upon its character rather than upon the locality where it is done. Judge STORR, in *Trecothick v. Austin*, 4 Mason, 16, 35, says: "A will, bequeathing personal estate, conveys the property, wherever it may be situated, if the will is made according to the law of the place of the testator's domicile. And it has never been supposed that it was indispensable to the assertion of a title, derived under such will, that there should be a probate in every place where such property was situated." In this case, as also in *Hutchins, Adm'r, v. State Bank*, 12 Metc. 431, transfers of property by foreign executors were recognized. In *Wilkins v. Ellett*, 9 Wall. 740, a payment to a foreign administrator was held to be good against an administrator afterward appointed in the State where the debtor resided. Many cases might be cited where payments of debts outside of the jurisdiction of the court appointing the representative have been upheld.

In *Shakespeare v. Fidelity, etc., Co.*, 97 Penn. St. 173, it was held that United States coupon bonds, deposited with the defendant for safe-keeping, were properly delivered, in Philadelphia, to a foreign executor. Very often the powers given to executors by wills are broader than those which the law gives to an administrator, and most of the cases on this point relate to executors. But, with reference to the settlement of the estate, their powers and duties are the same. In either case, however, the letters testamentary of an executor have no greater extra-territorial force than letters of administration. What an executor can do, as the representative of the deceased, regardless of special powers, an administrator may do. In the recent case of *McCord v. Thompson*, 92 Ind. 565, it was held that a note given to administrators in Illinois, for goods sold, made payable in Indiana, could be collected by the administrators in the latter State, even against the claim of an administrator appointed in Indiana. If an executor or administrator can dispose of property outside of the jurisdiction where he is appointed, there is no good reason why he should be required to be within the limits of the

jurisdiction when he makes the transfer. In many cases it may be quite necessary for him to be present at the place where the property is, in order to carry out the transfer.

From this review of the law it appears that the notes could be legally transferred from Kelly, as administrator, to the plaintiff. From the testimony it appears that they were transferred for adequate consideration in part payment of a claim, which was subsequently passed upon and allowed, for a larger sum than the amount of the notes, by the surrogate in New York. While the evidence shows that the transfer was made by Kelly as soon as he learned that his co-administrator, Duffy, had taken steps to collect the notes, and that it may have been made to prevent Duffy from getting the proceeds of the notes into his hands, still we cannot, simply from this, infer that it was fraudulent, when it appears to have been made upon good consideration and with immediate notice to the defendant. The testimony shows that the transfer of the notes to the plaintiff was talked over at the time of the settlement, April 30, 1881. A payment made after such notice could not avail as against the plaintiff, who then held the notes and who had demanded payment.

One more question remains. A paper seal was pasted upon one of the notes, and the defendant claims that this made it non-negotiable. The vote of the corporation did not authorize the treasurer to make a note under seal; the note itself does not purport to be under seal; it is not the seal of the corporation, and the treasurer, who has been a witness, did not state that it was his seal or that he put it on. In other respects it is in the form of an ordinary negotiable promissory note. We think, therefore, that we must consider the paper, as suggested by plaintiff's counsel, "a piece of unnecessary ornament," or, in the words of *Jones v. Horner*, 60 Penn. St. 214, disregard "the seal as a mere excess."

We conclude, therefore, that the plaintiff is entitled to recover the amount due upon the notes when they came into his hands.

Judgment for plaintiff.

[See 26 Eng. Rep. 11. — Ed.]

ESTES, Administrator, v. HOWLAND.

July 18, 1885.

EXECUTOR AND ADMINISTRATOR — WHEN CANNOT SET ASIDE CONVEYANCE IN FRAUD OF CREDITORS.

An administrator cannot in Rhode Island maintain proceedings to recover property conveyed away by the deceased, though the conveyances may have been in fraud of creditors and the property may be needed to pay the debts of the estate of the deceased. In such case the defrauded creditors are the proper parties to act.

SAME — WHEN MAY.

An administrator is, however, the proper party to act, in order to recover sufficient property to defray the expenses of administration if the assets in his hands are not sufficient for this purpose.

PLEADING — AMENDMENT TO BILL IN EQUITY.

When a bill in equity was brought by an administrator to set aside as fraudulent against creditors conveyances made by the deceased, and it did not appear whether the administrator held sufficient assets to pay the expenses of administration, —

Held, that the bill instead of being dismissed might, if the administrator lacked funds to defray the expenses of administration, be amended by setting forth this fact and by adding the creditors or some of them suing for themselves and the others.

Bill in equity brought by the administrator *de bonis non* with will annexed of George Howland, late of Tiverton, to set aside certain conveyances of realty made by the testator while in life as being fraud of his creditors.

William P. Sheffield & William P. Sheffield, Jr., for complainant. *Darius Baker*, for respondents.

DURFEE, C. J. The complainant is administrator *de bonis non* with will annexed of George Howland, deceased. The testator died, owing or liable for considerable sums, leaving personal assets which, as inventoried and appraised, amounted to only \$82.97, and after having conveyed away all his real estate. The complainant brings this suit in his representative capacity to set aside certain

conveyances of real estate made by the intestate shortly before his death, on the ground that the conveyances were fraudulent and void as against his creditors, and that the estates conveyed are needed for the payment of his debts. The first question is, whether such a suit can be maintained by an administrator. It is perfectly well settled that an administrator cannot impeach his intestate's conveyances of either real or personal property for fraud, if the property conveyed away is not required for the payment of the debts. The complainant concedes this, but he contends that the administrator can impeach the conveyances for fraud if the property conveyed away is needed for the payment of debts, because the statute makes it the primary duty of an administrator to pay the debts, and, therefore, to the extent of the debts, he represents the creditors. This is a view which has prevailed in some of the States, but more generally it is held that the administrator cannot act in such way for the creditors unless he is specially empowered to do so by statute. 1 Am. Lead. Cas. *43; Bump Fraud. Conveyances (3rd ed.), 445, and cases cited in notes 1 and 2; *Crawford's Adm'r v. Lehr*, 20 Kans. 509; *White v. Russell*, 79 Ill. 155; *Burton v. Farinholt*, 86 N. C. 260; *Merry v. Fremon*, 44 Mo. 518; *Zoll v. Soper*, 75 id. 460; *Cobb v. Norwood*, 11 Tex. 566; *Boggs v. McCoy*, 15 W. Va. 844.

We have come to the conclusion that it is not the duty of an administrator under our statute to do more, in respect of the personal estate, than to administer the assets which he is required to inventory, namely, "the goods, chattels, rights and credits of the deceased," which, in our opinion, do not include goods, chattels, rights and credits which the deceased has conveyed away in fraud of his creditors; and that, in respect of the real estate, it is his duty, if the personal assets are deficient, to obtain leave to sell as much of the real estate left by the deceased, not including the real estate conveyed away by him in fraud of his creditors, as is necessary to make up the deficiency; and that in these respects the power of the administrator is only commensurate with his duty. If the deceased has conveyed his estates away in fraud of his creditors, the creditors who have been defrauded are the proper parties to prosecute the remedy.

The complainant contends that, even if he cannot maintain the suit in his representative capacity for the benefit of the creditors, he is, nevertheless, a proper party to enforce a charge for funeral expenses and expenses of administration. The defendants urge in reply that the real estate is not liable for these expenses, because they were incurred after the real estate had been conveyed away. We think, however, considering how shortly before the death of the intestate the real estate was conveyed, that, if the conveyances are set aside, the real estate may be charged for these expenses as well as for the other debts, these expenses, though incurred after the other debts, being preferred to them in the settlement of the estate. See *Allen v. Allen's Adm'r*, 18 Ohio, 234. It does not appear, however, that the complainant has either paid the funeral expenses or that he contracted for them, and so made himself personally liable for their payment. We do not see why, if he did not contract and has not paid them, it is for him, instead of the claimants, to enforce the charge for them more than for the other debts. As to the expenses of administration, we think he is a proper party, if the assets in his hands are not sufficient to pay them, and that, if the assets are not sufficient, the bill, instead of being dismissed, may properly be amended by showing the fact and by adding the creditors, or a portion of them suing for themselves and in behalf of the others, as parties upon terms as to costs.

Order accordingly.

[In *Bottomly v. Covert*, 20 Ind. 508, it was held that "if A. has conveyed land in fraud of creditors, a single creditor might institute a suit to set aside the conveyance, although the estate was represented by an administrator." See, also, *Janerin v. Curtis*, *post.*]

FOSDICK v. FOSDICK.

July 18, 1885.

MARRIAGE—SEPARATION—PRIOR CAUSE NO BAR TO DIVORCE.

That the liberal divorce law of this State influenced a petitioner for divorce to come here does not make her any the less a domiciled inhabitant of the State, if she came here *bona fide* to reside permanently and not merely to obtain a divorce and then return to her former home.

Articles of separation by husband and wife which contain no express stipulation against divorce are not *per se* a bar to a divorce prayed for by the injured party for causes existing prior to the execution of the articles.

Petition for divorce.

Francis B. Peckham, for petitioner. Edward H. Hazard and Charles H. Parkhurst, for respondent.

DURFEE, C. J. This is a petition for divorce on the charge of extreme cruelty. The respondent makes three defenses, namely: *first*, that the charge is not true; *second*, that the petitioner was not during the year before the preferring of her petition a domiciled inhabitant of this State; and, *third*, that the parties have agreed to articles of separation which have been duly executed. The questions raised by the first two defenses are questions of fact. We think it is enough to say of them that in our opinion both of them on the evidence must be decided in favor of the petitioner. The fact that the liberal divorce law of this State was one of the inducements which led the petitioner to come here is certainly calculated to awaken suspicion, but nevertheless it does not make her any the less a domiciled inhabitant of the State, if she came here, *bona fide*, for the purpose of making the State her permanent home, and not simply to get a divorce and then return again to her former home in New York. We will, therefore, pass to the consideration of the third defense. The articles of separation were agreed to and embodied in the deed of separation, February 14, 1883, after the treatment complained of as amounting to extreme cruelty had been received and when the parties were already living apart. The validity of the deed is not questioned. It is admitted that the sums agreed to be paid as a provision for the wife have all been paid as agreed. The respondent contends that in these circumstances, as the petitioner is obligated to keep the articles on her part in good faith, and that, inasmuch as they contemplate not a divorce but a continuance of the marital relation, they must be taken to be a complete bar to the petition. In support of his position he cites *Squires v. Squires*, 53 Vt. 208; S. C., 38 Am. Rep. 668, which holds that when articles of separation have been agreed to and fully performed by the husband, a divorce will not be granted at the suit of the wife for cruel treatment received before the agreement was made. The authority which is cited by the court in *Squires v. Squires* in support of the decision is *Matthews v. Matthews*, 3 Swab. & Trist. 161, and *Williams v. Williams*, L. R., 1 Prob. & Div. 178. The doctrine of the latter cases, however, is not that articles of separation are *per se* a bar to divorce for causes previously existing and known to the petitioner, but only that they may be taken in connection with lapse of time and other circumstances as evidence to show that the petitioner is not prosecuting the petition in good faith, and is, therefore, not entitled to the favorable consideration of the court. With the exception of *Squires v. Squires*, all the cases, both English and American, are to the effect that such articles are not *per se* a bar. *Beedy v. Beedy*, 1 Hagg. Ecc. 789; *Nash v. Nash*, 1 Hagg. Consist. 140; *Anderson v. Anderson*, 1 Edw. Ch. 380; *Rogers v. Rogers*, 4 Paige, 516; *J. G. v. H. G.*, 38 Md. 401; *Kremelberg v. Kremelberg*, 52 Md. 553, 557; *Wilson v. Wilson*, 40 Iowa, 230. The case of *Brown v. Brown*, 5 Gill, 249, which has been thought to hold otherwise, is explained in *J. G. v. H. G.*, *supra*. We can think of no ground on which such articles can be held to be a bar, unless they can be held to rest on an implied condition that the marital relation shall continue notwithstanding the separation. But is any such implication warranted? We think not, where the agreement is only an agreement for separation with provision for the injured party. Such an agreement is not inconsistent with divorce, for divorce is only a more absolute separation. It is reasonable to suppose that such a condition, if it

had been intended, would have been expressed. It follows that the agreement, whatever effect we might give to it, if it were subject to such a condition, is no bar, and that the divorce, the cause alleged being proved, must be granted.

CLARKE v. RICH.

July 18, 1885.

JUDGMENT — ACTION ON.

An action of debt on a judgment of a court of magistrates for \$40.09 and \$3.45 costs was brought in the court of common pleas, the writ being served by attachment of real estate. *Held*, that the action was rightly brought under Pub. Stat. R. I., chap. 193, § 3.

EXECUTOR AND ADMINISTRATOR — CANCELLATION OF BOND — EFFECT.

The cancellation of an administrator's bond by the court of probate does not revoke the appointment of the administrator nor does it disqualify him from bringing suit as administrator.

EVIDENCE — THAT ACTION BROUGHT WITHOUT PLAINTIFF'S CONSENT.

Evidence was offered by a defendant, on his motion to dismiss, to show that the action was brought without the plaintiff's consent. This evidence was rejected by the presiding justice, who ruled that the plaintiff, knowing of the action, should himself appear and object. *Held* error, and that the evidence should have been received; and that this court would hold the case and hear the evidence, the motion to dismiss being a question for the court.

Justice courts are the successors of courts of magistrates, and the clerk of a justice court is the proper person to certify records and papers of the court of magistrates to which his justice court succeeded.

Exceptions to the court of common pleas.

Thomas H. Peabody, for plaintiff. *Crafts & Tillinghast*, for defendant.

DURFEE, C. J. This is debt on a judgment for \$40.09 debt and \$3.45 costs recovered against the defendant in the court of magistrates of the city of Providence by the plaintiff's intestate, April 7, 1864. The case was commenced in the court of common pleas by attachment of real estate, and comes here after trial in said court, resulting in a judgment for the plaintiff for \$91.88 and costs, on exceptions for error in the rulings of the court.

The first question raised by the exceptions is, whether the court of common pleas had original jurisdiction of the action, the amount in suit being less than \$100. We think it had original jurisdiction, being expressly given to the court of all civil actions at law "which shall be commenced by attachment of real estate." It does not matter, in our opinion, that the writ directed the attachment of "the goods and chattels and real estate" of the defendant, and not his real estate only, so long as his real estate was attached. Indeed, if the officer had literally obeyed the precept and attached the goods and chattels as well as the real estate, the action would still have been rightly brought in the court of common pleas. To the suggestion that the officer might have attached the goods and chattels only, it is enough to say that he did not do it. The jurisdiction is determined by what was done, not by what might have been but was not done.

The second error alleged is, that the court below sustained the plaintiff's demurrer to the defendant's plea setting up that the court of probate, which appointed the plaintiff administrator, did on September 1, 1879, cancel his bond and relieve him and his sureties from all responsibility thereon, without taking any new bond in its stead. We do not think the ruling was erroneous. The statute which empowers courts of probate to cancel such bonds authorizes but does not require them to take new bonds in their stead. The mere cancellation of the bond does not, in our opinion, revoke the appointment of the administrator or disqualify him from suing as such.

The third exception is for the refusal of the court below to receive evidence offered by the defendant in support of a motion made by him for the dismissal of the action, on the ground that it was being prosecuted by counsel without the consent and against the will of the plaintiff. The reason given for not receiving the evidence was, that it was for the plaintiff, the pendency of the action being known to him, to object to the prosecution himself, if it was against his will. We think, however, that the court should have heard the evidence, for it does not follow that the action was not being prosecuted against the plaintiff's will because the plaintiff did not appear to object; and it may be that the court, if it

had heard the evidence, would have been convinced that it was being so prosecuted; and *prima facie* at least counsel ought not to be permitted so to prosecute. *Horton v. Champlin*, 12 R. I. 550; S. C., 84 Am. Rep. 722. We think, however, that it will not be necessary to remit the case for rehearing on this point. The motion to dismiss makes a question for the court, and we can hear it. The counsel who brought the action says the plaintiff assents to it now, and if so, the effect is the same as if he had authorized it originally. *Craig v. Twomey*, 14 Gray, 486.

The last exception is because the court below admitted in evidence a copy of the judgment in suit as extended, certified by the clerk of the justice court of the city of Providence, under the seal of said court, together with the original writ and pleadings, the judgment being a judgment of the court of magistrates of said city. The court of magistrates ceased to exist in 1872. The justice court, under the statute by which it was established, is the successor of the court of magistrates, and as such, received from it all its books, records and papers, and carried its business remaining unfinished when it ceased to exist to completion. We think, therefore, that copies of the records and papers of the court of magistrates, certified by the clerk of the justice court, are entitled to be received in evidence the same as if they were copies of the records of the justice court. *Capen v. Emery*, 5 Metc. 436. We think, too, that the objection to the judgment that it does not show jurisdiction is not fatal, the jurisdiction appearing by the original writ, which was produced.

The first, second and fourth exceptions are overruled. The third exception is sustained; the case to stand for hearing on the motion to dismiss in this court at the next August term in Washington county.

Order accordingly.

CHAFEE v. SPRAGUE.

July 18, 1885.

EJECTMENT — NEW TRIAL — VERDICT AGAINST EVIDENCE.

At the hearing of a plaintiff's petition for a new trial of an action of ejectment on the ground that the verdict was against the evidence, it appeared that the only evidence on the record and allowed by the justice presiding at the trial related to the defendant's possession. The time prescribed for the allowance of evidence under the forty-eighth rule of practice at law had expired.

Held, that the plaintiff could not amend the allowed statement of evidence by affidavits setting forth what the other evidence in the case was, and showing that the only matter submitted to the jury by the presiding justice was the question of possession.

Held, further, that the plaintiff was entitled to show to the court by proof that the only question submitted to the jury was that of the defendant's possession.

Held, further, it being shown by affidavits that the presiding justice ruled as matter of law in the plaintiff's favor on all questions save that of possession, which was alone submitted to the jury, that the court would consider the petition for a new trial on the allowed evidence.

Plaintiff's petition for a new trial.

Benjamin F. Thurston, Charles Hart, James Tillinghast and C. Frank Parkhurst, for plaintiff. *Abraham Payne, Elisha C. Clarke and Andrew B. Patton*, for defendant.

TILLINGHAST, J. This is a petition for a new trial preferred by the plaintiff on the ground that the verdict is against the evidence. The action is ejectment to recover possession of the premises known as Canonchet, in South Kingstown, and was tried in the court of common pleas sitting at Westerly on the 18th and 19th days of January, 1883, and resulted in a verdict for the defendant.

The first question which we are called to pass upon is, whether the statement of evidence allowed by the judge below and brought upon the record is sufficient to give the court jurisdiction to hear the petition. The forty-eighth rule of practice provides as follows, viz.: "Motions or petitions for a new trial founded on any alleged error in the rulings or charge of the court, or upon the ground that the verdict is against evidence, shall be accompanied by, or contain a written statement of the portion of the charge or of the rulings complained of, or of the evi-

dence, in substance, against which it is complained the verdict has been rendered; which statement shall have been presented to the judge trying the cause within five days of the time of verdict rendered, for his allowance, if the court shall so long continue in session, and if not, during the session of the court, unless a further time be by him, upon motion and for cause shown, specially given; and no motion or petition for a new trial for the causes aforesaid shall be heard, unless the same shall have been presented for allowance as aforesaid, and, excepting cases of death, removal or disability, allowed in writing by the judge who has tried the same."

Within the time given by the judge below, in this case, after verdict rendered, the plaintiff presented, for allowance, a stenographic report of that part of the evidence which related to the defendant's being in possession of the premises described in the declaration at and before the date of the plaintiff's writ. This report or statement was allowed by the judge and is a part of the record in the case. That part of the evidence submitted at the jury trial, which related to the other branches of the case, namely, title and the right to immediate possession in the plaintiff, was not presented for allowance and is not, therefore, a part of the record.

At the first hearing in this court, it being suggested by defendant's counsel that the statement of evidence on file was not and did not purport to be a full and complete report of all the evidence submitted at the jury trial, but only of that part bearing upon the question of possession by defendant, the court declined to proceed with the trial on the ground that so far as the record appeared, the jury might have decided the case upon one of the other issues raised by the pleadings and not upon the one involved in the testimony presented, there being nothing then before the court to show that this was the only issue which was left to them to decide.

The plaintiff's counsel then applied to the judge below to allow all of the evidence submitted at the jury trial, a complete stenographic report thereof, together with the charge and rulings of the court, etc., being presented to him for this purpose. This he declined to do on the ground that he then was without authority under said rule of practice, the five days having long since elapsed. Thereupon the plaintiff filed affidavits setting forth what the other evidence in the case was, and also setting forth the fact that the only question submitted to the jury was the one relating to possession by the defendant, the court having ruled as matter of law that the plaintiff was entitled to recover on the other issues raised in the case. He now asks the court to allow him to amend the original statement of evidence by these affidavits. This we cannot do under the rule as heretofore construed by this court. *Potter v. Padelford*, 8 R. I. 162, 169; *Olney, Receiver, v. Chadsey*, 7 id. 224, 229; *Peck v. Parkis*, 8 id. 364.

He claims, however, that even if not permitted to amend his statement of the evidence in this way, he had a right to show by proof that as a matter of fact the only question which was submitted to the jury was that relating to the defendant's possession of the premises in dispute; and that, having proved this, the court has jurisdiction to hear his petition for a new trial, because he thus brings himself clearly within the rule.

We think this position is well taken. The rule does not require all of the evidence offered in a case to be incorporated in the statement, but only "the portion . . . of the evidence, in substance, against which it is complained the verdict has been rendered." And the rule is in nowise infringed upon by allowing the petitioner to prove by affidavit or otherwise that there was but one question submitted to the jury, and also what that question was. In the case at bar the affidavits, which are undisputed, show that the judge below instructed the jury that as matter of law the plaintiff was entitled upon the evidence to recover, so far as the questions of title and the right to immediate possession were concerned, and that they need not consider the evidence bearing upon those issues, but only that bearing upon the question of the defendant's possession. All of the evidence, therefore, which the jury had any right to consider, and upon which they must have based their verdict, is now before the court in strict accordance with said rule. There is no occasion for the evidence submitted upon the other issues

to be brought here, or if here, to be considered by the court. It would, therefore, simply be an incumbrance to the record.

It appearing, then, beyond dispute or question that all of the evidence which was before the jury for their consideration is now regularly brought upon the record under the rule, it only remains for the court to say whether the verdict is clearly and palpably against that evidence. We entertain no doubt that it is. Considerable evidence was offered by the plaintiff strongly tending to prove that the defendant was and long had been in the actual possession and control of the premises in dispute. One of the pleas filed by him was to the effect that for more than twenty years next before the preferring of the plaintiff's writ, the defendant and those from whom he derived his title had been in the uninterrupted and actual possession of the premises; and there was no evidence whatsoever offered by the defendant to the contrary. We think the verdict was against the strong preponderance of the evidence, and therefore ought to be set aside and a new trial granted.

Petition granted.

CHURCH v. CHURCH.

July 25, 1885.

WILL — DEVISEES TAKING AS TENANTS IN COMMON — PER CAPITA — LAPSED LEGACY — RESIDUARY CLAUSE CARRIES.

Testator's will concluded with the following residuary clause:

"I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, wherever and however situate, of which I am now possessed, or may die seized or possessed, unto my sons S., T., B., H., J., and C. to have and to hold the same with all the privileges and appurtenances to the same belonging, to them the said S., T., B., H., J., and C. their heirs and assigns forever."

Held, that the devisees took under Pub. Stat. chap. 172, § 1, as tenants in common, not as joint tenants. The devisees being individually named and nothing in the will or in the testator's circumstances indicating a different intent, that the devisees took as individuals not as a class.

One of these sons died without issue before the testator. *Held*, that the deceased son's share lapsed, and at the testator's death descended to his heirs as intestate estate.

A general residuary devise or bequest carries lapsed or void devises or bequests, but does not include any gift which fails of the residue itself.

Bill in equity for partition.

O. L. Bosworth, for complainant. *Irving Champlin & Charles F. Baldwin*, for respondents.

DURFEE, C. J. The question now before us for decision arises under the will of Samuel W. Church, late of Bristol, deceased. The will, after several specific devises and bequests for the benefit of the wife and daughters of the testator, concludes with the following residuary clause, to-wit: "I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, wherever and however situate, of which I am now possessed, or may die seized or possessed, unto my sons Samuel W. Church, Jr., Thomas Church, Benjamin Church, Hezekiah W. Church, James C. Church, and Charles Henry Church, to have and to hold the same with all the privileges and appurtenances to the same belonging, to them the said Samuel W., Jr., Thomas, Benjamin, Hezekiah, James and Charles, their heirs and assigns forever." One of the sons died without issue before the testator. The question is, whether the share of real estate which he would have taken under the residuary clause, if he had survived the testator, descended as intestate estate to the heirs at law of the testator, or passed under the will to the residuary devisees.

We think there can be no doubt that under our statute — Pub. Stat. R. I., chap. 172, § 1 — the devise to the sons, so far as it applies to real estate, was a devise to them as tenants in common, there being no words manifestly showing an intent to have them take as joint tenants. The devise, therefore, if it is to be construed as a devise to the sons individually, was in effect a devise of one undivided sixth part of the residuary real estate to each son, and, consequently, when one son died without issue before the testator, the part devised to him was

as if it had never been devised to him, it lapsed, and there being no words to carry it elsewhere under the will, it necessarily descended as intestate estate to the heirs at law. 1 Jarman on Wills (5th Am. ed.) 622; 3 id. 17; *Page v. Page*, 2 P. Wms. 489; *Sykes v. Sykes*, L. R., 4 Eq. 200; *In re Wood's Will*, 29 Beav. 236; *Owen v. Owen*, 1 Atk. 494; *Norman v. Frazer*, 3 Hare, 84; *Lombard v. Boyden*, 5 Allen, 249. The cases cited to show that, since the statute authorizing the devise of after-acquired real estate, the distinction between lapsed devises and lapsed legacies no longer holds, and that now a lapsed devise like a lapsed legacy will fall into the residue, are not in point, for the devise here was residuary in its inception, and therefore could not fall into the residue. This would be so if the estate were personal; for though the general rule is that a general residuary bequest carries lapsed or void legacies, it does not include any part of the residue itself which fails. *Baguell v. Dry*, 1 P. Wms. 700; *Page v. Page*, 2 id. 489; *Garthwaite's Executor v. Lewis*, 25 N. J. Eq. 351; *Hamd v. Marcy*, 28 id. 59; *Floyd v. Barker*, 1 Paige, 480; *Hamlet v. Johnson*, 26 Ala. 557; *Sohier, Adm'r*, v. *Inches*, 12 Gray, 385; *Waring v. Waring*, 17 Barb. 552; *Reed's Estate*, 82 Penn. St. 428; *Frazier v. Frazier's Executors*, 2 Leigh, 642. The surviving sons, however, contend that the devise to the sons was a devise to the sons not individually, but as a class, and that they are, therefore, entitled as a class to the entire residuary estate. But the devise was a devise to the sons, severally named, which indicates that they were, not simply as a class, but each individually, the objects of the testator's bounty. Cases are cited for the sons which show that a gift to persons by name may nevertheless be a gift to them as a class. *Schaffer v. Kettell*, 14 Allen, 528; *Stedman v. Priest*, 103 Mass. 293; *Springer v. Congleton*, 80 Ga. 976; *Warner's Appeal*, 39 Conn. 253; *Talcott v. Talcott*, id. 186. In these cases, however, the general rule that a gift to persons named is a gift to them individually is recognized, and reasons are found in the language or structure of the will, or in the circumstances, for deciding that the intent of the testator, which is of course paramount to the rule, would be best subserved by disregarding it. It was in fact apparent in every one of the cases cited that the gift, though to persons named, was a gift to them as constituting a particular branch or as representing a particular member of the family, and that if the gift were suffered to lapse and go to the heirs and next of kin generally, it would disappoint the purposes of the testator. There are no such reasons in the case at bar for finding that the sons were intended to take as a class. The beneficiaries under the will are a wife, four daughters, one of whom is married, and six sons. The design of the will seems to have been, after making special provisions for the wife and the married daughter, to divide the rest of the property among the sons and unmarried daughters equally or nearly so, during the lives of the daughters at least, and if the daughters have issue, their shares to go to such issue. Without question there is some favor to the sons, a remnant of the old traditional partiality lingering still, but we see no reason to doubt that, if the will had been made after instead of before the death of the son who died, the shares of the daughters, as well as of the sons, would have been proportionately increased. We can, therefore, see no reason why we should not construe the residuary devise according to its more obvious interpretation as a devise to the sons individually. *Bain v. Lescher*, 11 Sim. 397; *Knight v. Gould*, 2 Myl. & K. 295; *Williams v. Neff*, 52 Penn. St. 326; *Todd v. Trott*, 64 N. C. 280; *Starling's Ex'r v. Price*, 16 Ohio St. 29.

Our decision is that the share of the real estate given to the deceased son descended at the death of the testator to his heirs at law as intestate estate.

LIPPITT v. AMERICAN WOOD PAPER COMPANY.*

July 25, 1885.

CORPORATION — SHARES OF STOCK — ASSIGNMENT — ATTACHMENT.

The legal title to shares of corporate stock which are "assignable only on the books" of the corporation will not pass by an assignment of the shares neither made nor recorded on the books of the corporation.

In Rhode Island an equitable or executory right to, or interest in, corporate stock is not attachable.

A. was the record owner of corporate stock. He assigned it to B. Afterward B. assigned it to C., and this assignment was made on the books of the corporation. The stock never stood on the books of the corporation in the name of B.

Held, that the stock was not attachable as the property of B.

Trespass on the case to recover damages for the defendant's refusal to transfer certain corporate stock.

A. & A. D. Paine and Benjamin N. Lapham, for plaintiff. Charles P. Robinson, for defendant.

DURFEE, C. J. This is an action on the case to recover damages of the defendant corporation for refusing to the plaintiff the rights of a stockholder in the corporation. The plaintiff claims to be entitled to one hundred shares of stock formerly attached as the property of one Morton C. Fisher in an action against him, and sold on execution under a judgment recovered against Fisher in said action, the plaintiff being the purchaser. The defendant contests the right of the plaintiff on the ground, among other grounds, that Fisher had no legal and therefore no attachable interest or title. Prior to February 8, 1875, said shares belonged to Isaac Hartshorn, and stood in his name on the corporation books. On February 8, 1875, Isaac Hartshorn, by his attorneys in London, transferred said shares by deed of assignment to Morton C. Fisher, then in London. The shares were attached as aforesaid as the property of Fisher, February 16, 1875. At that time they stood in the name of Hartshorn on the books of the corporation. They were never afterward transferred into the name of Fisher on the books; but on September 4, 1876, they were, at the request of Fisher, transferred on the books of the corporation to George Earl Church, the transfer being signed "Morton C. Fisher by William S. Slater, Treasurer." The sale on execution to the plaintiff took place March 20, 1882. The charter of the corporation provides that the "shares shall be transferred in such manner as shall be prescribed by the by-laws of said corporation." One of the by-laws enacts: "The stock shall be assignable only on the books of the company by the person in whose name the same appears or by his legal representative; but no transfer shall be made, or certificate issued thereupon, until the certificate originally issued be surrendered and canceled." The defendant contends that, by force of this provision and by-law, the legal title of the hundred shares was on February 16, 1875, when the attachment is claimed to have been made, in Hartshorn, and that Fisher had under the assignment to him only an equitable or beneficial title which, however good it may have been between him and Hartshorn, was not attachable. The question, therefore, is whether the shares were attachable as the property of Fisher on February 16, 1875.

The plaintiff contends, *first*, that Fisher had the legal title, and *second*, that the shares were attachable even if he had only an equitable or executory title. We do not think he had the legal title. It seems to us that it is impossible to hold that shares which are "assignable only on the books" can be assigned so as to pass the legal title by an assignment neither made nor recorded on the books. This is the view which has generally prevailed in the courts where the question has arisen. *Fisher v. Essex Bank*, 5 Gray, 373; *Blanchard v. Dedham Gas-light Co.*, 12 Gray, 218; *Marlborough Manuf. Co. v. Smith*, 2 Conn. 579; *Northrop v. Newton & Bridgeport Turnpike Co.*, 8 id. 544; *Shipman v. Aetna Insurance Co.*, 29 id. 245; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529; *State Insurance Co. v. Saz*, 2 Tenn. Ch. 507; *Williams v. Mechanics' Bank of New Haven*, 5

* See *Lippitt v. American Wood Paper Co.*, 14 R. I. 801.

Blatchf. 59; *Brown v. Adams*, 5 Bissell, 181; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Black v. Zacharie*, 3 How. (U. S.) 483; *Otis, Adm'r, v. Gardner et al.*, 105 Ill. 436; *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600; *Application of Thomas Murphy*, 51 Wis. 519; *Union Bank v. Laird*, 2 Wheat. 390; *Pittsburg & Connelleville R. R. Co. v. Clarke*, 29 Penn. St. 146. Some of these cases hold that an attachment of shares of stock, as the property of the person in whose name they stand, will prevail over a prior *bona fide* transfer for value not made nor recorded on the books, though others hold that the transfer is entitled to priority notwithstanding that it carries only its equitable title. The case of *Fisher v. Essex Bank*, *supra*, is a case in which the attachment was sustained with great force of reasoning, the opinion being delivered by Chief Justice SHAW.

The attachment here, therefore, was not good unless an equitable or executory right or interest in stock is attachable under our statute. At common law an equitable right or interest in personal property is not attachable—Freeman on Executions, § 116—and it is natural to suppose that the intention of the statute, in subjecting corporate stock to attachment and levy, was simply to put it on a par with other personal property. This view accords with the language of the statute. It is "the shares of the defendant," or his "stock or shares," and not his right or interest in the stock or shares, which, in the words of the statute, may be attached or levied upon. Gen. Stat. R. I., chap. 196, § 21; chap. 197, § 9; chap. 212, §§ 18, 19 and 20; Pub. Stat. R. I., chap. 207, § 22; chap. 208, § 9; chap. 223, §§ 20, 21, 22. The officer with process is authorized to make attachment or levy by leaving a copy of the writ or execution with an officer of the corporation. Evidently the idea is that the copy shall operate by way of notice or garnishment to designate and hold the stock in the charge of the corporation for the purpose of the attachment or levy; and it can accomplish this effectually only when the stock stands in the name of the defendant on the books of the corporation. If the defendant does not appear on the books as a stockholder, the copy conveys no knowledge of what stock is intended to be attached unless the corporation happens to be otherwise informed that the defendant is a transferee by transfer not on the books. The statute, moreover, makes it the duty of an officer of the corporation served with a copy of the writ to render an account on oath of what stock or shares the defendant had in the corporation when the writ was served. It cannot be supposed that it was the intention of the statute to make it the duty of the officer to render this account from information obtained otherwise than officially or from the books. For how can the officer render an account of what stock or shares the defendant had, if by "stock or shares" the statute means not only the stock or shares standing in the name of the defendant on the books, but also stock or shares transferred in any other manner so as to vest in him an equitable or executory title? Certificates of stock are often issued with blank assignments with power printed on their backs. A stockholder, in order to transfer the equitable title to the stock, has only to indorse and deliver such a certificate, leaving the blanks to be filled by the holder. A certificate so indorsed will pass from hand to hand carrying the equitable title with it, like a note payable to bearer. Now suppose that A., a stockholder of record, so transfers his shares to B., and that a creditor of B. issues a writ against him directing the attachment of the stock or shares of the defendant, which is served by leaving a copy with the corporation. The copy will only inform the corporation that the stock or shares of B. are attached, but not what stock or shares B. has, if he can have any not shown by the books, nor what stock or shares are intended to be reached by the attachment. But directly B. passes the certificate to C. and C., filling the blanks, perfects his title by transfer on the books, the corporation having no knowledge that the shares transferred are the shares intended to be attached. Now can it be that the corporation is bound by the attachment? It is if the plaintiff's construction is correct. It seems to us that if the general assembly had intended such a construction it would have shown its intention by providing some surer and more efficient procedure. It seems to us too that such a construction is repugnant to the clear indications of the statute. It may be said that the corporation might protect itself by inquiry of the attaching creditor. Sometimes it might, perhaps, but certainly not

always; and we see no reason to think that it was ever intended to subject the corporation to the burden and risk of such an inquiry. An attachment, to be really such, ought to operate as a taking and holding of the thing attached.

The plaintiff cites no case to this point. The only cases bearing upon the point which we have found are *Foster v. Potter*, 37 Mo. 525, and *Middletown Savings Bank v. Jarvis*, 33 Conn. 372. In those cases it was held that an equity of redemption in stock, transferred on the books of the corporation by way of mortgage to the mortgagees, was liable to levy or to attachment and levy under the statutes of those States. But the decisions were largely influenced by the language of the statutes, the statutes recognizing the right to take stock under incumbrance and providing a carefully contrived procedure for the identification of the rights or shares taken and sold and for the protection of all concerned. See Gen. Stat. of Missouri, chap. 160, §§ 25, 26, 53; Gen. Stat. of Connecticut, chap. 2, § 19; chap. 14, § 237. It would seem, moreover, that in both States, certainly in Connecticut, the statutes in express terms extend not only to "stock or shares," but to "rights or shares," and in the Connecticut case the court say, "the language is broad and expressly includes not only the shares of stock but the rights in them," as a reason for holding that equitable rights are subject to attachment and levy. We do not think the cases are entitled to much weight here, our statute being so different. The plaintiff directs our attention to Gen. Stat. R. I., chap. 212, § 19, which provides that the officer's deed of stock sold on execution "shall vest in the purchaser all the defendant's right, title and interest in such shares so sold," and contends that the language covers all interests equitable as well as legal. This argument, it seems to us, involves the fallacy known as arguing in a circle or begging the question; for it is a deed given in pursuance of a valid levy and sale which is to have this effect, and, therefore, unless an equitable right is subject to levy and sale, a deed to carry out such levy and sale is of no avail. It is clear that if such rights were subject to levy and sale, a sale of them without identification or any disclosure in regard to them, as the sale if authorized might be made, would generally be nothing but a most unconscionable sacrifice. In *Beckwith v. Burrough*, 14 R. I. 366, we decided that shares of stock were liable to attachment and execution sale as the property of the defendant, notwithstanding his previous transfer of them on the corporation books, if the transfer was made in fraud of the attaching creditor. We so decided, not without a good deal of hesitation, being pressed by the language of the statute, on the ground that the transfer being fraudulent and void as against the creditor might be treated as to him as a mere nullity. In the case at bar we are asked to go further and hold that shares, which are assignable only on the corporation books, are liable to attachment and execution sale, as the property of a defendant, when they have not been so assigned to him and do not stand in his name, if they have been assigned to him by transfer not on the books so as to vest in him an equitable title. We have come to the conclusion, after a careful study and consideration of the subject under the statute, that we cannot so decide. See, also, *Beckwith v. Burrough*, 13 R. I. 294, 298.

The circumstances of this particular case are such as appeal to us strongly in favor of the plaintiff, but we do not find that they are such as will entitle us to decide in his favor without holding what we are not prepared to hold, namely, that merely equitable rights in stock are liable to attachment and execution sale. We do not think the corporation is subject to any estoppel; for though the writ issued against Fisher directing the attachment of his stock and shares in consequence of information received partly from William S. Slater, who was the treasurer of the corporation, that the shares had been transferred to Fisher, it does not appear that the information was, or that it was understood to be, that the shares had been transferred upon the corporation books. Whether, if the information given had been that the shares had been transferred upon the books, it could have created an estoppel which would avail the plaintiff, we need not decide.

Judgment for defendant for costs.

[See 13 Eng. Rep. 40; 22 id. 407; 23 id. 754; 28 id. 842; 29 id. 280; 1 Pac. Rep. 156; 93 N. Y. 592; 66 How. 13; 13 Abb. N. C. 173; 94 N. Y. 204; 61 Miss. 611; 89 Ind. 178. — Ed.]

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BOSS v. PROVIDENCE AND WORCESTER R. R. Co.

July 25, 1885.

NEGLECTANCE — GETTING OUT OF CAR BEFORE ARRIVING AT STATION —
INFERENCE EITHER WAY — QUESTION FOR JURY.

The verdict of a jury will not be set aside when the question of fact is not free from doubt, or when more than one conclusion can be drawn from the facts by reasonable men; and it is quite immaterial that the court might have come to a different conclusion from that drawn by the jury, or that another jury might, on the same evidence, find a different verdict.*

The train on which A. was approaching his home stopped before arriving at the station to allow a freight train coming in the opposite direction to pass the station. It was dark. A., thinking that the station was reached got out and was injured by the freight train. The conductor, as soon as he learned the cause of the stop, moved his train forward to the station. It was in evidence that passengers at the station habitually left the train on both sides. A. sued the railroad company for his damages and recovered a verdict.

Held, that the questions of the defendant's negligence and of the plaintiff's contributory negligence were for the jury to decide, under proper instructions from the court, which in the case at bar were presumably given.

Defendant's petition for a new trial.

Oscar Lapham and Simon S. Lapham, for plaintiff. *Edwin Metcalf, Nicholas Van Slyck and Stephen O. Edwards*, for defendant.

TILLINGHAST, J. This is a petition for new trial on the grounds that the verdict is against the evidence and the weight thereof, and that the damages found by the jury are excessive. The main facts in the case are not in dispute, and are substantially as follows, viz.: The plaintiff, who resides at Pawtucket, was a passenger on defendant's road from Providence to Pawtucket on the night of January 2, 1883, leaving Providence in the 6:10 P. M. train, which was due at Pawtucket at 6:22 P. M. The train, which consisted of five cars, ran on the west track going out, and as it approached the Dexter street crossing, which is about six hundred feet south of the Pawtucket station, which is on the west side of the track, it was signaled to stop by a crossing tender of the road, and did stop. When it came to a stand still the engine and one car had passed over said Dexter street crossing, the remainder of the train being over and immediately to the south thereof. A freight train on the east track was about to pass the Pawtucket station going south, and the signal to the passenger train to stop was given to prevent the latter from reaching the station at the time when said freight train was passing the same, and to avoid the consequent liability to accident on the part of the passengers. No notice was given in the smoking car that the train had not arrived at the station. Directly upon the stopping of the train, the plaintiff, who occupied a seat near to the forward door of this car, which was next the engine, went to the front platform, and having alighted, attempted to cross the east track of said road, going in the direction of his home. In the act of crossing he was struck by the engine of said freight train, knocked down, his right leg so badly injured that it had to be amputated just below the knee, and other injuries inflicted. The cars were well filled with passengers at the time of the accident, quite a number of whom were for Pawtucket; and when the train stopped as aforesaid many of them, supposing that they had arrived at the station, arose from their seats and started to leave the cars. The plaintiff testified upon this point as follows:

"There are two tracks laid side by side. George Brown was with me. Finally the train stopped, and I thought we had got to the depot. Judging by the time I thought it was just about time to get to the Pawtucket depot. I never thought any thing about Dexter street for I had never stopped there before. I thought I was at the depot, and felt perfectly safe in getting out. That is the side I always got off at. I got out the same as I always had at the depot. It was dark, and I could not see what there was in front of me. It is just the common distance between the two tracks."

* See 50 N. Y. 23; 58 id. 411; 16 W. Dig. 356; 21 id. 169; S. C., 98 N. Y. 649, Mem.; 63 How. Pr. 450; 1 Abb. Dec. 181; 31 Alb. L. J. 388; 20 W. Dig. 148.—En.]

It was and long had been the custom for passengers to board and leave trains at the Pawtucket station, on either side thereof, without caution or restriction from the officers or servants of the road; and passengers alighting from a train at said station on the east side of the train going north, would necessarily descend upon the ground, there being no platform between the tracks, and would cross the east track, which is the one used by inward, Providence bound trains. There were platforms on each side of the double track at the station, the one on the east side, however, being very short and used mainly in the handling of baggage, but it frequently happened that they were not of sufficient length to accommodate the entire trains stopping there; in which cases passengers in the extreme front and rear cars descending upon either side thereof would frequently alight upon the ground. The train in which plaintiff was a passenger was on time and it had never before stopped, so far as the employees of the defendant knew, at said Dexter street crossing. One of the printed rules of the road provided that "when a passenger and freight train approach a station at the same time the freight train must always be stopped before reaching it, and wait for the passenger train, and no switching will be done until it has passed." Said rules took effect January 1, 1879. But since then the road has been provided with electric signals; and, to meet this new condition of things, the superintendent has from time to time supplemented and varied these rules and regulations by personal instructions given to the employees of the company. At the time of the accident both trains and the crossings were in charge of the usual number of careful, competent and experienced officials, and the gates at said Dexter street crossing were closed and furnished with the lights ordinarily used at such places. The conductor of the passenger train had no warning of the intended stop or the cause thereof. He proceeded promptly to ascertain the cause, and, having done so, caused his train to move forward slowly to the station. The stop at said crossing was but momentary. The engine on the freight train carried a head-light, which lighted the track in front for a considerable distance. There was a curve in the road, however, at and near to said Dexter street crossing, which prevented said head-light, to some extent, from lighting the track where the accident occurred. Said freight train was running at the rate of about fifteen miles per hour; and both the engineer and fireman thereon saw the plaintiff on the track before he was struck, but it was impossible then to stop the train or lessen its speed before it struck him.

The plaintiff was well acquainted with the surroundings at said crossing and at the station, having been on the police force of the town for several years, and had frequently been a passenger on defendant's road between Providence and Pawtucket. There is some conflict of testimony as to whether it was cloudy and foggy at the time of the accident; but it was dark and there was no moon. The witness, Sewell Read, testified upon this point as follows:

"It was a very dark night; that is, it was misty. It is just as dark when you get opposite the depot as it is there, place of the accident . . . Going on the opposite side, from the depot, you are going into total darkness. There is a light on Exchange street, clear at the corner of the bridge, but you could not tell by that I should think."

The jury found for the plaintiff and assessed the damages at \$6,000. The defendant contends, *first*, that upon this state of facts there is no evidence of negligence on its part; and, *second*, that there is evidence of gross carelessness on the part of the plaintiff.

In regard to the degree of care which the law imposes upon common carriers of passengers, it is settled by a long and uninterrupted line of adjudications, that they are bound to exercise the utmost care and skill which prudent men would use under similar circumstances; and that they are liable for injuries resulting from even the slightest negligence on the part of themselves or their servants. *Weed v. Panama Railroad Co.*, 5 Duer, 193; *Maverick v. Eighth Avenue Railroad Co.*, 38 N. Y. 378; *Caldwell v. Murphy*, 1 Duer, 233; *Edwards v. Lord*, 49 Me. 279; *Sales v. The Western Stage Co.*, 4 Iowa, 547; *Derwort v. Loomer*, 21 Conn. 245; *Simmons v. New Bedford, Vineyard & Nantucket Steamboat Co.*, 97 Mass. 361; *McElroy v. Nashua & Lowell Railroad Corp.*, 4 Cush. 400; *Ingalls v. Bills* 9 Metc. 1 and cases there cited; *Stokes v. Saltonstall*, 13 Pet. 181, 191; *Bowen v. New*

York Central Railroad Co., 18 N. Y. 408; *Thayer v. St. Louis, Alton & Terre Haute Railroad Co.*, 22 Ind. 26; *Chicago, Burlington & Quincy Railroad Co. v. George*, 19 Ill. 510; *Virginia Central Railroad Co. v. Sanger*, 15 Gratt. 230; *N. & C. Railroad Co. v. Messino*, 1 Sneed, 220.

It is also equally well settled that the question as to whether or not the defendant in a given case is chargeable with negligence is ordinarily a question of fact to be determined by the jury, under proper instructions from the court as to what constitutes negligence. And the same is true with regard to contributory negligence on the part of the plaintiff. And, although there are cases in which, the facts being undisputed, and being decisive of the case, it becomes the duty of the court to decide as matter of law upon the question of negligence, yet it is only in those cases where the question of fact is entirely free from doubt, and where only one conclusion can be fairly arrived at therefrom, that the court has the right to thus apply the law without the action of the jury. In the language of the court in *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622, cited on defendant's brief, "When, from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible, and may be differently made by different minds, it is for the jury to make them; that is to say, when the process is to be had at a trial of ascertaining whether one fact had being from the existence of another fact, it is for the jury to go through with that process." Or, as is tersely said by COOLEY, C. J., in *Detroit & Milwaukee R. R. v. Van Steinburg*, 17 Mich. 99, 122, also cited by defendant: "When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ. See, also, *Bernhardt v. Rensselaer & Saratoga Railroad Co.*, 32 Barb. 165; *Shearman & Redf. Neg.*, § 11, and notes; *Keller v. New York Central R. R. Co.*, 2 Abb. Ct. App. Dec. 480; *Ireland v. Oswego, Hannibal & Sterling Plank-road Co.*, 13 N. Y. 526, 533; Wells on Questions of Law and Fact, § 265, and authorities cited.

The case at bar, in our judgment, is not one in which the court sitting with a jury could pass upon the question of negligence as matter of law. For, while the main facts therein are not in dispute, yet the inferences and deductions to be drawn therefrom are not so manifest and apparent as to warrant the court in declaring them. They were, therefore, properly left to the jury, and, we are bound to presume, under as favorable a construction of the law as the defendant was entitled to. For, represented as it was at the jury trial by able and diligent counsel, it made no objection that the law applicable to the facts in proof was not fully and clearly stated. The jury found for the plaintiff, and the only question now is, whether that finding was clearly, palpably and decidedly against the evidence and the weight thereof, or, in other words, whether the evidence *very strongly* preponderates against the verdict. *Johnson v. Blanchard*, 5 R. I. 24, 25. If so, the court should set it aside; but if not so, it should not be disturbed. Upon a careful study of all the evidence and the law applicable thereto, we are unable to say that there is a very strong preponderance of evidence against the verdict. There were many facts and circumstances connected with the case which it was the peculiar province of the jury to weigh and consider, and from which it was their prerogative to draw such inferences as in their good judgment they might legitimately and fairly draw. For instance, we think that the question as to whether the defendant was guilty of negligence in stopping the train so near to the station in the night-time without notifying the passengers in this car that they had not reached it, considering the imminency of the approaching freight train, was one which the jury might properly consider and pass upon. *Pennsylvania Company v. Hoagland*, 78 Ind. 203; *Lewis v. Eastern Railroad*, 60 N. H. 187; *Robinson v. N. Y. Central & Hudson River R. R. Co.*, 20 Blatchf. 338. And as different minds would doubtless arrive at different conclusions, and that too with entire honesty and fairness, upon the evidence as to that question, it would be simply substituting the court for the jury, if it should say that they

were not warranted in finding that there was negligence on the part of the defendant from this one fact. And the same is true with regard to several other facts which appeared in evidence, namely, allowing the freight train to pass the station when the passenger train was due, thereby necessitating the stoppage of the latter so near to the station, with knowledge on the part of the defendant that passengers were in the habit of leaving the train on both sides thereof the moment it arrived at the station, and that, when the trains were long, as frequently was the case, passengers in the smoking car would be obliged to alight upon the ground for want of sufficient length of platform, and this, too, where there were no lights. These facts, together with others of more or less importance, were before the jury for consideration under the instruction of the court as to the law applicable thereto, and they arrived at the conclusion that the defendant was guilty of negligence. And it is quite immaterial that the court, if originally acting as the triers of this question of fact, might have come to a different conclusion. It is immaterial, even, that another jury might arrive at a different conclusion upon the same proof so long as no claim is made that the jury that tried the case was actuated by improper motives or was not a fit and proper jury in every respect to try the same.

As to the claim made by defendant that the accident resulted from the plaintiff's carelessness, it seems to us that the only reply which the court need make is, that while unquestionably there was evidence tending to prove this, yet it was for the jury to say whether it was proved as matter of fact under the law as given by the court; in other words, that the evidence of carelessness on his part is not so conclusive and free from doubt as to warrant the court in deciding as a matter of law that he was guilty of contributory negligence, or that the finding of the jury upon that question was against the strong preponderance of the evidence. In *Hoyt v. City of Hudson*, 41 Wis. 105; S. C., 22 Am. Rep. 714, it was held that if the plaintiff's evidence merely tends to show negligence on his part, it is for the jury to say whether it existed. See, also, *Manufacturing Co. v. Morrissey*, 40 Ohio St. 151; S. C., 48 Am. Rep. 669; *Fassett v. Roxbury*, 55 Vt. 552, 555; *Longenecker v. Pennsylvania R. R. Co.*, 105 Penn. St. 328; *Dahlberg v. Minneapolis Street Railway Co.*, 32 Minn. 404; S. C., 50 Am. Rep. 585; *Scott v. D. and W. Railway*, 11 Irish C. Law, 377; *Beisiegel v. New York Central Railroad*, 34 N. Y. 622; *Bowers v. Union Pacific R. R. Co.*, 20 Reporter, 58; *Hoye v. Chicago & N. W. R. R. Co.*, id. 62. Several of the cases cited by the defendant as bearing upon the question of the plaintiff's carelessness, namely, *Ormsbee v. Boston & Prov. R. R. Corp.*, 14 R. I. 102; *Wheelwright v. Boston & Albany Railroad*, 135 Mass. 225; *Stubley v. London & North-western Railway Co.*, L. R., 1 Exch. 13; *Ernst v. Hudson River Railroad Co.*, 36 How. Pr. 84; S. C., 35 N. Y. 9, and Whart. Neg., § 384, are cases in which the persons injured were not passengers on the trains from which they received the injury, but simply travelers in the act of crossing or walking upon the railroad track. But as a very different rule of responsibility obtains where an accident occurs during the existence of the relation of passengers and common carriers from that which obtains under the former circumstances, we do not think that these cases have much bearing upon the one under consideration. The case of *Bridges v. North London Railway Co.*, L. R., 6 Q. B. 377, cited on defendant's brief, would seem greatly to strengthen their position; but as this case was subsequently reversed by the house of lords, see *Bridges v. Directors, etc., of North London Railway Co.*, L. R., 7 H. of L. 213; S. C., 9 Eng. Rep. 165, it is not an authority.

Mr. Justice BRETT, one of the judges summoned by the house of lords to give an opinion in the case, said, among other things: "What men of ordinary care and skill would or would not do under certain circumstances is matter of experience, and so of fact, which a jury only ought to determine. It seems to me that it will aid the consideration of what is the proposition or rule of law which is to govern the determination of a judge whether there is or is not evidence fit to be left to a jury, to consider what duty with regard to facts is cast upon the judge after the jury has found a verdict. He must undoubtedly determine whether the verdict is against the weight of the evidence. Here, again, I think that a definite rule of conduct, or, in other words, a definite proposition for legal application, which is, I think, a proposition of law, to be applied to the facts in

evidence, should be laid down, That proposition cannot be whether the judge agrees in opinion with the jury. If so, the judge has left to the jury evidence which he has already decided to be such as it is not unreasonable to act upon, and yet when it is acted on he overrules it. I do not speak here of the cases in which a judge may, for precaution's sake, leave matter to the jury, reserving for more careful consideration by the court the question whether there was evidence fit to be left to the jury. The proposition or rule of conduct to be applied to the consideration of the verdict seems to me to be identical with that to be applied to the evidence before leaving the case to the jury. It is, again, not whether the judge would have decided in the same way, but whether the verdict is such as reasonable and fair men might not unfairly arrive at, or, in other words, whether the decision is such as would be clearly wrong in the judgment of the great majority of ordinarily reasonable and fair men."

The following named cases cited by the defendant, namely, *Pennsylvania Railroad Co. v. Zobe*, 33 Penn. St. 318; *Gonzales v. New York & Harlem Railroad Co.*, 38 N. Y. 440; *Chicago, R. I. & P. R. R. Co. v. Dingman*, 1 Bradw. 162; *Bancroft v. Boston & Worcester R. R. Corp.*, 97 Mass. 275, in so far as the facts were similar to those in the case at bar, are analogous, and seem to support the position taken by the defendant. But as the facts and circumstances in cases of this sort are so well nigh infinite in their variety, and as each case must depend almost entirely upon the facts which appear in connection therewith, authorities, however pertinent, are useful mainly only in so far as they settle general propositions of law, and assist the court in applying these propositions to the particular facts of the case before it. While, therefore, not assuming to say that the law as applicable to the facts in said cases respectively was not correctly enunciated, still we are not prepared to say that the law is so applicable to the facts in the case at bar, as to control in the decision thereof.

The second ground upon which the defendant asks for a new trial is that the damages found by the jury are excessive. This ground was not urged, however, at the hearing; and even if it had been, we do not think the court could properly say that under the evidence as to the extent and permanency of the injury the jury was influenced by passion, partiality or prejudice in assessing the damages, or that the amount is so manifestly excessive and unreasonable as to warrant the interference of the court. See Sedgwick on Measure of Damages (6th ed.), 762-764 and notes; Hilliard New Trials (2d ed.), 562-564, §§ 2, 3, 3a, and notes. The petition for a new trial must be dismissed.

Petition dismissed.

IN RE THE CENSUS SUPERINTENDENT.

STATUTE—APPOINTMENT TO BE MADE WITHIN CERTAIN TIME—DIRECTORY.

A statute provided that "a census . . . shall be taken . . . on the first day of June," and that at least six months previous the governor shall appoint a superintendent of the census.

Held, that the power to appoint a superintendent was incident to the imperative duty of taking the census; and that the governor not having made an appointment within the prescribed time could make it afterward.

The Public Statutes of Rhode Island, chap. 68, §§ 1 and 3 provide:

"SECTION 1. A census of the population, manufactures, agriculture, fisheries and business of the several towns shall be taken as they exist on the first day of June, one thousand eight hundred and eighty-five and every tenth year thereafter.

"§ 3. At least six months previous to the date for taking the census in each census year, the governor shall appoint a superintendent of the census, who, together with the governor and the secretary of State, shall constitute the census board, which shall have the charge of taking the census."

These statutory provisions being in force the governor, acting under article 10, section 3 of the Constitution, which provides that "the judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor," addressed the following communication to the justices of the court:

STATE OF RHODE ISLAND, EXECUTIVE DEPARTMENT, }
PROVIDENCE, April 22, 1885. }

To the Honorable the Judges of the Supreme Court :

I have the honor, under the provisions of article 10, section 3, of the Constitution, to request your opinion on the following question of law :

January 5, 1885, I appointed Amos Perry, of Providence, to be superintendent of the census, no appointment having been previously made. Was such appointment lawful ?

Very respectfully,

AUGUSTUS O. BOURN, *Governor.*

OPINION OF THE COURT.

April 24, 1885.

To His Excellency, AUGUSTUS O. BOURN, *Governor of the State of Rhode Island and Providence Plantations :*

We have received from your excellency a communication requesting our opinion upon a question stated as follows, to-wit :

"January 5, 1885, I appointed Amos Perry, of Providence, to be superintendent of the census, no appointment having been previously made. Was such appointment lawful ?"

The statute — Pub. Stat. R. I., chap. 63, § 1 — provides that "a census of the population, manufactures, agriculture, fisheries and business of the several towns shall be taken as they exist on the first day of June, one thousand eight hundred and eighty-five, and every tenth year thereafter." It will be noted that the language is imperative, "the census shall be taken." The third section provides that "at least six months previous to the date for taking the census in each census year, the governor shall appoint a superintendent of the census, who, together with the governor and the secretary of State, shall constitute the census board, which shall have the charge of taking the census." The language here is likewise imperative. Other sections, particularly section 4, prescribe duties to be performed by the superintendent, which are indispensable to the proper taking of the census. The power to make the appointment is unquestionably given as incident to the duty which is imperative. The only question, therefore, is whether the governor, having failed to make the appointment within the prescribed time, could lawfully make it afterward. We think he could, for without the appointment the taking of the census, which is absolutely prescribed, would fail. We think the provision in regard to time must be construed as merely directory, the duty to appoint being paramount and essential. The case of *People v. Allen*, 6 Wend. 486, seems to be exactly in point. There a statute of the State of New York provided that "the commanding officer of each brigade of infantry shall, on or before the first day of June in every year, appoint a brigade court-martial." The officer did not appoint until July. The question for the court was, could the power of appointment be exercised after the first day of June? The court decided that it could. Judge MARCY, delivering the opinion of the court, said : "The general rule is, that where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as *directory* merely, unless the nature of the act to be performed, or the language used by the legislature, show that the designation of the time was intended as a limitation of the power of the officer." We think that here, without doubt, the purpose was not to limit the power, but to insure its timely exercise.

DURFEE, C. J., MATTESON, STINESS, TILLINGHAST and WILBER, JJ.

SUPREME COURT OF NEW HAMPSHIRE.

BOODY v. WATSON.

July 31, 1885.

TAXATION—EXEMPTION OF MANUFACTURING PROPERTY.

The statute authorizing towns to exempt manufacturing property from taxation for a term not exceeding ten years does not confer authority to exempt the same property for a second period of ten years.

Petition for *mandamus*, requiring the selectmen of Northwood to assess a tax upon the shoe manufacturing property of Pillsbury Brothers for the year 1884. Facts agreed for the judgment of the court. June 21, 1873, the town voted as follows: "*Resolved*, That we exempt from taxation any shoe manufactory, or any other manufactory, that has been or may be established in this town, for the term of ten years, provided there shall be invested in such manufacturing business at least \$10,000 and is established prior to January 1, 1875."

For a period of ten years following this vote the establishment and capital of the Pillsbury Brothers were not taxed. September 23, 1882, the following vote was passed: "The town will exempt from taxation any shoe manufacturing establishment and the capital used in operating the same, for the term of ten years, which has been or may be established in said town, or any other manufacturing establishment that has been or may be established, provided there shall be invested in any such manufacturing business at least \$10,000, and may be established prior to January 1, 1884." Under this vote the selectmen omitted to assess a tax upon the property in question in April, 1884, and it is to compel the assessment of such tax that this proceeding is brought.

Marston & Eastman, for plaintiffs. *Bingham & Mitchell*, for defendants.

BLODGETT, J. "Towns may by vote exempt from taxation, for a term not exceeding ten years, any establishment therein, and the capital used in operating the same, for the manufacture of cotton, wool, wood, iron, or any other material; and such vote shall be a contract binding for the term specified therein." Gen. Laws, chap. 53, § 10. Under the authority thus delegated, the town of Northwood, at a legal meeting held in 1882, and in accordance with an article in the warrant therefor, passed a vote exempting certain manufacturing property for a second term of ten years, and by virtue of that vote the defendants, as selectmen and assessors of the town, omitted to assess the property for purposes of taxation in the annual assessment for 1884.

Waiving the question of the sufficiency of the vote by reason of its general terms—*Cox Needle Co. v. Gilford*, Belknap, June Term, 1883—the case is reduced to the single point of the authority of the town to grant further immunity from taxation to property which had already received the benefit of a ten years' exemption. This point is neither difficult nor doubtful. The statute exemption in such case is limited to ten years. *Opinion of the Justices*, 58 N. H. 623. The language of the statute strongly supports this conclusion, and so does the uniform current of authority, that, taxation being the rule and exemption the exception, the exemption is to be strictly construed, and will never be permitted to extend, either in scope or duration, beyond what its terms clearly require. *Academy v. Exeter*, 58 N. H. 306, 307, and cases cited; *People v. Davenport*, 91 N. Y. 574, 575; *Washburn College v. Commissioners*, 8 Kans. 344; *Commissioners v. Brackenridge*, 12 id. 114; *State v. Bank of Smyrna*, 2 Houst. (Del.) 99; *Bailey v. Maguire*, 22 Wall. 215, 226; *Tucker v. Ferguson*, id. 527, 528, 575. But irrespective of these considerations, and without regard to the obvious applicability of the maxim *expressio unius est exclusio alterius*, it cannot reasonably be supposed that the legislature would have fixed a definite period of exemption if their purpose was to enable towns to make it practically perpetual by renewal and extension. In fact, there is no legitimate point of view which does not lead to the conclusion that the right of towns to vote exemptions is applicable to temporary exemptions only, and for a period not exceeding ten years in all.

The second exemption by Northwood, not being within the terms or the meaning of the statute, nor within the apparent scope of its powers as a town, was a mere nullity, under which no rights could be acquired; and as the vote conferring the exemption is the only justification set up by the defendants for their neglect to assess the property embraced in it, no legal defense whatever is made.

Petition granted.

CLARK, J., did not sit; the others concurred.

OSGOOD v. THORNE.

July 31, 1885.

FRAUDULENT CONVEYANCE — WHEN PREFERENCE DOES NOT MAKE.

The fact that a conveyance was made for the purpose of preferring certain creditors of the grantor does not of itself make such conveyance fraudulent as to his other creditors.

An objection to the competency of a magistrate appointed to determine whether an execution debtor shall be admitted to take the poor debtor's oath should be addressed to the judge who makes the appointment.

Debt on a bond to take the poor debtor's oath. Plea, the general issue with a brief statement that the principal, Thorne, took the oath within the year. Facts found by the court.

July 1, 1882, the plaintiff recovered a judgment against Thorne for about \$800. Directly upon learning of the judgment, and between July 5 and July 11, Thorne mortgaged and conveyed to certain of his creditors all his attachable property as security for and in payment of his indebtedness to them, with the intent to prefer those creditors. July 28d Thorne was arrested on an execution issued upon the above judgment and gave the bond in suit. Upon his application, afterward made to a justice of this court, two magistrates were appointed to determine whether he should be admitted to take the oath. One of those magistrates, Mr. Fitts, acted as scrivener in making some of the conveyances above referred to. May 28, 1883, a hearing was had before the magistrates, and Thorne was admitted to take the oath. When Fitts wrote one of the mortgages he had knowledge that Osgood had recovered a judgment against Thorne. The mortgages and conveyances would not have been made but for the rendition of the judgment.

The plaintiff objected that Fitts was disqualified to act as magistrate; and that the decision of the magistrates was wrong as matter of law, inasmuch as they must have decided that the conveyances of Thorne, though made to hinder, delay and defraud his creditors, were not fraudulent.

The court ordered a nonsuit and the plaintiff excepted.

Wm. L. Foster & J. B. Haselton, for plaintiff. *A. F. L. Norris*, for defendants.

BLODGETT, J. As matter of law, the mortgages and conveyances were not fraudulent. They were made to secure or pay just debts, and, as a consequence of ownership and dominion, a debtor may legally either give or allow a preference in respect of his property to one creditor rather than another, provided that it be done in good faith. Nor, in the absence of statute provisions to the contrary, is this right affected by the debtor's insolvency, or the preferred creditor's knowledge of such insolvency. If there is no secret trust or understanding between them for the debtor's benefit, and the motive of the transfer is to pay or secure an honest debt, the transaction is a lawful one, although the effect may be to delay or even to prevent the other creditors from obtaining payment of their equally meritorious claims; in short, the payment or security of a debt to one creditor by way of preference is legally no fraud upon other creditors, and so does not come within the provisions of the statute of 13 Elizabeth, chap. 5, as to fraudulent conveyances. "The distinction is between a transfer of property made solely by way of preference of one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, which is fraudulent and illegal." BIGELOW, C. J., in *Bunfield v. Whipple*, 14 Allen, 15. Between the debt of the plaintiff and those of the preferred creditors, the law knows no distinction. The statute is aimed only at intended fraud; hence, if the debtor acts in good faith in the transfer of his property, and reserves no advan-

tage to himself, fraud cannot be predicated upon such a transaction, and the rights of creditors must be determined according to their respective priorities. In point of law, therefore, no manifest error appears in the finding of the magistrates exonerating the debtor from any fraud, deceit, or falsehood in relation to his property. Gen. Laws, chap. 241, § 6.

Whether Fitts was disqualified to act as one of the magistrates on the debtor's application to take the poor debtor's oath by reason of the mere clerical service of writing some of the mortgages, it is unnecessary to determine. See, however, *Cook v. Berth*, 102 Mass. 372. If he was disqualified, the objection was not properly taken at the hearing, but should have been made to the justice of this court, by whom Fitts was appointed, so that another magistrate might have been seasonably substituted in his stead.

Exceptions overruled.

SMITH, J., did not sit; the others concurred.

FULLER v. DANIELS.

July 31, 1885.

INJUNCTION — RESTRAINING DIVERSION OF WATER.

Injunction granted to restrain a mill-owner from opening his gates and allowing water to run to waste when the plaintiff, an owner on the other side of the stream, taking his water from the same dam, has a right to all the water not needed for use by the defendant.

Bill in equity for an injunction to restrain the diversion of water from the plaintiff's mill, for an assessment of damages for such diversion, and to define the respective water rights of the plaintiff and defendant. Facts found by the court.

April 2, 1849, the Sonhegan Manufacturing Company owned a dam and water-power on the Sonhegan river, in Milford village, and land and mills on both sides of the river, and on that day conveyed to Daniel Putnam and Leonard Chase all the land, buildings, etc., of said company, lying on the westerly side of the river and between the river and highway, together with the right to rebuild and repair the company's dam in case the same should be abandoned or suffered to fall into decay by the company; also the right to maintain gates "whereby water may be admitted into the flume belonging to the premises hereby released, as it is now admitted from said company's pond whenever there is a surplus of water running to waste, not needed for said company's use, and to admit and draw into said flume through such gates any such surplus of water whenever the same may be done without detriment or inconvenience to said company, and without interrupting or preventing said company, their successors and assigns, in prosecuting any purpose connected with said dam or pond, or their water-power derived therefrom, or their works operated thereby." Excepting and reserving to the company their dam and so much of the west bank of the river as supports the west wing thereof, with the right to enter for repairs; also excepting and reserving the water-power at said dam and pond formed thereby, and the control and management of the water therein and flowing thereinto; and also the right to enter for the purpose of closing the gates admitting water from the pond into the flume, whenever the flume or penstock shall be so out of repair as to suffer the water to run to waste.

The plaintiff now has title by deed to all which Putnam and Chase took by this deed, and the defendant now has all the land and rights on both sides of the river which remained in the company after its execution.

At the time of the above conveyance to Putnam and Chase, the Sonhegan Manufacturing Company owned a cotton mill of the capacity of about five thousand spindles, situated on the east side of the river and operated by its dam and water-power. It continued to operate this mill until it was destroyed by fire in 1872. The mill was never re-built. There was no controversy about the use of the water until about July 3, 1884, when the pond was drawn to such an extent that the plaintiff was unable to obtain sufficient power for operating the machinery in her mills. The plaintiff's agent called on the defendant and complained that he was allowing the water to run to waste, and requested him to close his gates and flume. The defendant claimed that he had the right to keep his gates open and to

draw all the water from the pond if he chose, and refused to close his gates or allow them to be closed, giving as a reason that it was necessary for the preservation of his flume and water-wheel that they should be kept wet. As a matter of fact, the water was not needed by the defendant for the preservation of his property, nor for any manufacturing or useful purpose.

Subject to exception, the plaintiff introduced evidence of the manner in which the water had been used by Putnam and Chase, and by Andrew Fuller, the plaintiff's deviser, when the Sonhegan Manufacturing Company was operating its cotton mill.

If the plaintiff is entitled to recover damages of the defendant in this proceeding, for the diversion of water from July 5 to August 16, 1884, such damages are assessed at \$150.

Robert M. Wallace, for plaintiff. *A. F. Stevens* and *Thos. H. Dodge* (of Massachusetts), for defendants.

BLODGETT, J. The provisions of the conveyance from the Sonhegan Manufacturing Company to Putnam and Chase expressly gave to the latter the right to draw from the grantor's pond, through the flume belonging to the premises conveyed, all the water not needed for the grantor's use; that is, Putnam and Chase took, by the conveyance, the right to draw out and use so much of the water in the pond as was not required by the company in operating their mill as it was then operated. The plaintiff has succeeded to the rights of Putnam and Chase, and the defendant to those remaining in the company. The plaintiff is, therefore, entitled to the surplus water not needed for the defendant's use. Necessity being the test of the defendant's right, it is not for him to claim that the plaintiff's surplus was increased by the burning of the company's mill in 1872. Whenever he requires such increase for any useful purpose, he may take it, upon the familiar principle that where a right exists to use a certain quantity of water, a change in the mode or object of the use, without increasing the quantity, is no violation of the right; but until then, he plainly has no right to raise his gates and cause the water for which he had no use to run to waste. Having done so, and to the plaintiff's injury, he is liable to respond to her in damages in this proceeding. The assessment made at the trial term is accordingly affirmed.

The evidence excepted to was admissible. The acts and conduct of the parties thus shown did not alter or vary the terms of the conveyance in any respect. Their only effect was to define and limit the water rights of each as they understood them to exist under the conveyance. This they might properly do, and certainly there can be no more weighty evidence in the interpretation of that conveyance, so far as it relates to water rights, than the practical construction given to it by the parties themselves as evidenced by the manner of their use of such rights.

The temporary injunction heretofore granted is made perpetual. If, however, in point of fact, the storage capacity of the pond, or the water supply of the river, has been increased by the defendant or his grantor since the conveyance to Putnam and Chase, to the extent of that increase, the injunction will be modified upon application. *Whittier v. Cocheco Man. Co.*, 9 N. H. 454.

Decree for plaintiff.

CLARK, J., did not sit; the others concurred.

CLARK v. LABRECHE.

July 31, 1885.

STATUTE OF FRAUDS — SALE OF GOODS — WHAT SUFFICIENT ACCEPTANCE.

A constructive receipt and acceptance of goods to meet the requirements of the statute of frauds can only be proved by clear and unequivocal acts on the part of the buyer.

The defendant verbally bargained with the plaintiffs for a lot of crockery to be imported by them at Boston, and forwarded to him at Manchester; and it was further agreed that upon its arrival in Boston, it should be stored and kept there by the plaintiffs for him till he ordered it sent forward. After keeping it a reasonable time they forwarded it to him at Manchester with a bill, and he refused to receive and pay for it.

Held, that there was no acceptance of the goods within the meaning of the statute of frauds.*

Assumpsit, for goods sold and delivered. Facts found by the court, September 18, 1883. The defendant, at Manchester, through the plaintiffs' agent, verbally ordered a lot of crockery. The crockery was to be imported by the plaintiffs at Boston, and on arrival was to be sent to the defendant at Manchester. The plaintiffs ordered the crockery. November 8, the crockery not having arrived in Boston, the defendant wrote the plaintiffs not to send it until further orders, as he was having some repairs done in his store. November 9, the plaintiffs replied by letter, saying "we will notify you when goods arrive and won't ship until you are ready." About a week after this the defendant was at the plaintiffs' place of business in Boston, and requested them that if the crockery should arrive before he ordered it sent, it should be kept for him there until he directed it to be forwarded. The crockery arrived November 30, and the defendant was notified; and as he had not ordered it sent, it was stored in a warehouse by the plaintiffs. About the middle of January, 1884, the plaintiffs' agent called on the defendant and asked him what he was going to do about the crockery. He said he did not want it then, and that they need not send it. February 16, 1884, the plaintiffs shipped the crockery by cars to Manchester directed to the defendant, and the same day sent him notice by mail that it was shipped, together with an itemized bill of it, amounting to \$245.97. The defendant refused to receive the goods, and they have since remained at the railroad warehouse in Manchester. At the time the defendant was in Boston in November, he understood the plaintiffs were to store the crockery on its arrival, and keep it for him until he should order it sent forward. There was no acceptance and no receipt of the crockery by the defendant within the meaning of the statute of frauds, unless, upon the facts stated, the plaintiffs were his agents, and became his bailees from the time of its arrival and storage in Boston, or upon the facts, an acceptance is implied.

Cross & Taggart, for plaintiffs. *Burnham & Brown*, for defendant.

BLODGETT, J. The verbal bargain between the parties was an executory contract for the sale of certain goods. The single question is whether the goods were accepted and received within the requirement of that clause of our statute of frauds — Gen. Laws, chap. 220, § 16 — enacting that no oral contract for the sale of goods, wares or merchandise, for the price of \$33, or more, is valid, unless the buyer accepts and actually receives part of the property. So far as the question is one of fact, it has been found against the plaintiffs, and such must be the finding as matter of law.

Conceding that acceptance and receipt may be constructive only, all the cases agree that such acceptance and receipt must be proved by clear and unequivocal acts on the part of the buyer; but as acceptance generally implies receipt, and plainly would have that effect in this case, it is necessary to consider the question of acceptance only, which, as against the buyer, is to be determined solely by his acts.

The test here, therefore, is, whether the acts of the defendant, done or undone, clearly amount in legal effect to a constructive acceptance; for the question being one of fact, it is only when the facts are not controverted, and afford plain and unequivocal evidence of the parties' intention, that the court will undertake to determine the legal effect.

What, then, are the facts? So far as they bear upon the matter of acceptance, they are: that both parties understood the plaintiffs were to store the goods on their arrival in Boston until the defendant should order them to be forwarded to his place of business in Manchester; that the goods were accordingly stored by the plaintiffs in a Boston warehouse; that they remained there a reasonable time and then were withdrawn by the plaintiffs and forwarded in their firm name to the defendant contrary to his order, who refused to receive them; and that he

* See *Moak's Van Sant*. Pl. 675; 61 N. Y. 1; 47 id. 449; 57 id. 211; 7 Am. Rep. 545; 33 Hun. 553; 20 W. Dig. 185; 8 Keyes, 409; 1 N. Y. 261; 44 How. 181; 118 Mass. 143; 120 id. 209. — Ed.]

had a reasonable time in which to exercise his right of examining the goods before they were so forwarded.

Bearing in mind that no act of the seller alone, in however strict conformity to the terms of the contract, will satisfy the statute, and that the mere storage of goods by the seller, or their removal to a place appointed by the buyer, will not imply any acceptance of them by the latter—*Shepherd v. Pressey*, 32 N. H. 55, 56, and cases cited—it is obvious that upon the facts to which reference has been had, the law does not imply an acceptance, for so far as appears, the goods were deposited in the warehouse by the plaintiffs as their property, without any *indictum* whatever of title or ownership in the defendant, and with no agreement affecting their lien, and so continued to remain under the same apparent ownership and control until they were taken away, and billed and forwarded by the plaintiffs as owners; whereas, acceptance cannot legally take place in the absence of a special agreement, so long as the seller preserved his dominion over the goods so as to retain his lien for the price, for he thereby prevents the purchaser from accepting and receiving them as his own within the meaning of the statute. *Balday v. Parker*, 2 B. & C. 37, 44; *Benj. on Sales* (3d Am. ed.), § 187; *Story on Sales*, § 276; *Browne on Stat. of Frauds* (4th ed.), § 317. And consequently, if there is nothing indicating a surrender of the seller's lien, any acts of control by the buyer will not be an acceptance—*Shepherd v. Pressey*, *supra*, 56, and cases cited; for although there may be cases in which the goods remain in the possession of the vendor, and yet may have been received and accepted by the vendee, in such cases the vendor holds possession, not by virtue of his lien as vendor, but under some new contract by which the relations of the parties are changed. *Cusack v. Robinson*, 1 B. & S. 299, 308; *Castle v. Swooner*, 6 H. & N. 828; *Dodsley v. Varley*, 12 A. & E. 632; *Safford v. McDonough*, 120 Mass. 290, 291. But the acts of the parties must be, in such a case, wholly unequivocal; and if the vendor retain possession of the subject-matter of the sale, it must be under circumstances which expressly show that he holds as agent or bailee of the other party, and has abandoned all claim to the property of every kind. *Story on Sales*, § 278.

No such acts or circumstances appear in this case. In fact there is nothing found on which it can be held as matter of law that the plaintiffs acted as the defendant's agents or bailees in the storage and retention of the goods, or from which an acceptance can be implied against him.

Judgment for the defendant.

ALLEN, J., did not sit; the others concurred.

MORAN v. MANSUR.

July 31, 1885.

TRESPASS QUARE CLAUSUM—JUDGMENT CONCLUSIVE OF TITLE.

A judgment for the plaintiff in an action of trespass *quare clausum fregit*, rendered upon a plea of soil and freehold in the defendant, is conclusive of the title in a writ of entry for the same land brought by the former defendant against the former plaintiff.

Writ of entry for land in Concord. The defendant pleaded a judgment rendered in his favor in an action of trespass brought by him against the plaintiff for breaking and entering the demanded premises, and there pulling down a building, whereto this plaintiff pleaded soil and freehold in himself. To this plea the plaintiff demurred.

A. F. L. Norris, for plaintiff. Chase & Streeter, for defendant.

BLODGETT, J. The parties are adjoining land-owners. The controversy between them in point of fact is as to the divisional line between their lots. But it appears clearly from the facts stated in the case that the identical matter in issue was determined and adjudicated in the former action of trespass *quare clausum* between the same parties, and hence the judgment in that proceeding is an absolute bar in this, the difference in the form of action being immaterial. Then, as now, the location of the divisional line was, aside from the incidental one of damages, the only question in controversy, and therefore the plaintiff cannot now

object to a judgment upon the merits which was rendered upon an issue that he then voluntarily presented by his pleadings, and upon which he was fully heard. Having elected to put his defense in that suit upon a claim of ownership and title up to a certain specified time, by the judgment therein against him, he became estopped to contest the same matter again; and this proposition is quite too plain for discussion or for the citation of authorities, especially in this jurisdiction. See, however, *Eastham v. Clark*, 62 N. H. 31.

Judgment for the defendant.

BINGHAM, J., did not sit; the others concurred.

BATES v. HAZEN.

July 31, 1885.

PAYMENT—NOTE OF THIRD PERSON—EVIDENCE.

Plaintiff testified that a third party's note was taken by him as collateral security merely; defendant, that it was taken as payment.

Held, that a letter from the maker of the note to plaintiff, saying he would pay the note, was admissible.

Assumpsit, on an account annexed. The dispute was whether the plaintiff agreed to take the note of one Nichols in payment, provided Nichols said he would pay the note to him; or whether he took it as collateral security for the debt. The plaintiff excepted to the admission of a letter from Nichols to him saying he would pay the note.

W. W. Flanders, for plaintiff. A. P. Davis, for defendant.

BLODGETT, J. The evidence excepted to was so clearly competent as to the capacity in which the plaintiff received and held the note, that its admission does not afford ground even for doubt; and it is equally clear that no sufficient cause is assigned for setting aside the verdict. The plaintiff testified that he took the note as collateral security, and the defendant, that it was taken as payment. The issue thus presented was one of fact purely, and there is nothing in the evidence as reported tending to show that the judgment of the court was not fully exercised in its consideration, or that the conclusion reached might not properly have been arrived at by any tribunal.

Exceptions overruled.

BINGHAM, J., did not sit; the others concurred.

BERRY v. BICKFORD.

July 31, 1885.

ESTOPPEL—TOWN, PURCHASER OF LAND SOLD FOR TAXES—SETTING UP OWNER'S TITLE.

A town which becomes the purchaser of land sold for taxes under Gen. Laws, chap. 59, § 8, is not estopped to set up the title so acquired by the fact that for two years after the sale, and before a deed had been given by the collector, the premises were taxed to the owner, and the taxes paid by him.

Writ of entry. Trial by the court. The land in question was conveyed in mortgage to the Gonic Five Cents Savings Bank by one Nutter, February 4, 1869. February 28, 1874, Nutter's assignee in bankruptcy quit-claimed it to the bank, and October 10, 1882, the assignee of the bank quit-claimed to the plaintiff.

The defendant's title was a quit-claim deed of the premises from the town of New Durham, dated March 14, 1882; and the title of the town was through a deed of quit-claim, dated January 14, 1882, from its collector of taxes for 1878. May 31, 1879, the land was duly sold for the taxes of 1878, and was bid off by the town. In 1880, and also in 1881, the land was taxed to the bank, and the bank paid the taxes.

Sanborn & Cochrane, for plaintiff. R. G. Pike, for defendant.

The court ordered judgment for the defendant, and the plaintiff excepted.

ALLEN, J. The only point raised by the plaintiff in the case is, that the town

by assessing a tax upon the land to the bank, the plaintiff's grantor, and receiving the tax in 1880 and 1881, after it had purchased the land and had a right to a deed, was estopped from denying the title of the bank, and as against that title took nothing from the collector's deed, and conveyed nothing to the defendant.

Although the town had a right to demand and receive a deed at the end of a year from the time of sale, the land was open to redemption by the bank, which had an interest to protect, at any time prior to the reception of a deed from the town. Gen. Laws, chap. 59, §§ 8, 14. The bank had a title to the land as early as 1874, and there is nothing to show it was not the duty of the bank to pay the tax of 1878. The proceedings of the collector in selling the land in 1879, for the unpaid taxes of 1878, were matters of public record in the town, and were constructively known to the bank, and the bank had the right and privilege of paying the delinquent taxes and protecting its title at any time up to January, 1882, when the town took its deed. The fact that, during all the time, between the tax sale in May, 1879, and January, 1882, or any part of it, when the land was open to redemption, it was taxed to the bank, whose duty it was to pay the tax, cannot estop the defendant nor the town under whom the defendant claims from asserting a title, which the bank might have defeated, but did not take the necessary steps to do. So long as the land was open to redemption, neither the town nor its selectmen could show that the bank would not pay the tax and make its title sure. Having a right to redeem the land, the bank had such an interest in it that the town, during the existence of such right, might well assess the tax against the bank, and in doing so, there would be no estoppel nor waiver of a right on its part to assert a title, not before defeated or destroyed, by the redemption of the land from a tax sale. The position of the bank, the plaintiff's grantor, was not changed to its injury or disadvantage by any thing which the town did. Even if neither the plaintiff, at the time of his purchase, nor the bank, at the time of the proceedings in the sale of the land to and by the town, had actual notice of the same, there could be no estoppel against a purchaser at a tax sale, notice of the proceedings, as provided by law, having been given, and actual notice not having been intentionally or fraudulently withheld. No question is raised by the case upon the effect of want of notice to the bank, beyond the bearing of the fact upon the question of estoppel, and that question cannot be affected by want of notice, if the want did not arise or was not promoted by the fraud of the defendant or the town. It was no fault of the town that the bank was ignorant of the assessment of the tax of 1878, or of the sale of the land for that tax in 1879, nor was it the fault of the town that the bank did not redeem the land and protect its title by paying the tax some time in the two and one-half years after the sale, and before the deed was taken, and neither the plaintiff nor his grantor, the bank, can now complain if the defendant and his grantor, the town, insist upon asserting a title which they, the plaintiff and the bank, might by reasonable diligence have easily defeated.

The selectmen of the town are public officers, whose duties are defined by law, and the town would not be estopped from claiming title to its land by any wrongful or unauthorized act of its selectmen in assessing a tax upon the land against one not the owner, nor in collecting and receiving the tax. *Rossire v. Boston*, 4 Allen, 57, 58; *St. Louis v. Gorman*, 29 Mo. 593; *Ellsworth v. Grand Rapids*, 27 Mich. 250; *McFarlane v. Kerr*, 10 Bosw. 249.

Exceptions overruled.

BLODGETT, J., did not sit; the others concurred.

STATE v. PERKINS.

July 31, 1885.

CRIMINAL LAW — INDICTMENT.

An indictment for keeping for sale fermented cider in less quantity than ten gallons need not contain a denial that it was intended to be sold elsewhere than in this State.

Edward G. Leach, solicitor, for State. *A. F. L. Norris* and *Henry Robinson*, for defendant.

ALLEN, J. The ground of the motion to quash the indictment is, that it does not, with sufficient definiteness, describe the offense so as to give the defendant full information of what the State expected to prove against him. Ordinarily, in indictments for offenses created by statute, it is sufficient to describe the offense in the words of the statute. *State v. Abbott*, 3 N. H. 434; *State v. Blaisdell*, 33 id. 395; *State v. Wentworth*, 37 id. 223.

The indictment charges, that the respondent on, etc., at, etc., "not being an agent of any town, place, or city for the purpose of selling spirit, with force and arms did then and there unlawfully, knowingly, and criminally keep for sale fermented cider in less quantity than ten gallons, which said fermented cider was not then and there kept for sale by a manufacturer at the press, contrary, etc.," and the description is substantially in the language of the statute creating the offense. Gen. Laws, chap. 109, § 15. The defendant's claim, that the description of the offense should contain an averment of keeping the cider with intent to sell the same in New Hampshire and not elsewhere, is a claim not warranted by the statute. "Keeping for sale" is the language of the statute, and the indictment uses the phrase and names the place of the offense, and it is not necessary to aver a negative of an intent to sell anywhere else. If keeping the cider with an intent to sell elsewhere than at the place charged in the indictment would be a different offense, it is not necessary to exclude the different offense by a formal denial; and if such keeping with intent to sell elsewhere is no offense, it cannot be necessary to negative such intent. It is not alleged that any specific quantity less than ten gallons was kept for sale, but some quantity less than that. Had the specific quantity kept for sale been alleged, it would have been necessary to use other words limiting the amount to the specific measure, that it might be certain that a less quantity than ten gallons was intended. *Commonwealth v. Gollin*, 23 Pick. 275. As it is, language could not be used to make it more certain than fermented cider less than ten gallons by measure was alleged to be kept for sale. The indictment charges the offense substantially in the language of the statute and with sufficient certainty.

Exceptions overruled.

SMITH, J., did not sit; the others concurred.

JANVRIN v. CURTIS.

July 31, 1885.

EXECUTOR AND ADMINISTRATOR — ACTION TO SET ASIDE CONVEYANCE IN FRAUD OF CREDITORS.

An administrator can maintain a bill in equity for the discovery of assets and the recovery of property conveyed by the deceased in fraud of his creditors, so far as it is needed to pay the debts of the deceased *

FRAUDULENT CONVEYANCE — TO PREVENT WIFE COLLECTING ALIMONY.

A conveyance made to hinder and prevent the wife of the grantor from collecting alimony in a proceeding for divorce is fraudulent as to her, and will be set aside if necessary to enable her to collect the amount of the decree.

CONTRIBUTION — FRAUDULENT GRANTEES OF LAND.

There may be contribution among fraudulent grantees of land when the land conveyed to one of them is taken to pay the grantor's debts, such contribution to be adjusted according to existing equities between the several grantees.

Bill in equity, to cancel fraudulent conveyances made by George Janvrin, the plaintiff's intestate, to the defendants. Facts found by the court.

George Janvrin married Jane Janvrin in 1870. Before marriage they made an agreement that at his decease she should have \$1,000 and all household furniture then belonging to him. Some trouble arose between them in 1874, when, April 8 of that year, she left him and never lived with him afterward. She petitioned for a divorce, on the ground of extreme cruelty, and her petition was dismissed after a hearing on the merits at the January term, 1878. February 8, 1878, he filed his petition for a divorce, on the ground of abandonment. This was heard before a referee, who, June 15, 1878, announced his award for a divorce, and that

* See *Estes v. Howland*, ante, 479

the libellant pay the libelee \$1,490, as alimony. After proceedings at the law term on the referee's report, a decree of divorce and that he pay the alimony was made, October 15, 1878. Suit was brought by Jane upon the decree for alimony, upon which, November 17, 1881, she recovered judgment for \$1,802.41 and costs, \$7.52. This has never been satisfied. George Janvrin died intestate, March 22, 1882, leaving, so far as is known, only a small amount of personal estate which was applied in payment of his funeral expenses. He left no debts of any considerable amount, and none to be considered in this case, excepting the judgment for alimony in favor of Jane Janvrin. He left children, a son and four daughters, to each of whom and to a grandson, George J. Curtis, during the ten years from 1868 to 1878, he conveyed real estate at different times and in distinct parcels, altogether being all he had, and of the value of many thousands of dollars. The son is the plaintiff. The grandson and three of the daughters are the defendants. The plaintiff was appointed administrator and brings this bill solely in the interest of Jane Janvrin as a creditor of the intestate, and seeks to cancel the conveyances that were made to these defendants on the ground that they were fraudulent and void as to her.

Wiggin & Fuller and *W. W. Stickney*, for plaintiff. *J. G. Hall* and *Jeremiah Smith*, for defendants.

SMITH, J. No question is made as to the correctness of the finding that the following conveyances were valid as to Jane S. Janvrin, a creditor of George Janvrin, viz.: The deed dated January 10, 1873, to George J. Curtis, of land in Hampton Falls and Kensington; the deed dated April 10, 1868, to Mrs. Curtis, of land in Hampton Falls; the deed dated January 10, 1874, to Susan and Caroline D. Janvrin, of the west part of the block; and the deed dated January 12, 1874, to George Janvrin, Jr., of twenty-four acres of pasture.

Also, no question is made as to the correctness of the finding that the following conveyances were fraudulent as to Jane S. Janvrin, viz.: The assignment September 10, 1877, to Mrs. Curtis of the note for \$200 secured by mortgage of land in Brentwood; the deed dated December 3, 1875, to George Janvrin, Jr., and Charles W. Janvrin, of the east part of the block, subject to the life estate of Albert Janvrin; and the deed dated October 26, 1876, to Frank J. Brown of part of the Spring lot.

It is found that the conveyance of January 23, 1877, to Mrs. Curtis of the Spring lot was valid, unless it shall be held to be defeated by the claim of Mrs. Janvrin on the facts stated. The finding, that the depriving of his wife of any power to collect her claim entered into the purpose of George Janvrin in making this conveyance, and that this was understood by Mrs. Curtis, brings the conveyance within the prohibition of the statute 13 Eliz., chap. 5. Mrs. Curtis having purchased with knowledge of the fraudulent design of her grantor to defeat, hinder and delay the plaintiff in interest by the conveyance in collecting her claim, is in law charged with a participation in the fraud, although she may have paid full compensation for the land, and the conveyance, as to Mrs. Janvrin, is void. *Robinson v. Holt*, 39 N. H. 557, 561; *Crowninshield v. Kittredge*, 7 Metc. 520; *Wadsworth v. Williams*, 100 Mass. 126; 1 Story's Eq. Jur., § 369 and authorities cited.

The conveyance, August 23, 1874, of the Grove street house to Susan and Caroline D. Janvrin is found to be in fraud of the rights of Jane S. Janvrin. If the conveyance was without consideration it was fraudulent as to creditors, and the finding is based upon the assumption that the conveyance was a gift. The facts reported do not support the finding. The conveyance was a substitute for the one-half of the Academy street house conveyed in February, 1873. That conveyance was valid not only as between the parties, but as to the creditors of George Janvrin. As between the parties the title of the grantees was as good as if they had paid full value for it. George Janvrin was then solvent, and had no purpose of defrauding any creditor. With the delivery of the deed the title to the premises passed to the grantees, and was not revested in the grantor when they returned the deed to him, for it is found that it was not their intention to divest themselves of their title by returning the deed. When the grantor subsequently conveyed the premises to Jefferson Janvrin without their knowledge or consent,

he became thereby their debtor to the value of the premises, and this indebtedness was paid by the conveyance of the Grove street property. The conveyance was for an adequate consideration, and the fact is expressly found that the grantees had no knowledge of any fraudulent purpose on the part of the grantor. The conveyance is valid as against the creditors of George Janvrin.

If Wellington Bros. and Prescott's estate are liable to the plaintiff in interest for the value of Albert's life interest in the block levied upon by them, no decree can now be rendered against them, they not being made defendants. For the same reason no decree can now be rendered against George, Jr. and Charles W. Janvrin for their interest in the block, nor against Frank J. Brown for that part of the Spring lot conveyed to him October 28, 1878.

This is a bill for the discovery of assets and to cancel fraudulent conveyances. Jane S. Janvrin is the plaintiff in interest and the only creditor interested in the purposes for which the suit was brought. There is no reason why she should be compelled to bring in the creditors of Albert or the other fraudulent grantees, and be subjected to further delay and expense in litigating with them their titles to property. If the assets discovered are sufficient to satisfy her claim she ought not to be compelled to ferret out all the fraudulent conveyances in order that the equities may be adjusted between them. She may amend the bill so as to include in her claim a decree against Mrs. Curtis for the Spring land and the note for \$200 secured by mortgage upon land in Brentwood. If the defendants desire that all persons who appear to have received fraudulent conveyances from George Janvrin be made parties in order that they may contribute to the value of Mrs. Janvrin's claim in proportion to the value of what they have respectively received from George Janvrin in fraud of her claim, it may be done. The maxim that there can be no contribution among wrong-doers does not apply. *Bailey v. Bussing*, 28 Conn. 455, 459; *Goldsborough v. Darst*, 9 Bradw. (Ill.) 205, 211.

Chamberlayne v. Temple, 2 Rand. (Va.) 884, was a bill to set aside conveyances fraudulent as to creditors. The plaintiff, who was a creditor of the grantor, convened all the parties who had received such conveyances and laid before the court all the evidence for an apportionment of his claim among all the defendants. A decree was ordered against each defendant for his proportionate share of the plaintiff's claim, with a reservation of the right to the creditor to resort for satisfaction to all the parties responsible to him to the full extent of their liabilities, respectively, in the event of his failing, for insolvency or other cause, to procure satisfaction from any of the parties of their due proportions of his demand. The court said: "At law persons claiming under voluntary fraudulent conveyances cannot require a creditor to proceed against them severally for ratable proportions of their debt. He might proceed against them severally after the death of the debtor as executors *de son tort* for the full value of the assets of the debtor in their hands; and the insolvency of one would not excuse any other; and so it should be in equity, if an attempt to equalize the burden produced any unreasonable delay, or detriment to the creditor."

In *Brice v. Myers*, 5 Ohio, 121, the case was this: The defendant conveyed to his four sons and son-in-law five tracts of land, one to each, in consideration of an annuity of \$20. The conveyances were held fraudulent as to the plaintiff, a creditor of the defendant, and it was ordered, that on failure of the debtor to pay the amount of the plaintiff's judgment, the land conveyed to the other defendants be separately valued, that such part of each tract might be sold as should appear necessary to satisfy the plaintiff's claim.

In *Cornish v. Clark*, L. R., 14 Eq. 184; S. C., 8 Eng. Rep. 695, Clark had distributed his property to his children and made no provision to pay debts. The conveyance was held fraudulent under the statute 13 Eliz., chap. 5. The plaintiff sued for himself and all other creditors (the debtor having died during the pendency of the suit). It was ordered that as between the defendants the funeral and administration expenses and debts of the intestate (Clark) be borne by them in proportion to the amount or value of the several gifts to them respectively, but the order to be without prejudice to the right of the plaintiffs to enforce the decree against all or any of defendants and against all or any part of the estate of the intestate as they may be advised. The question of contribution of the defendants *inter sese* was reserved for further consideration.

As between George Janvrin and the defendants the conveyances were valid and effectual. The title to the several tracts passed by the conveyances from him to them respectively. They did not take the conveyances subject to the payment of his debts. They did not agree to pay his debts and were under no legal obligation to pay them. If he had paid his debts, or they had been satisfied out of other property of his, he would have had no claim upon the defendants or the lands conveyed to them for reimbursement. A gift of property by a father to his child is not in itself wrong. A conveyance fraudulent as to a creditor is set aside because it deprives the creditor of the means of satisfying his debt. When a grantee under such circumstances pays the debt to save his land from sale, it has been held that he is entitled to subrogation as against the grantor *Cole v. Malcolm*, 66 N. Y. 363. See, also, *Sheldon on Sub.*, §§ 46, 210, 213; *Bridgen v. Cheever*, 10 Mass. 450; *Crosby v. Taylor*, 15 Gray, 64; *Harbert's Case*, 3 Rep. 11; *Campbell v. Mesier*, 4 Johns. Ch. 334.

Some of the defendants whose conveyances have been found fraudulent paid adequate considerations for the same. This fact can be considered when the other grantees whose conveyances appear to have been fraudulent are made parties to this suit, and when the question what proportion of Mrs. Janvrin's judgment shall be borne by the several parties, as between themselves, is presented for consideration.

The plaintiff may have a decree canceling the fraudulent conveyances to the defendants and for a sale of so much of the land as will satisfy the claim of Mrs. Janvrin with interest, cost and expenses of sale, unless they shall pay into court for her use the amount of her claim with interest and costs. If the defendants do that they may have an amendment making the execution creditors of Albert, Albert's children, George, Jr., and Charles W., and Frank J. Brown co-defendants, who will be entitled to be heard; and if the fraudulent character of their conveyances is established, a decree may be rendered for equitable contribution in favor of those who pay Mrs. Janvrin's claim.

ALLEN, J., did not sit; the others concurred.

The foregoing opinion was delivered at the June term, 1884. The case was subsequently amended and re-argued. The amendments appear in the opinion of the court delivered at the June term, 1885, by

SMITH, J. In the former opinion the conveyance of the Grove street property was held valid as against the creditors of George Janvrin, because the conveyance was for an adequate consideration and it had not been found that the grantees had any knowledge of any fraudulent purpose of the grantor. The plaintiff, upon a rehearing, contended that the conclusion of the trial court, that the conveyance was in fraud of the rights of Jane S. Janvrin, was a conclusion of fact and not of law. The case has been amended and the fact now appears that the grantees had no knowledge of the fraudulent purpose of their father, George Janvrin. The conveyance must, therefore, be held valid as against the creditors of George Janvrin.

At the former argument no question was made as to the correctness of the finding of the trial court that the conveyance of the west part of the brick block was not in fraud of the grantor's creditors nor of any rights of the plaintiff, and it was, therefore, assumed in the former opinion that the conveyance was valid as against creditors. A rehearing upon this part of the case was also asked for upon the ground that the facts reported did not justify the conclusion of the trial court, that the conveyance was not in fraud of the claim of Jane S. Janvrin, but, on the contrary, did show that it was in fraud of her claim. By an amendment of the original case the fact now appears that the grantees of the block, Susan and Caroline D. Janvrin, had no knowledge of any fraudulent purpose of the grantor, George Janvrin, in the conveyance of that property to them; and further, that "they understood it was done in accordance with, and in fulfillment of, a long cherished purpose of his to convey the block to them, partly in payment of a debt due to them and partly as a gift for their benefit." It is now contended by the plaintiff that the conveyance was fraudulent on the part of George Janvrin, and this contention is based upon the finding in the original

case that "after April, 1874, it was George Janvrin's purpose and he sought to prevent the establishment of any claim of his wife, and after its establishment in 1878, he used every means in his power to prevent its collection, and in making the conveyances bearing date subsequent to April, 1874, the depriving of his wife of any power to collect her claim entered into his purpose,"

The deed of the west part of the block to Susan and Caroline D. Janvrin is dated January 10, 1874, but was not delivered until the spring or summer of 1875, and it is claimed that this conveyance should be treated as if dated at the time of its delivery. But we interpret the finding to mean the literal date of the deed. The other construction would be inconsistent with the finding that the "deed was on good consideration, and not in fraud of the grantor's creditors."

It appears that the value of the block was \$9,000 at the time of the conveyance, and to the extent of about \$5,000 was a gift from George Janvrin to his daughters, the grantees. The plaintiff claims that if the conveyance was not fraudulent as to the whole premises, it was fraudulent as to this balance of \$5,000. The facts appear to be that at the time of the delivery of this deed, the grantor then owned the east part of the block, worth \$4,200, conveyed to Albert Janvrin and his sons, December 3, 1875, twenty acres of the Spring land, conveyed January 23, 1877, to Mrs. Curtis for \$1,000, and the rest of the Spring land conveyed October 26, 1876, to Frank J. Brown, property much more than sufficient for the payment of all his debts. The conveyance of the west part of the brick block, therefore, was not fraudulent, either in fact or in law.

The result reached in the former opinion is not changed.

Case discharged.

ALLEN, J., did not sit; the others concurred.

SUPREME COURT OF VERMONT.

ROYCE/v. MALONEY.

January, 1885.

LIBEL — PLEADING — JUSTIFICATION.

In an action for libel, it is not sufficient for the defendant to justify the very words as published; but he must justify them in the sense alleged in the declaration under innuendoes, when the innuendoes fairly explain them; thus, the plaintiff was chief judge of the supreme court; the publication contained the following: "*He has received presents and favors from leading litigants,*" the innuendo or explanation given to these words in the declaration was, "meaning thereby that the plaintiff was guilty of bribery in his said office," etc. The plea justified the words as true, but did not justify them in the sense charged by the innuendo.

Held, that the plea was defective; that the words, aided by the facts alleged in the plea, were susceptible of the meaning given to them in the innuendo, and that it was for the jury to say whether they were used in that sense or not. Nor does the concluding allegation in the plea, that the defendant "did publish the said words of and concerning the plaintiff as in said first count," etc., amount to a justification of the words in the sense imputed to them in the innuendo, because if the defendant intended to charge the plaintiff with bribery and wished to justify, the justification should be in clear and unequivocal terms.

Libel. Heard on demurrer to the defendant's plea, September term, 1884, REDFIELD, J., presiding. Judgment, that the plea to the first count in the declaration (wherein bribery is averred) is sufficient, that the plea to the second count is insufficient and demurrer overruled.

The declaration alleged in part that the defendant published a malicious libel of and concerning the plaintiff "and of and concerning his official conduct in said office of chief judge of the supreme court of Vermont, that is to say: 'He' (meaning the plaintiff) 'has received presents and favors from leading litigants' (meaning thereby that the plaintiff was guilty of bribery in his said office of chief judge by receiving valuables from parties having causes for determination

in the court over which the plaintiff then presided, with a view to influence the decision of the plaintiff in said causes." The plea is sufficiently stated in the opinion of the court."

Cross & Start, for plaintiff. *Wilson & Hall*, *H. C. Adams*, *Farrington & Post*, and *A. G. Safford*, for defendant.

Taft, J. The question presented in this case arises upon demurrer to the plea of the defendant Maloney. It is alleged in the declaration that the defendant published of the plaintiff, chief judge of the supreme court of this State, that he received presents and favors from leading litigants, with the innuendo, "meaning thereby that the plaintiff was guilty of bribery in his said office of chief judge by receiving valuables from parties having causes for determination in the court over which the plaintiff then presided, with a view to influence the decision of the plaintiff in said causes." The plea justifies the words as true, and sets forth with sufficient certainty the time, place, and the persons from whom the plaintiff is claimed to have received presents and favors, and the suits in which said persons were parties litigant. The plaintiff contends that the plea does not answer the innuendo; that it is silent upon the question of whether the defendant meant by the words used to impute bribery to the plaintiff; and insists that the plea should have justified the words in the sense charged by the innuendo; and that in this respect it is defective. The rule upon this subject is stated by Peck, J., in *Nott v. Stoddard*, 38 Vt. 25, viz.: "Where the words are ambiguous, it is competent for the plaintiff thus (by innuendo) to allege the meaning of defendant in the language which he used, and it is for the jury to find the sense in which the words were spoken. In such case it is not sufficient for the defendant to justify the very words; he must justify them in the sense alleged in the declaration." The case of *Ames v. Hazard*, 8 R. I. 143, holds the same doctrine, the court saying: "While a defendant is not bound to justify any forced construction, made by way of innuendo upon the language of the publication, he is bound to more than a literal justification; he must justify the substance of the publication, its character, and its imputations; and he must justify in the sense in which the innuendoes explain it, if they explain it fairly."

If the words used by the defendant are susceptible of the meaning contended for by the plaintiff, it is clear to us that the plea is insufficient; for, if the plaintiff should traverse the plea, and the jury should find that he did receive some present or favor, the defendant would be entitled to a verdict, even if it appeared that such present or favor was not in connection with any suit or litigation, and made or granted without reference to the decision in any cause; so that to hold such a plea good would enable the defendant, by the form of his plea, to defeat the plaintiff's action, although the jury might find that he charged the plaintiff with bribery when he knew he was innocent. Are the words used in the publication susceptible of the meaning given them in the innuendo? It is stated in the declaration that the plaintiff was chief judge of the supreme court of the State; and that the defendant published of and concerning him and his official conduct as such judge the words: "He has received presents and favors from leading litigants." In disposing of this question, the rules of pleading require us to consider in connection with the facts stated in the declaration, all those alleged in the plea; as it is a rule, that a defect in pleading is aided, if the pleading is answered in such a manner that an omission or informality is expressly or impliedly supplied, or rendered formal or intelligible. 1 Chit. Pl. 671; *Hoyt v. Smith*, 32 Vt. 304, and cases cited. Recurring to the plea, it is therein stated that the plaintiff was one of the judges of the supreme court from May, 1874, to May, 1884; was chief judge from May, 1883 to May, 1884, and by virtue of the office was the presiding judge of the county court in Franklin county, and a chancellor; that he sat with the other judges of the county court, heard and determined causes, and transacted other business as such judge; acted in causes as chancellor, and transacted the business of the court of chancery for Franklin county. The plea further sets forth, that during the time the plaintiff was such judge certain suits were pending before said court, involving important issues, and setting forth in detail the parties to the suits; that in said suits the plaintiff

was the presiding judge or chancellor, in chancery causes, and made rulings, decisions and decrees; that he presided at jury trials, and made decisions as presiding judge, and setting forth the presents and favors claimed to have been received by the plaintiff; and we think it fairly inferable from the language of the plea that the presents and favors were given and granted before the causes were determined, as the words of the plea are that the plaintiff "did receive valuable presents and favors from parties having causes for determination in the court over which the plaintiff then presided;" — the obvious meaning is from parties *then having* causes, not from those who had had causes long before. In fact, the times alleged in the plea show that the alleged presents and favors were received during the pendency of the suits set forth in the plea. The pleadings, therefore, disclose that the presents and favors were received from litigants in causes pending before the plaintiff, or in courts over which he presided — causes in which he made rulings, decisions and orders, and while issues were pending before him. We think it not far fetched to say that the defendant might have meant that the plaintiff was influenced in his acts as judge by the presents and favors, and that he chose apt words to express that meaning. The words stated in the declaration, aided by the facts alleged in the plea, are capable of the meaning ascribed to them in the innuendo. They may not have been so used, may not have been so understood, yet they were susceptible of that meaning; and it is for the jury to say whether the defendant did use them in that sense or not. In *Bornman v. Boyer*, 3 Binney, 515, TILGHMAN, C. J., says: "Where words will bear several meanings the plaintiff has a right to aver by an innuendo the meaning with which he conceives they were spoken, and it is for the jury to decide whether he is right."

It is argued in support of the plea that the concluding allegation, that the defendant "did publish the said words of and concerning the said plaintiff as in said first count of said declaration mentioned," etc., amounts to a justification of the words in the sense imputed to them in the innuendo. This depends upon the construction to be placed upon the words. The defendant says that he did publish the words as mentioned in the first count; but does it refer to any thing save the publication? does it mean that he did publish the words, and that he meant thereby to charge the plaintiff with bribery? The latter construction, we think, would be a strained or forced one. The defendant does not expressly state that he spoke the words with the meaning alleged; and the effect of the pleading is to leave it in doubt whether he meant that he spoke the words with the meaning or without it. It is incumbent upon the pleader, in stating the ground of his action or defense, to explain himself *fully and clearly*. Gould's Pl., chap. 3, § 169. It is a maxim in pleading that every thing shall be taken most strongly against the pleader. *Took v. Glascock*, 1 Saund. 259, n. 8. A pleader must say what he means, and the court will not search out a meaning for him. 1 Chit. Pl. 261, n. c. The language of the plea is not susceptible of the meaning contended for by the defendant. It relates to the words used rather than the meaning of the defendant when using them. It is peculiarly within his knowledge whether he meant to charge the plaintiff with bribery. If he did, and he wishes to justify, good pleading requires him to say so, in clear terms, not equivocally. A plea should be certain. Com. Dig. Pleader, E, 5. This one is not so in the respect mentioned. The court below should have held the demurrer well taken.

Judgment reversed and cause remanded.

POWERS, J., did not sit, having ruled upon the same question in the case of *State v. Maloney*.

NILES v. HOWE.

February, 1885.

TRESPASS — LOCAL TRANSITORY ACTION — JURISDICTION — MOTION TO DISMISS.

Trespass on the freehold will not lie in this State for a trespass committed on lands in Massachusetts.

Objection to the jurisdiction may be raised at any stage of the proceedings by motion to dismiss.*

* See 90 N. Y. 526.

Trespass on the freehold. Heard on motion to dismiss, Dec. term, 1884. WALKER, J., presiding. Motion granted. The docket entries show that the suit was entered in court at the December term, 1883, and that the motion to dismiss was made at the December term, 1884. It appeared by the writ that both the plaintiff and defendant resided in the county of Bennington. The declaration averred that, "said J. B. Howe . . . at Monroe, in the county of Franklin and Commonwealth of Massachusetts, broke and entered the close of the said Joseph Niles, situated, lying, and being in Monroe aforesaid, and with cattle, to-wit: ten oxen and cows and other young cattle eat up and depastured the grass," etc., . . . "by means whereof the said Joseph Niles . . . was deprived of the benefit, profit and occupation of said close, to-wit: at Monroe aforesaid." The defendant moved that the suit be dismissed on the ground that the trespasses mentioned in the declaration were committed in Massachusetts, and therefore not within the jurisdiction of the court.

Batchelder & Bates, for plaintiff. *O. E. Butterfield*, for defendant.

POWERS, J. This action was brought to the county court, is between residents of Vermont, and is for a trespass on lands in Massachusetts. Section 899, R. L., declares that actions in the county court of ejectment and trespass on the freehold shall be brought in the county in which the lands lie. It is argued that this section refers to lands lying in this State; and further, that the distinction existing at common law between local and transitory actions rested upon reasons no longer existing, and should therefore no longer be observed.

Our statute leaves the venue in actions of trespass *quare clausum* as it was at common law. At common law venue was transitory when the cause of action *might have happened* in any county; it was local when it could happen in one county *only*. An assault *could* happen in any place. The entry upon land could only happen where the land lay. The place of trial in the latter case, therefore, was fixed by the very nature of the injury complained of.

In *Doulson v. Matthews*, 4 T. R. 503, which was trespass for entering the plaintiff's house in Canada, Lord KENYON nonsuited the plaintiff on this count, because the action was local; and BULLER, J., said: "It is now too late for us to inquire whether it was wise and politic to make a distinction between transitory and local actions; it is sufficient for the courts that the law has settled the distinction, and the action of trespass *quare clausum fregit* is local." In *Rafael v. Verelst*, 2 Bl. W. 1055, DEGREY, Ch. J., said that as to rights of real property the jurisdiction was local. In *Shelling v. Farmer*, 1 Str. 646, the plaintiff, *inter alia*, declaring for a seizure of a house in the East Indies, EYRE, Ch. J., refused to let in evidence respecting the seizure of the house, inasmuch as such cause of action was local. In *McKenna v. Fisk*, 1 How. 241, the action was brought in the District of Columbia. One count went for breaking and entering a storehouse in Maryland. The supreme court said the evidence offered in support of the count for breaking and entering was not competent; "because the venue is local, and cannot be changed to any other county than where the trespass to the realty was done, and never can be carried out of the sovereignty in which the land is." See, also, *Hurd v. Miller*, 1 Hilton, 540; 2 Waterman Tres., § 985, *note*.

If it was too late in Lord KENYON's time to inquire into the wisdom of the distinction between local and transitory venue, the lapse of near a century has made the inquiry no more opportune; especially since the courts have been meantime rooting the doctrine deeper and deeper in the law by a uniform course of decision.

The venue in case of crimes is local. It would hardly be claimed that our courts had jurisdiction over a crime committed in another State. And yet the same reason that supports the doctrine of local venue applies equally to crimes and real actions. *Ree v. Johnson*, 6 East, 508. We hold, therefore, that at common law and under our statute the court below had no jurisdiction of the cause of action declared upon.

Under our practice an objection to the jurisdiction of the court over the subject-matter may be raised at any stage of the proceedings, by motion to dismiss. In the case cited by the defendant in 21 Vt. the objection made did not affect the jurisdiction of the court.

Judgment affirmed.

STATE v. MEAGHER.

February, 1885.

MANDAMUS — TO COMPEL CLERK TO FURNISH COPIES OF RECORD — STATUTE OF LIMITATIONS.

A writ of *mandamus* is the proper process to compel the clerk of a municipal court to furnish certified copies of its records.

There is no statute of limitations that bars the right to prefer a petition for a writ of *mandamus*.

CONTINUANCE — WHEN OPERATES AS DISCONTINUANCE — RECOGNIZANCE — WHEN VOID.

The clerk of a municipal court, in the absence of the judge, continued a case three weeks and five days, when he was empowered by statute to continue it only *three weeks*. *Held*, that the continuance operated a discontinuance; and that a subsequent continuance by the judge did not have the effect to revive the case; it being a criminal cause, the court had no authority to issue a new warrant commanding the respondent to be arrested to answer to the old complaint; and the recognizance required by the court and entered into by the defendant and his surety, was void; as there was no legal cause in court.

PRACTICE — CLERK REFUSING TO FURNISH COPIES OF RECORD.

An action of debt on a recognizance was pending on appeal in the county court. The clerk of the court from which the appeal was taken refused to furnish copies of the records, which were necessary for a defense, until after the appeal case was tried and the defendant had brought a petition for a writ of *mandamus* to compel the production of the records. In this condition the court heard the exceptions and rendered judgment, as if the matters in the records had been properly pleaded.

Action of debt on a recognizance. Heard on demurrer, December term, 1882. VEAZEY, J., presiding. Demurrer overruled, and judgment for the plaintiff.

The petition for a writ of *certiorari*, *mandamus*, etc., was dated January 23, 1884. The other facts as to this petition are sufficiently stated in the opinion. The declaration in the original action averred that the State's attorney made complaint against the defendant Meagher for the illegal sale of intoxicating liquor. The writ was dated November 20, 1882; and the defendant was notified to appear before the municipal court of the village of Bennington. It appeared that the complaint and warrant against the defendant Meagher were dated April 11, 1882; that he was arrested June 29, 1882, on the warrant issued by said court; that the judge of the said municipal court being absent, the clerk of the court continued the cause to the 25th day of July, 1882; that on the 20th day of July the judge of said court continued said cause to the said 25th day of July; that on July 25th the court continued the cause to the 16th day of August, 1882; that when defendant Meagher was arrested June 29th he entered into a recognizance, with M. E. Burgess as surety, in the sum of \$500 for his appearance at court on July 25th; and that this recognizance was forfeited by the court on August 15th for want of said Meagher's appearance in court.

It further appeared that on November 15, 1882, said court issued a new warrant for the arrest of said Meagher, "to answer to a complaint presented against him by the State's attorney, and filed in said court on the 11th day of April, A. D. 1882." Meagher was arrested and brought into court. He moved to dismiss, on the ground that the cause was continued by the clerk from the 29th of June to the 25th day of July. The motion was overruled; the cause was continued to the 17th day of November, 1882, and Meagher and John Healey recognized in the sum of \$500. On the failure of said Meagher to appear on the 17th, the bond was forfeited, and this recognizance was the basis of this suit.

Batchelder & Bates and *W. B. Sheldon*, for defendant. *J. E. Fenn*, State's attorney, for State.

ROYCE, C. J. This is a petition addressed to the supreme court praying that a writ of *certiorari*, *mandamus*, or other appropriate writ may issue, directed to the municipal court of Bennington, commanding that court to certify to the supreme court the files, proceedings, minutes, records and purported records of that court, in the cause in which the said Meagher was prosecuted before said court on the complaint of the State's attorney, and the said Healey became recognized with Meagher for his appearance in court, in order that they may be inspected in the suit now pending in this court, brought upon said recognizance.

The State's attorney moved to dismiss the petition for the reason that it was not brought within one year from the rendition of the judgment rendered in the

county court in the case of *State v. Meagher*. If the writ of *certiorari* were the only one that could issue to compel the certifying of the records referred to, it is doubtful whether this petition was seasonably brought; as R. L., § 1401, requires that petitions for *certiorari* shall be commenced and served within one year after the rendition of the judgments to reverse which they are brought; but we do not deem it necessary to decide that question. The petition, it will be noticed, is in the alternative, praying for the one writ or the other, or for such writ as the court may deem appropriate to secure the desired result.

Section 18 of No. 203 of the Acts of 1880, establishing the municipal court in and for the village of Bennington, provides that the clerk of that court shall furnish to any person, on demand and tender of legal fees, certified copies of any of the records, proceedings, or minutes of said court, under the seal thereof. The act is mandatory, and the duty of the clerk is clearly defined. It is alleged in the petition, and not denied, that the legal fees for the copies desired were tendered to the clerk, and that he refused to furnish them. The proper process for compelling the furnishing of such copies, we think, is a writ of *mandamus*. The duty of the clerk to furnish them is ministerial, and where it is by statute made the duty of an officer to perform a duty that is purely ministerial, the writ of *mandamus* will issue to compel its performance. High Ex. Rem., §§ 240, 241, 242, 243. There being no statute of limitations which bars the right to prefer a petition for such a writ, the motion to dismiss is overruled.

The writ is a discretionary one. Here, the procuring of the records for the inspection and consideration of the court was indispensably necessary to the defense of the suit *State v. Meagher*; hence the discretion of the court should be exercised in favor of its issuance; and if there was any apparent necessity for making an order that such writ should issue, we should make it. But the records of the municipal court have all been produced since the trial in the county court, and are now here for our inspection; and we think it is for the interest of the parties that we should now render such judgment, upon the exceptions and copies of record that are now before us, in the case of *State v. Meagher*, as the county court should render if the matters contained in those records were properly pleaded as a defense.

It is claimed that the recognizance which was entered into by Meagher and Healey was not legal and enforceable, because it appears by the copies of record that there was no such prosecution pending at the time it was entered into as justified the municipal judge in requiring or taking it. It appears that the complaint upon which Meagher was arrested and to answer which he and Healey became recognized for his appearance, was presented by the State's attorney to the municipal judge on the 11th day of April, 1882, and said judge on the same day issued a warrant upon the same, on which Meagher was arrested on the 29th day of June, 1882, at which time, the judge being absent, the cause was continued by the clerk of said court until the 25th day of July, 1882, a period of three weeks and five days. The power of the clerk to continue causes on account of the absence of the judge is conferred by the fifteenth section of the act creating the court; and it is expressly stated in that section that he shall continue the same for a period not exceeding three weeks. The continuance by him for a longer period, therefore, operated as a discontinuance of the cause and the continuances entered by the judge after the one entered by the clerk on the 29th of June did not have the effect of reviving or keeping it in life.

There is nothing in the record tending to show that Meagher waived his right to claim that the proceeding was discontinued; but on the contrary, it appears that upon all occasions when he had opportunity he insisted that there were no legal proceedings pending that he was under obligation to answer to.

It would seem that the idea of holding him responsible on account of what transpired before the 15th of November, 1882, was abandoned, for on that day a new warrant was issued by the municipal judge, commanding his arrest to answer to the complaint that was exhibited on the 11th day of April, to answer to which he had once before been arrested, and the whole proceeding, as we have seen, discontinued. It was while Meagher was under arrest on this last warrant that the recognizance of Meagher and Healey was entered into; and the question

is presented as to the right of the judge to attach a second warrant to that complaint and cause the arrest of Meagher. If he had no such right, the arrest was unlawful, and he had no such jurisdiction over the party as justified him in requiring a recognizance to be entered into; and if one was entered into, it was voidable, if not void.

While a discontinuance of a cause is not, in general, a bar to a new suit or prosecution for the same matter, it is not allowable to use the proceeding which has been discontinued, or any part thereof, upon which to predicate such new suit or prosecution. The legal effect of a discontinuance is to bar the party from the use of such proceeding in the subsequent attempt to enforce the same claim or right. In *Bryant v. Pember*, 43 Vt. 599, it was said, that where a justice of the peace had continued a suit for more than thirty days, it was continued out of court; that the defendant was absolved from all obligation to appear further in the cause; and that any judgment thereafter rendered in it would have been of no force or validity; and in *Crawford v. Cheney*, 12 Vt. 567, that where a suit had been so discontinued, no after proceedings could legally be had.

The cause in which the judgment was rendered by the municipal judge was the cause which had been discontinued; the complaint exhibited on the 11th of April constituted the cause, and the warrant issued on the 15th of November was the process used to compel Meagher to again to appear to answer to it. In our judgment the municipal judge exceeded his power in requiring Meagher to again appear to answer to said complaint; and when he was arrested and brought before the court there was no legal cause pending that he was under obligation to answer to. The judge, therefore, had no right to require that he should give bail for his subsequent appearance, and the recognizance entered into by Meagher and Healey for that purpose was void.

The judgment of county court is reversed, and judgment rendered for the defendants.

WHITCOMB v. WHITEMORE.

February, 1885.

MORTGAGE — PRIVILEGE OF CONTRACT — SUBROGATION.

A. sold his farm incumbered with three mortgages to B., and B. ignorant of the first two assumed the third. Then C. and D. virtually exchanged farms; that is, under an agreement with the three, B. deeded to C., and C. deeded his own farm to D., and D. executed a mortgage back to secure the payment of said third mortgage. The orator owning foreclosed the first two mortgages; and while the foreclosure proceedings were pending, before his title became absolute, purchased said third mortgage. A bill having been brought to foreclose against D.

Held, that D.'s promise, though not in terms to any one, was, in legal intendment, to the orator, inuring to his benefit; and that he was entitled to a decree.

Bill to foreclose a mortgage. Heard on bill, answer, replication, and a master's report, Dec. term, 1884. Foreclosure decreed.

The following facts appeared: On May 2, 1876, one Goodyear conveyed to Sarah A. Farris, wife of Carlos Farris, a certain farm in Ripton, upon which were two mortgages. On the same day the said Carlos and his wife executed a third mortgage on the farm to Elias H. Matteson, to secure two promissory notes given to him by the said wife. On the 30th of the same May the said Carlos and Sarah A. Farris deeded the farm to H. E., Wm., E. M., and J. M. Slade, and Jane S. Pride, with covenants of warranty against incumbrances, except the last-named mortgage to said Matteson. At this time the orator, Bean, was the owner of a farm in said Ripton, and wished to exchange it for the Farris farm; and the defendant Whittemore desired to purchase the Bean farm. With a view of effecting such trades they conferred with the Slades and Pride, all the parties acting on the supposition that the Farris farm was incumbered only by the Matteson mortgage. It was finally agreed by the three parties, that the said Slades and Pride should deed the Farris farm to Bean; that Bean should deed his own farm to Whittemore; that Whittemore should execute a mortgage back on the Bean farm to insure the payment of the Matteson mortgage. In accordance with this agree-

ment, in the fall of 1876 the several deeds were executed. The conditions of the Whittemore mortgage were as follows:

"The conditions of this deed are such that if I, the said William Whittemore, or my heirs, executors, or administrators shall well and truly pay or cause to be paid two certain notes in writing, bearing date May the 2d, 1876, and made payable to Elias H. Matteson or bearer, one for \$100 to be paid on or before the 1st day of April, 1877, and the other for \$64 to be paid on or before the 1st day of April, 1878, with interest annually according to the terms of the said notes, being the same notes specified in a mortgage deed from Sarah A. Farris *et al.* to the said Elias H. Matteson, dated May 2, 1876, recorded in book 8, page 416, then this deed to be void and of no effect, otherwise of full force in law."

The master found:

"All of said deeds were a part of the same transaction, and were duly executed, delivered, and recorded. Said deed last above described is the mortgage upon which this petition is brought, and was made subject to a prior mortgage to said Slades and Pride, which has since been paid and discharged.

"At the December term, 1876, of this court, the orator Whitcomb, having become the owner of said Lyford and Damon mortgages on said Farris farm (both being prior and superior to said Matteson's mortgage) proceeded by petition to foreclose the same, making the said Bean and wife, the said Slades and Pride, and all other persons interested, parties defendant, and thereupon obtained a decree, which, no person redeeming, became absolute on the 10th day of December, 1879, and said Beans abandoned said Farris farm, which thereupon passed into the possession of said Whitcomb as sole and absolute owner thereof, and said Beans have since had no interest therein."

The orator became the owner of the Matteson mortgage, February 13, 1877, after inquiring of said Whittemore as to it. Whittemore told him that the notes were secured on the Bean farm and that "he had got to pay them."

Hunton & Stickney, for defendants. *J. J. Wilson*, for orators.

Ross, J. When Farris and wife sold the farm on which the mortgage given by them to Matteson was resting, they sold it subject to that mortgage. When their grantees sold it to the orator, Bean, they recognized their liability to pay the Farris notes to Matteson, and in the exchange of farms with defendant Whittemore, left in his hands funds to pay the Farris notes and mortgage to Matteson, under an agreement that he would pay said notes and save the Farris farm therefrom. The performance of this agreement was secured by a mortgage from him on the Bean farm, which they then conveyed to the defendant Whittemore. The condition of the mortgage is, that Whittemore shall and will pay the two Farris notes, therein describing them particularly. This promise from Whittemore is not in terms to any one, but by legal intendment to the holder of the Farris notes. On these facts, Whittemore, in legal effect, became the principal, whose primary duty it was to pay the Farris notes. As between Mrs. Farris, her grantees, and Whittemore, she was but a surety thereafter for the payment of the notes. Her promise to pay them was for full consideration, in writing, contained in the condition of the mortgage signed by him and in equity, at least, inured to the benefit of the holder of the Farris notes, though the security for the fulfillment of the promise was taken to Bean, who, by the same transaction, became the owner of the Farris farm, on which the notes were also secured. While matters were in this position, it cannot be doubted, we think, upon the Farris notes falling due, Matteson and Bean could have maintained a foreclosure of Whittemore's mortgage against him for the payment of the notes. Matteson could have joined in such foreclosure, as he was the owner of the notes to which Whittemore's promise attached. The mortgage to Bean was an incident to the notes. Bean, as the legal holder of the mortgage, could have joined in such foreclosure, and as also interested to have his farm cleared from the incumbrance resting upon it by reason of the Farris mortgage, which also secured the payment of said notes. The orator Whitcomb is now the legal owner of the Farris notes given to Matteson and of the Farris farm. As to the farm, he stands in the rights of Bean, having secured his equity of redemption therein by the foreclosure of

two mortgages resting thereon, executed earlier than the mortgage securing the Farris notes to Matteson. The Matteson notes he has purchased and thereby succeeded to Matteson's rights in Whittemore's mortgage given to secure them. The orator Bean still holds the Whittemore mortgage, and since the law day thereon has passed, holds the legal title to the Bean farm, as security for the fulfillment of the condition thereof, to-wit: the payment of the Farris notes and the relief of the Farris farm therefrom, both of which interests now belong to his co-ordinator, Whitcomb. On these facts and the legal effect thereof, without regard to the question of estoppel, raised by the facts found by the master, we think the orators are entitled to hold the foreclosure of the mortgage which the court of chancery decreed to them.

The decree is affirmed and cause remanded.

HACKETT v. HEWITT.

February, 1885.

CONVERSION—MARRIED WOMAN'S PROPERTY—HUSBAND CANNOT MAINTAIN ACTION.

A husband cannot sustain an action of trespass and trover in his own name for the conversion of his wife's property.

Trespass and trover for a cow and two steers. Plea, general issue and notice. Trial by jury, Dec. term, 1884. Verdict for the plaintiff.

It appeared that the plaintiff's wife, Lorette E. Hackett, at the time of her marriage, had one cow and about \$100 in money; that said property was always treated and considered by the plaintiff as his wife's sole and separate property; that the cow and steers in contention were acquired by said property, and always considered as her separate property. The court instructed the jury that the plaintiff was entitled to recover the full value of the cow and steers, and a verdict was rendered accordingly. After verdict and before judgment, the defendant moved to set aside the verdict; and also for judgment notwithstanding the verdict. Both motions were overruled. The motion was made, "Because said verdict is against the law applicable to said cause; because it appears by the writ and declaration in said case that the plaintiff has no cause of action against the defendant."

Declaration in part: "William R. Hewitt is attached of his goods to answer unto Lorenzo Hackett, in a plea of the case, for that at . . . the plaintiff was in possession of one cow of the value of \$50, and one pair of steers of the value of \$60, as of the proper goods and chattels of Lorette E. Hackett, then and still the wife of the plaintiff, which she, the said Lorette, owned in her own right, and being so thereof possessed, the plaintiff thereafterward, on the same day, lost the same," etc.—common count in trover. The count in trespass also alleged that the property was "of the proper goods and chattels of said Lorette, then and still the wife of the plaintiff, which said Lorette owned in her own right."

William E. Johnson, for defendant. *S. M. Pingree*, for plaintiff.

Ross, J. The defendant, as a deputy sheriff on a proper process, regularly attached and sold the property sued for as the property of the plaintiff. The plaintiff now seeks, and by the county court was allowed, to recover for the property in his own name, on the ground that the property was the sole and separate property of his wife. Under the decisions and law of this State, which are so fully, carefully, and clearly collated, stated, and reviewed in the brief of the defendant's counsel, that they need not be further referred to, we think this was error. The common-law doctrine, that the personal chattels of the wife on marriage vest in the husband does not apply to such property. The legal status of the sole and separate property of the wife is, that the wife holds it to her own use, free from the rights which the husband by the marriage otherwise would have to it. It is because this property was thus held by the wife, that defendant is unable to attach and hold it as the property of the husband. The common law allowed the husband to recover for the personal chattels of the wife, because by that law they were by virtue of the marriage his property, subject to his sole

use, care, and control, and liable to be appropriated in satisfaction of his debts. Doubtless modern civilization and law have departed somewhat from the common law, in allowing the husband by post-nuptial agreement with the wife, or by acquiescence even, to renounce the right which the common law by the marriage conferred upon him, and allow the wife to hold such property to her sole and separate use. We are not aware, however, that any common-law decisions can be found, that hold that a husband can recover in his own name for personal property owned and held by the wife to her *sole and separate* use. Under the practice that prevailed under the common law, that question could not well arise. By that law, the practice was to vest the title to property, so held, in a trustee. The marriage gave the husband no power or control over such property. Modern law, and our own statute law, as well as decisions, allow the wife herself to hold the title to property thus held by her. It is repugnant to all the principles of the common law, even to allow a plaintiff in his individual capacity and right to recover against the defendant for property which the defendant lawfully took and held against him in that individual capacity and right.

Generally, at common law, suits in regard to the sole and separate property of the wife were brought in the courts of equity; and the wife joined as co-ordinator, because interested in the property; and because in that court, such property could be protected against the unlawful encroachments of the husband even. But this court has held that the husband and wife may recover in their joint names, for the benefit of the wife, for such property. If the husband, by reason of such recovery, attempted to deprive her of the property, she had only to apply to a court of equity for protection against him, until the passage of the recent statute which enables her to sue him at law. The principles of the common law, even when applied to the legal status of such property, with the title vested in the wife, require that the wife in whom the legal title is, and for whose benefit the recovery is had, shall be a party to a suit for its recovery. She is the real party plaintiff to the suit. He is the nominal party; and only a necessary party, because by the coverture she is under his legal protection and guardianship, as it were.

Inasmuch as by the declaration, the plaintiff only seeks to recover in the right of the wife, and that discloses no right of recovery in him, it was the duty of the county court to have rendered judgment for the defendant upon the defendant's motion, notwithstanding the verdict. It is the duty of this court to render such a judgment, as the county court should have rendered on the verdict and motion. The judgment of the county court is reversed, and judgment rendered for the defendant to recover his costs.

WOODWARD v. AMSDEN.

February, 1885.

COSTS—SHERIFF'S FEES FOR SERVING WRIT OF REPLEVIN.

An officer is entitled — R. L., § 4547 — to charge for serving a writ of replevin for *taking and delivering* the property to the plaintiff, in addition to travel, copy, and appraiser's fees, such sum as would be in proportion to the fees provided in other cases for securing attached property; but not for transporting the property to the plaintiff; nor for holding it until a bond is taken, or, ordinarily, until appraisal.

Question of costs. Heard by the court on appeal from the clerk's taxation, May term, 1884, TART, J., presiding. It was an action of replevin; and judgment had been rendered for the plaintiff to recover one cent damages and costs. The clerk allowed the plaintiff \$83.75, for sheriff's fees, as indorsed on the writ, and the defendant appealed.

The sheriff's fees were: "78 miles travel, \$7.80; paid expenses of removing replevied cotton (to several different persons named and amount to each), \$59; 8 days' attendance on replevin and appraisal of cotton, and personal expenses, \$15; copy, \$2; paid appraisers," etc. The plaintiff offered to show by witnesses, that all the items taxed and allowed by the clerk for expenses of replevying the cotton were actually and necessarily incurred and paid by the sheriff in getting the property replevied out of the possession of the defendant, and keeping possession

of the same until it was, within a reasonable time, appraised, the bond taken, and the property delivered to the plaintiff. The court excluded the evidence; allowed only the items for travel, copy, and what was paid to the appraisers.

Gilbert A. Davis, for plaintiff. *M. Batchelder*, for defendant.

VEAZEY, J. The question is not *what* fees shall be allowed an officer serving a writ of replevin for getting the property replevied out of the possession of the defendant, and keeping possession of the same until it was within a reasonable time appraised, the bond taken, and the replevied property delivered to the plaintiff; but it is whether *any thing* shall be allowed him for expenses in any of these respects actually and necessarily incurred by him. The statutory fee bill does not provide for such allowance. It does provide that for securing property attached on *mesne* process a sheriff or other officer shall be allowed a reasonable sum as fees, subject to the revision and allowance of the court. R. L., § 4503. It also provides, that officers and persons whose duty it is to record proceedings or *give copies* shall, when no other provision is made, be allowed seven cents a folio therefor; and for *other* services such sums as are in proportion to the fees established by law. R. L., § 4547. In *Henry v. Tilton*, 17 Vt. 179, it was decided that the right to compensation under this section was not confined to clerks and recording officers merely. To constitute replevin the officer must take the property from the defendant and deliver it to the plaintiff. *Miller v. Cushman*, 38 Vt. 593. The plaintiff cannot recover as taxable costs the expense of the officer in transporting the property to the plaintiff. Expense in that respect would be an element of damage for the defendant's wrongful detention. In contemplation of law the plaintiff is at hand to receive the property when taken by the officer from the defendant. No costs are allowable for expense of holding the property until a bond is taken, because by the statute the bond must be taken before the writ is served. Ordinarily, there would be no occasion for the officer to hold the property at expense for the purpose of appraisal; but we are not prepared to say a case might not arise where it would be improper to allow such an item. But it is plain, that the property to be replevied might be of a kind and amount and so situated that the officer must incur expense in the taking and delivery to the plaintiff for which no fees are provided except under section 4547, R. L. Under the construction given to that section in *Henry v. Tilton*, *supra*, we think the officer *might* under sufficient showing be entitled to an item of charge in addition to travel, copy and appraisers' fees, such sum in fact as would be in proportion to the fees provided in other cases, as in securing and holding attached property.

The evidence offered but excluded in this case would tend to show a basis for the allowance of such item of charge. It was, therefore, error to exclude it.

The ruling of the county court is, therefore, reversed and cause remanded.

SUPREME JUDICIAL COURT OF MAINE.

CHANDLER v. WILSON.

January 26, 1885.

DEEDS FROM MASSACHUSETTS—OFFICE COPIES—EVIDENCE—IDENTITY OF GRANTEE.

Copies of deeds from the Commonwealth of Massachusetts, of land in Maine, may be certified by the land agent of Maine to the registry of deeds where the land is situated, and certified copies from such registry may be used in evidence whenever the original deeds could be.

Massachusetts conveyed land in Maine to Samuel Cook without naming his place of residence. She conveyed other lands in the same township to Samuel Cook, of Houlton.

Held, that these facts *prima facie* establish the identity of Samuel Cook, of Houlton, as grantee in the first-named deed.

A deed was made in 1837 by the land agent of the Commonwealth of Massachusetts to Samuel Cook, as assignee of a soldier certificate. The only evidence of the assignment to Cook was the recital of that fact in the deed.

Held, in a real action by one claiming under Cook, that as against one who claimed neither under the soldier nor the Commonwealth, the recital was *prima facie* proof of the fact recited.

TAX SALE—ILLEGAL PROCEEDINGS—TITLE.

Where land is forfeited to the State for the non-payment of taxes assessed upon it, and the State fails to convey the title to a purchaser because of illegality in its proceedings of sale, the original owner has the better title, and may maintain an action therefor against such purchaser.

SAME—PRESCRIPTIVE TITLE TO WILD LANDS.

A person having for over twenty years a recorded deed of a township of mainly wild land, and during that time lumbering on some portions of it and cultivating other portions, does not thereby divest the true owner of his title to certain lots within the township which have not been occupied during that period of time.

A person who obtains the title of three of the five heirs of an owner of land, deceased, can recover only three undivided fifths of the land of a person in possession, although the latter person does not occupy under the other heirs.

Powers & Powers, for plaintiff. *Wilson & Spear* and *J. P. Donworth*, for defendant.

PETERS, C. J. The demandant, to prove his title to lots 58 and 59 in the town of Mars Hill, produces a deed of quit-claim to himself, dated in 1881, of the lots from three of the five heirs of Samuel Cook, who died in 1861. He also produces from the office of the land agent in this State, certified copies of deeds of those lots from George W. Coffin, agent of the Commonwealth of Massachusetts, to Samuel Cook, dated in 1837.

Several objections to this title are presented by the defendant :

1. That the land agent's certificate from the office in Maine is not within the provision authorizing the use of copies of Massachusetts deeds in the courts of this State. It seems to us that it falls clearly within the statutory limit. Rev. Stat., chap. 5, § 5. No objection is made of a want of record in Aroostook county, where the land lies.

2. The form of the certificate is objected to, in that it does not certify that the deed is a true copy of the record, as required. The land agent says as much, however, and virtually the same thing, when he says the copy is a true copy of a deed recorded in this office.

3. The defendant denies that there is evidence that Samuel Cook, father of the plaintiff's grantors, is the Samuel Cook to whom the Commonwealth conveyed. We are satisfied that the issue should be decided for the plaintiff. Samuel Cook, under whom plaintiff claims, lived in Houlton. The Commonwealth's deeds of 1837 did not describe him as a resident of any place. But another deed from the same grantors to Samuel Cook, given in 1836, of another lot in the same township, does describe him as of Houlton. There is no suggestion that any other Samuel Cook ever lived there. The defendant does not himself claim under any Samuel Cook. This Samuel Cook had in his possession a plan of the town, with some marks of his own upon it. The defendant urges upon our attention that

Samuel Cook, of Houlton, never took possession of the land, or attempted to. But no person of that name ever occupied the lots. This man was for a time, longer or shorter, in California, and there is an intimation that he was not always sane.

4. The point evidently most relied upon by the counsel for the defendant is that the deeds from Coffin, as land agent, were not authorized by any law. The deeds run to Cook as assignee of certain revolutionary soldiers who had received certificates for lots of land from the Commonwealth. The question involves a construction of a resolve of that State passed in 1828. The plaintiff contends that that act contemplated a deed to be given to an assignee of a certificate; the defendant denies it. The defendant further contends that the resolve, *proprio vigore*, carried the title to the soldier, making no provision for any assignee. The resolve is this: "*Resolved*, That there be, and hereby is, granted to each non-commissioned officer and soldier who enlisted into the American army to serve during the Revolutionary war with Great Britain, and who was returned as a part of this State's quota of said army, and who did actually serve in said army the full term of three years, and who was honorably discharged, and to their heirs and assigns, two hundred acres of land to be held in fee-simple from the date hereof; those who have heretofore drawn lots to retain the lots they have severally drawn, and those who have not yet drawn lots are hereby permitted to draw the same from the undrawn lots, remaining in said Mars Hill township, any time within five years from the date hereof, any provisions or conditions in the former resolves on this subject to the contrary notwithstanding."

Our opinion is that the act, when examined in the light of the previous legislation and the attendant facts, is correctly construed by the plaintiff. The question turns on the meaning of the words, "and to their heirs and assigns." The plaintiff's construction is that the words mean, "or to their heirs or assigns," the word "assigns" meaning "assignees." The defendant contends that the words are descriptive of the amount of estate to be conveyed, — descriptive of a fee — and that the certificates of these lots having been previous to that time issued, the title went directly to the soldiers and could not be afterward conveyed by the Commonwealth to an assignee.

The literal reading is the principal argument for the defendant, and of course there is force in it. But there are several considerations that make strongly the other way. The report of the committee that reported the resolve is furnished us. It speaks of "soldiers or the heirs and representatives of soldiers" as the petitioners for the resolve. Again, it speaks of the petitioners as "the above-named persons, or those they represent." It also speaks of the "advanced age of many of the soldiers at the end of the war." The use of the phrase, "and to their heirs and assigns," instead of the phrase with the word "to" omitted therefrom, is a small indication worth throwing into the scales. Further, if the words are used to express a fee, why were the words, "to be held in fee-simple" afterward unnecessarily added? It is an uncommon thing to find the words, "to his heirs and assigns," inserted in a resolve, — an argument that heirs and assignees, as well as soldiers were intended.

Confirmation of this view is obtained by an examination of the former resolves alluded to in this resolve. This resolve grew out of those. The resolve of 1801 "gave two hundred acres (or \$20 money) to each non-commissioned officer and soldier . . . and unto the children, if any there be, if not, to the widow of such." Another resolve provides that, if the officer or soldier has deceased or shall de cease before he obtains his pension in land, "his children or widow as aforesaid shall be entitled to the same." The resolve of 1804 continues that of 1801, and speaks of "the children or widow" of soldiers. The resolve of 1820 appoints George W. Coffin an agent to make conveyances for the Commonwealth. The certificates assigned to both were issued by the secretary of the Commonwealth in 1806.

It may be observed that, if the resolve of 1828 made provision for the soldier only, the heirs were neglected in instances where the soldier was deceased. And in 1828, very many of the soldiers of the Revolution were not living. It would seem that Mr. Coffin interpreted the resolve as allowing him to convey to an

assignee of a soldier's claim and he made many such conveyances. In *Sargent v. Simpson*, 8 Me. 148, a Massachusetts resolve of 1804, authorizing a release of land to a person or persons, "and to his or their heirs and assigns," was construed as properly reading "or to his or their heirs and assigns"; an authority bearing strongly upon the question in the case before us.

5. The defendant contends that the assignment to Cook is not proved, except by recital. Considering, however, that the defendant does not claim under the soldiers to whom the certificates were issued, nor under the Commonwealth, as far as appears, we think the deed by Coffin, as a public officer, made as long ago as 1837, and recorded in the public archives of the two States, is satisfactory evidence that the plaintiff fairly holds the title which Massachusetts had. The official act of itself has some force. It is helped by the presumption of correctness that attaches to official proceedings. The following authorities amply support this conclusion. *Stockbridge v. West Stockbridge*, 14 Mass. 261; *Marr v. Given*, 23 Me. 55; *Cabot v. Given*, 45 id. 144; *Blaisdell v. Morse*, 75 id. 542; 2 Whart. Ev., §§ 1818, 1815.

6. Another objection is urged against the plaintiff's right to recover. The defendant claims under a tax title the land from the State. The law declares that lands shall be forfeited to the State for non-payment of taxes after the assessment has been advertised for a given period. But after that there must be proceedings by the State for the sale of the lands forfeited, the owner still having an interest in the proceeds derived from the sale, and having an after-right of redemption from the State and from the purchaser.

It is correctly admitted by the defendant that the proceedings were not valid to transfer any title from the State to the purchaser, but he contends that the plaintiff cannot recover if the forfeited title remains in the State, invoking the rule that a demandant must recover upon his own seizin and not upon that of another. It seems to be admitted by the plaintiff that the proceedings were regular enough to create a forfeiture to the State,

A demandant must recover upon the strength of his own title and not on the weakness of the tenant's. Still, a demandant may recover if he has merely a better title than the tenant. In such case he does recover upon the strength of his own title, because his title is the strongest. He may not have what is called the true title — a title good against the world — but if he has a good title as against the tenant, he may recover.

A bare possession is the first degree of title, and any degree is better than no degree of title. So that the question is which party is the better entitled to the possession, the demandant or the defendant?

Properly understood, it amounts to this, that a demandant, in order to prevail, must show that he has the title — or a better or higher evidence of title than the tenant. *Tebbets v. Estes*, 52 Me. 566; *Hubbard v. Little*, 9 Cush. 475; *Hunt v. Hunt*, 3 Metc. 175.

An application of this doctrine shows that the point taken by the defendant, that the plaintiff cannot recover because the State and not the plaintiff has the title, is not tenable. In such case the State has the land, not to keep — not to use — but to sell for the taxes. The State, in view of all the statutory requirements, has but a lien upon the land. There can be no doubt that as between these parties, the defendant not gaining a title under the State, the plaintiff has the title, or a title better than the defendant's title.

7. The defendant's claim by an adverse possession of twenty years needs but a passing word. It is not well founded. The lots are wild land and were never personally possessed by anybody. Having a deed of a township and lumbering on it, and cultivating some portions of it, will not and ought not divest an owner's title of premises situated as these are.

The plaintiff can recover for only three-fifths of the land demanded. He shows title to no more. The defendant is in possession under deeds of warranty, which is a better title to the remaining two-fifths than the plaintiff has. "Non constat that the other co-heirs are not as willing that the tenant should occupy their land as that the demandant should," said PARKER, C. J., in *Dewey v. Brown*, 2 Pick. 387, a case in point. *Somes v. Shinner*, 3 Pick. 52; 1 Wash. Real. Prop. 421; *Bruce v. Mitchell*, 39 Me. 390.

Judgment for demandant for three-fifths undivided of the premises demanded. DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

HASKELL, J. I concur in the result reached by the opinion of the court, but I do not think that a forfeiture to the State of the lands demanded has been proved or is admitted. If the lands had been forfeited, surely, the demandant's title thereto was lost. The tenant's possession is stronger than the demandant's original title, if that has been forfeited and lost. I do not think the tax proceedings have worked a forfeiture of demandant's title; because the land was sold by the State, for the non-payment of a legal State tax and an illegal county tax, and the demandant could not redeem from the one and not from the other. *Elwell v. Shaw*, 1 Me. 339. It is admitted that the county tax was invalid. The notice of sale was insufficient. *Tolman v. Hobbs*, 68 Me. 316. It follows, that the sale was irregular and invalid. The demandant's right to redeem did not expire until one year after the sale — Rev. Stat. 1871, chap. 6, § 48; that is, a valid sale, made in compliance with law. Forfeiture cannot be said to be completed until all right of redemption has become totally foreclosed. The owner of land should not be required to pay an invalid tax, to save the estate from forfeiture, for the non-payment of a valid tax; nor should he be required to redeem from an illegal and invalid sale. *Hodgdon v. Burleigh*, 4 Fed. Rep. 111. As the sale in this case was illegal, the title of the demandant did not become forfeited and lost and should prevail against the naked possession of the tenant.

CHANDLER v. SHAW.

January 26, 1885.

BETTERMENTS.

A divisional share of the betterments may be assessed where the demandant in a real action recovers only an undivided share of the estate.

Powers & Powers, for plaintiff. *Wilson & Spear* and *John P. Donworth*, for defendant.

PETERS, C. J. This case, with the exception of the question of betterments, is entirely disposed of in the opinion in the case of *Chandler v. Wilson*, *ante* — Two resolves not in that case, one of 1829 and one of 1831, are introduced, which merely extend the operation of the resolves already discussed. There is this immaterial difference between the two cases. At the foot of the soldier's certificate in this case is a minute, "Deeded to Ephram Builey's heirs." The deed shows the minute to be erroneous. The word "heirs" should be "assignee."

In this case the balance of the evidence authorizes the allowance of the betterments. We cannot take the space in a legal opinion to record at an extended length our reasons for a conclusion in matters merely of fact. Suffice it to say, all things considered, a jury might properly, and probably would allow betterments. In these matters of fact, we exercise jury powers.

A question arises whether a divisional share of the betterments may be assessed when a demandant recovers only an undivided share of the estate. We do not find that the point has ever been passed upon in any decided case in our own State. Betterments in such a case are recoverable in Massachusetts. *Backus v. Chapman*, 111 Mass. 386. We see no objection to it.

The writ demands lot 66 in Mars Hill. The defendant makes no claim to the south half, although no disclaimer is filed. The demandant is entitled to recover three-fifths of the whole lot. The defendant is entitled to three-fifths of the betterments on the north half. Betterments on the north half, *in toto*, to be reckoned at \$200, the value of the whole north half, without betterments, \$100.

Judgment accordingly.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

RICKER v. MOORE.

April 20, 1885.

VENDOR AND PURCHASER — AGREEMENT TO CONVEY REAL ESTATE — EQUITY — TRUSTS — ASSIGNMENT — MORTGAGE — ATTACHING CREDITORS.

When one delivers to another his promise in writing to convey to him real estate for a specified price, payable at a certain time, he thereby transmits an equitable estate, and he becomes the trustee of the estate for the equitable vendee, who becomes the trustee of the purchase-money for the equitable vendor.

The vendee may mortgage such an equitable interest and that mortgage may be assigned; and when the assignee give notice of the mortgage and assignment to the vendor the latter then becomes the trustee of the estate for the assignee.

Such an assignee after reasonable tender of the purchase-money brought a bill in equity against the vendor for conveyance, making the creditor of the vendee, who had attached the latter's interest in an action still pending, a party defendant.

Held, that such creditor, not having tendered the purchase-money, cannot set up that the mortgage and assignment were fraudulent as to creditors.

Wm. L. Putnam, for complainant. *Copeland & Edgerly*, for respondents.

VIRGIN, J. According to the fundamental rule in equity — "What ought to be done is considered as done" — when Moore executed and delivered his agreement of January 5, 1880, to W. A. Worcester, therein promising to convey his interest in the property described, he thereby transmitted an equitable estate to Worcester who was then regarded as clothed with the same ultimate interest in the property which he would receive and hold if Moore had actually fulfilled his agreement. Moore then became the trustee of the estate for Worcester, retaining the legal title as security for the purchase-money, and Worcester the trustee of the purchase-money for Moore. *Linscott v. Buck*, 38 Me. 580; *Green v. Smith*, 1 Atk. 572; *Broome v. Monck*, 10 Ves. 597; *Hadley v. Bank*, 3 DeG., J. & S. 68; Pom. Eq., § 368 *et seq.*; *Ross v. Watson*, 10 H. L. Cas. 672, 678; *Lysaght v. Edwards*, L. R., 3 Ch. Div. 499, 506; S. C., 17 Eng. Rep. 594, 614 *note*. The estate of Worcester under the agreement was of such a substantial character that he could sell, charge or incur it by mortgage, as he did do to Mrs. Niles, before the conveyance from Moore. *Seton v. Slade*, 7 Ves. 265; *Champion v. Brown*, 6 Johns. Ch. 398, 408. And notice thereof to Moore would constitute him the trustee of Mrs. Niles. Story Eq., § 789.

And the same rule would apply if the agreement coupled with the anterior proceedings between Worcester and the bank and Moore be regarded as security for the payment of the balance of the \$6,150 note, and therefore an equitable mortgage. For "equity regards the right of a mortgagor as the beneficial ownership of the land, subject, however, to the lien created by the mortgage as a security to the mortgagee for the payment of his demand. The mortgagor's equitable property is, in this respect, exactly analogous to the equitable estate of a vendee subject to a lien in favor of the vendor as security for the payment of the purchase-price. Pom. Eq., §§ 162, 168, 376. And while there are many facts and circumstances in this case tending to show that the negotiations by the bank, Moore and Worcester, which resulted in the execution of the agreement of January 5, constituted a mortgage, still we have concluded to consider it as a conditional sale.

In his letter Moore declined to release to any one claiming under Worcester, on the ground that the agreement ran to Worcester alone, and not to him and his assigns. And when the tender was made in behalf of this complainant he declined it. Moore's counsel now contend that Worcester had a right, in his own behalf, to demand and receive a conveyance on tender of the balance due under the agreement; but that if Moore had conveyed to the complainant, he would thereafter be liable to Worcester. We do not so understand the rules in equity. To be sure, in law, before our late statute, such an agreement could not be assigned so as to allow the assignee to bring an action thereon in his own name. But an assignment of a thing in action, though nugatory as a transfer at common law, is regarded in equity as clothing the assignee with all the rights of his assignor and to be enforced at the suit of the assignee. Pom. Eq., §§ 168, 369. And still to hold Moore as the trustee of Worcester's assignee, notice to him was essential, in order that he might shape his course according thereto. For Moore had a substantial interest in the property,

and a right to protect and assert it. And still he was bound to convey not to Worcester alone, but to whomsoever Worcester might assign his interest, provided that assignee should seasonably pay or tender the sum due under the terms of the agreement. If instead of an executed mortgage or assignment the negotiations between Worcester and Mrs. Niles had taken on the form of an agreement to assign, then notice of such an agreement would not have bound Moore to her, but he might, under that state of facts, convey to Worcester notwithstanding such an agreement. *McCreight v. Foster*, L. R., 5 Ch. 604, 610; S. C., *sub nom. Shaw v. Foster*, L. R., 5 H. L. 321, 333, 338, where Lords CHELMSFORD and CAIRNS elaborately discuss the subject.

In the case at bar, the notice given to Moore on January 3 was seasonable and ample, including copies of the mortgages and assignments together with the dates of their respective registration. So far as Moore is concerned, we perceive no reason why he should not be decreed to release the unsold land described in his agreement to the complainant. The defendant Lyman, however, alleges that the mortgages of Worcester to Niles are fraudulent as to him as creditor of Worcester; and that he in December, 1880, in an action still pending, attached Worcester's right under the agreement of January 5. There is no doubt that he had the right and authority to attach it. Rev. Stat., chap. 81, § 56. But to avail himself of any such attachment, either he or Worcester should have seasonably paid or tendered to Moore the amount due under the agreement. If, as alleged, the mortgages to Niles are void and the assignment of them to the complainant are, for the same reason, also void, then the tender to Moore was made by one having no right to the conveyance, and therefore of no avail, and the land has consequently been forfeited and the attachment has become valueless. We think, therefore, that Libby cannot set up that defense here.

Neither has the bank any reason to defend. The money tendered belongs to the bank under Morris' mortgage, which seems to have been purposely left unrecorded until a long while after the registration of the Niles mortgages. Whatever may be, the rights of the parties can be determined hereafter, the principal object being now to prevent a forfeiture of the land under the agreement of January 5.

Our opinion is that the bill should be sustained, that Moore, on the payment of the sum tendered January 3, should release to the complainant the unsold land described in his agreement of January 5, the complainant to hold the same in trust for the equitable owners of the property in accordance with their respective priorities and claims to be hereafter determined.

Bill sustained, with costs.

Decree according to the opinion.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

ROGERS v. SHEERER.

April 22, 1885.

SHIPPING — CONTRACT BETWEEN PART-OWNERS AS TO WHO SHALL BE MASTER.

A contract between two part-owners of a vessel, that each shall sail the vessel as master on alternate years, cannot be invoked by one (against the other) when he has acquired such habits of intemperance as render him unfit to perform the duties of master.

Whether such a contract is void as being against public policy, *quære*.

C. E. Littlefield, for plaintiff. A. P. Gould, for defendant.

VIRGIN, J. *Assumpsit* to recover damages for depriving plaintiff of his alleged right, under a contract between the parties, to sail and navigate, as master, the schooner E. H. Potter.

The report discloses that on October 2, 1871, the plaintiff, defendant and several others contracted with one Bean, to build for them a schooner, of about three hundred and fifty tons, according to certain written specifications, to be launched in the following April. On October 5, 1871, the plaintiff and defendant executed an agreement therein "mutually stipulating that O. H. P. Rogers is to sail the

vessel as master for the first year and Fred. Sheerer the second year, and then to alternate from year to year." Accordingly the plaintiff sailed her the first year, commencing September 1, 1872, and the defendant the second, the parties alternating from year to year until May 1, 1877, when on demand, at Portland, the defendant refused to surrender to the plaintiff although he had been in charge since January 11, 1876. Whereupon this action was brought for breach of the above agreement. The contract was executed by these parties alone and was not intended to be signed by any other owners.

There is strong reason and high authority for declaring such a contract void as against public policy, based upon the vast power and authority of a master of a vessel, the important nature of the trust reposed in him, the corresponding duty of exercising the utmost circumspection in his choice and appointment, and the great importance that the exercise of this duty shall be by an unfettered judgment, as declared by Lord TENTERDEN in *Card v. Hope*, 2 Barn. & Cres. 661, 674, 675. Judge STORY, speaking of the authority of the major part-owners to appoint and displace the master, says: "But, then, this authority must be exercised by a free and impartial judgment, . . . any contract, therefore, made by some of the part-owners only, which is calculated to have the effect of fettering their judgment and of binding them to appoint, or concur in the appointment of, particular persons as master and officers is a violation of that duty. . . . Such a contract is, therefore, utterly void, as against public policy, and the true interests of commerce and navigation. . . . Upon this ground a contract made by two part-owners who were the ship's husbands, with a third to sell him a part of their shares, and to be appointed master (they holding a majority of interests) and they to be continued as the ship's husbands and he or they to have the appointment of his successor, as master, has been held utterly void." *Sto. Part.*, § 432. The same doctrine is laid down in *Fland. Ship.*, § 370.

Mr. Maclachlan, in his treatise on the law of Merchant Shipping, speaking of the appointment of master, says: "In appointing to an office of such importance the owners, or those of them with whom the appointment lies, being usually a majority in interest, are bound by a regard to their own advantage, and much more by their duty to others, to proceed circumspectly in the exercise of a free and impartial judgment; and any contract which destroys that impartiality, *e. g.*, by obligating them or some of them to concur in a particular appointment at the peril of an action, is illegal and void." *Macl. Ship.* (2nd ed.) 123. See, also, *Coll. Part.* (Park. ed.), § 1211; *Abb. Ship.* (Sto. & Perk. ed.) 136; *Ward v. Ruckman*, 36 N. Y. 26, 30.

However we do not place the decision of this case upon this ground, but upon its more immediate merits. There are a very few contracts which expressly contain all of the intentions of the parties, hence they are to be construed with reference to their subject-matter. In construing the contract sued on we are not limited strictly to its express terms. It would be absurd for either party to contend that he was entitled to sail the vessel alternate years at all hazards; or that nothing short of the destruction of the vessel or of his own life could legally intervene. There are implied conditions along with which the express terms must be read in order to obtain the real intentions of the parties. The great power and authority of a master necessarily impose upon him commensurate duties and responsibilities, to perform which care, attention, prudence and fidelity are exacted of him by the law. In other words, the parties intended that each should sail the vessel alternate years, so long and only so long as he performed the high and responsible duties of master with that degree of care, attention, prudence and fidelity which the law demands; and when he failed to do that he could no longer invoke the aid of the contract which he had broken.

It is fully proved and not denied that the plaintiff became a defaulter at the time of his last settlement with the general agents, in January, 1876, to the amount of \$780, no part of which has he ever paid, and that he has not had any attachable property since then, but conveyed away his only share in the vessel at that time. This has been decided in admiralty to be sufficient cause for removal, as master, even though a part-owner. *Fland. Ship.*, § 371.

Again, the testimony is overwhelming that his habits of intemperance, especially during his last year, rendered him unfit to discharge his duties as master; and the general agents directed the defendant not to deliver the vessel over to his charge. Our opinion, therefore, is that under the stipulation in the report there must be judgment for the defendant.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and HASKELL, JJ., concurred.

STATE v. BEAN.

April 22, 1885.

CRIMINAL LAW — INDICTMENT — ARSON — NOLLE PROSEQUI.

An indictment charged the defendant in one count with burning a dwelling-house and barn. *Held*, that the prosecuting officer may by leave of court, and against the defendant's objections, enter *nolle prosequi* to so much of the indictment as charged the burning of the barn.

The alleging of the commission of a criminal act in an indictment alleges the intent.

Joseph C. Holman, county attorney, for State. *H. L. Whitcomb*, for defendant.

PETERS, C. J. In a single count the defendant was charged with burning a dwelling-house and a barn. An objection was interposed, before the jury was impaneled to try the case, that the indictment was bad for duplicity. Thereupon the prosecuting officer, with leave of court, but against the defendant's consent, entered a *nolle prosequi* to so much of the indictment as charged the burning of the barn. The defendant's counsel denies the right of dividing a count by entering a discontinuance to a part of it.

It was held in *State v. Burke*, 38 Me. 574, that a *nolle prosequi* may be entered as to any part of a count whereby the charge is made less criminal. We think it may be entered at proper time to the whole indictment, or to any count or counts in it, or to any person or persons named in it, or to any part of a count. Such has been the common practice in our courts. Any part of a count, which is in its nature separable from the rest, may be removed by *nolle prosequi*, and the remainder stand. The defendant is not injured by the removal of superfluous or double allegations. He thus gets rid of the embarrassment he complains of. *Jennings v. Commonwealth*, 105 Mass. 586; *Commonwealth v. Dean*, 109 id. 849; *Commonwealth v. Tuck*, 20 Pick. 856; 1 Bish. Cr. Pr. (3d ed.), § 1391; Heard Cr. Pl. 128.

It is objected to the count that it does not declare that the defendant set fire to the building with an intent to burn and destroy it. The intent is fully alleged in the averment that the defendant "feloniously, willfully and maliciously" did the act. The criminal act alleged in the indictment cannot be committed without an evil intent. Alleging the commission of the act alleges the intent. The other points made by the defense do not require refutation. Shorn of the unnecessary and separable matter touching the burning of the barn, the count is in the common form and unobjectionable.

Case to stand for trial.

DANFORTH, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

SUPREME COURT OF RHODE ISLAND.

WHITTIER v. COLLINS.

June 13, 1885

NEGOTIABLE INSTRUMENT—INDORSER TAKING SECURITY—WAIVER OF DEMAND AND NOTICE.

In Rhode Island the indorser of a promissory note, by taking security from the maker, does not waive demand upon the maker and notice of non-payment. If, after the time for demand and notice has passed, the indorser of a promissory note merely requests the holder not to press the note against the maker, he does not thereby waive demand and notice.

Defendant's petition for a new trial. The opinion states the point.

Warren R. Perce, for plaintiff. James C. Collins & Walter H. Barney, for defendant.

STINESS, J. Petition for new trial in a suit against an indorser of promissory notes upon the ground that erroneous instructions were given to the jury. It was admitted at the trial that there was no legal demand and notice, but it was claimed that this was waived by the fact that the defendant stated to the plaintiff, when the loans were negotiated, that he held a bill of sale of certain property belonging to the maker of the notes to protect him as indorser of said notes. The defendant denied that he had security, and that he so stated, but requested the court to charge, that the mere holding of security by him to secure him as indorser would not be equivalent to a waiver of demand and notice. This the presiding judge refused, but instructed the jury that if the defendant held security, ample to cover his liability as indorser, of which his statement to that effect to the plaintiff would be evidence, then legal demand and notice of the dishonor of the notes were unnecessary. The defendant excepted.

It cannot be denied that there is authority, both in text-books and in decided cases, for the instruction that was given. Judge STORY, in his work on Promissory Notes (7th ed.), § 281, gives, among the excuses for non-presentment, "The receiving of security by the indorser before or at the time of the maturity of the note as an indemnity or payment thereof. In such a case, if the security or indemnity be a full security or indemnity for the amount of the note, it is plain that the indorser can receive no damage from the want of a due presentment." A similar statement is made in 3 Kent Com. (12th ed.) *113, and the same cases are cited as authority in both books. It will be seen however, upon examination, that the cases can hardly be regarded as authority for the statements of the distinguished writers. The doctrine seems to have had its origin in *Corney v. Da Costa*, 1 Esp. 302, a decision at *nisi prius*. An insolvent had made a composition with his creditors, but, to avoid the expense of a conveyance to trustees, it was agreed that he should give his notes, indorsed by the defendant, the latter taking a transfer of the debtor's property to the amount of the composition. Presumably the transfer covered the entire property of the debtor, although this is not stated, but the decision seems to rest upon the fact of a primary undertaking and liability on the part of the defendant, by reason of his agreement with the creditors, rather than upon his liability as a secured indorser. Indeed, he is not referred to as an indorser by the court. He seems to have been treated as a joint maker in fact, though an indorser in form. The case, therefore, is far from supporting the proposition which is quoted above. *Martel v. Tureaud's Estate*, 6 Mart. (N. S., La.) 118, is a case of similar character. The earliest and most frequently quoted case in the country is that of *Bond v. Farnham*, 5 Mass. 170, which was a typical case of another class. The point decided was that when an indorser takes for his indemnity *all* of the maker's property, thereby putting it out of his power to pay the note, he stands in the shoes of the maker, upon whom a demand would be fruitless, and a waiver of notice is consequently implied. It is to be noted, in this case, that the waiver is emphatically stated to depend upon the transfer of the whole of the maker's estate and not simply upon the fact that he received security. To exactly the same point are *Mechanics' Bank of N. Y. v. Grinnold*, 7

Wend. 165; *Perry v. Greene*, 19 N. J. L. 61; *Duwall v. Farmers' Bank of Maryland*, 9 Gill & J. 81; *Watkins v. Crouch & Co.*, 5 Leigh, 522. In *Andrews v. Boyd*, 3 Metc. 434, the indorser was held liable upon an express agreement; in *Prentiss v. Danielson*, 5 Conn. 175, it was held that indemnity given for other notes did not apply to the one in suit, and hence the indorser was not liable; in *Holman v. Whiting*, 19 Ala. 703, it was determined that the indorser was not indemnified and not liable. *Lewis v. Kramer*, 3 Md. 265, held that "receiving a sum less than the amount of the note will not necessarily operate as a waiver," but that it might be recovered by the holder against the indorser as money had and received to the holder's use, *pro tanto*, in discharge of the note. While there are numerous *dicta*, in these cases, to the effect that any taking of security is a waiver of demand and notice, the cases themselves do not decide, nor even support the proposition.

The cases of *Mead v. Small*, 2 Me. 207, and *Develing v. Perrie*, 18 Ohio, 170, do, however, directly support it; but the former cites only *Bond v. Farnham*, and the latter, the same case with *Mead v. Small* and *Mechanics' Bank of N. Y. v. Griswold*, *supra*. The foundation, then, of these cases is *Bond v. Farnham*, which, as before stated, stands upon a different ground and supports a different principle.

On the other hand, the question before us has arisen in many cases which have expressly decided that the receipt of security is not a waiver of demand and notice. *Kramer v. Sandford*, 4 Watts & Serg. 328; *Wilson v. Senior*, 14 Wis. 380; *Denny v. Palmer*, 5 Ired. 610; *Seacord v. Miller*, 13 N. Y. 55; *Holland v. Turner*, 10 Conn. 308; *Woodman v. Eastman*, 10 N. H. 359; *Moses v. Ela*, 43 id. 557; *Creamer v. Perry*, 17 Pick. 332; *Haskell v. Boardman*, 8 Allen, 38.

We think the weight of authority is with these cases. We also think that they are correct in principle. The general rule of an indorser's liability is so well understood in commercial circles, that no exception should be engrafted upon it which is not required by reason or necessity. Indorsements of negotiable paper have become such a necessary part of business affairs that the rules relating to them should be as simple and stable as possible. If they should be hedged about with unreasonable, or unnecessary exceptions, the plain man would become bewildered, and the law, instead of showing a straight path of conduct, would entangle him in a thicket of unexpected liabilities. Why should the receipt of security make an exception to the rule that an indorser is entitled to notice of non-payment? In taking security he has practically said to the maker, "I will hold this to indemnify me in case I become liable to pay your note." Why should it be said that he *thereby* becomes liable to pay it? This would change his contract and character from that of an indorser to that of surety or joint maker. If he has received funds for the express purpose of paying the note, or if he has taken the whole of the maker's property for security, reasons for holding him liable have been stated; but those reasons do not apply in a case like the one before us. The indorser's liability at the outset was contingent; to guard against the contingent liability he took security; we do not see how the liability thereby became absolute. It is said that the reason for the rule requiring notice to indorsers, is to enable them to proceed at once to collect from the maker and thus to secure themselves; that if the indorser is secured, he can lose nothing, and the reason for the rule failing, the rule itself does not apply. But this does not follow. An indorser, receiving no notice of non-payment, may think the note is paid; or may be wrongly informed that it is paid, and surrender the security, only to learn later, if this were the doctrine, that he has waived notice and is still liable without his security. Again, the security he supposed to be good, may prove to be worthless. Moreover, if the fact that the indorser would eventually lose nothing is to affect his liability, the solvency of the maker, from whom the indorser could eventually recover, might be shown, with equal reason, as a ground to hold the indorser liable. The liability of the indorser is not dependent upon his ultimate loss or reimbursement, but upon the rules of mercantile law, and hence it does not depend upon the fact of security or no security. This has been well stated by Professor Parsons; "The answer to the objection that the whole object in requiring notice is attained as soon as the indorsee is indemnified is, in

our opinion, that, whatever may have been its effect in the gradual formation of the law, the requirement of notice has at last settled down into a strict technical right, and an appeal to original reasons has become less frequent and less influential."

We think that the instruction given in this case, upon this point, was erroneous.

It is also set forth in this case, that the court erred in refusing to allow the defendant to prove that the rate of interest charged was exorbitant, in order to enable him to claim an unconscionable contract as in *Brown v. Hall*, 14 R. I. 249. But this case does not fall within the principle upon which *Brown v. Hall* was decided. The parties to this note were competent to contract, and it does not appear that there was any fraud or oppression or any advantage taken of a confidential relation. The testimony was, therefore, properly excluded.

The third ground of error alleged, is the instruction to the jury that requests by the defendant to the plaintiff for forbearance in demanding payment of the note, whether before or after maturity, would amount to a waiver of notice. It is not clear from the record, whether the request related to the legal demand at maturity, or whether it was a mere request to forbear demanding payment for a while, after maturity. If the plaintiff was induced to omit the legal demand by the defendant's request, of course she would thereby waive notice of demand and non-payment; but if it was a simple request, after the time for demand and notice had expired, not to press the maker of the note, the plaintiff still being at liberty to bring suit, if she chose, we do not think that such a request would amount to a waiver by the defendant.

Petition granted.

[See *Sheldon v. Horton*, 8 Am. Rep. 669; *Wright v. Andrews*, 35 id. 308—Ed.]

HOPKINS v. YOUNG.

June 13, 1885.

TAXATION — UNCERTAINTY — OMISSION OF DOLLAR SIGNS.

With an assessment-list for town taxes was a certificate setting forth the total valuation in dollars and cents and the amounts in dollars and cents of the total realty tax and of the total personalty tax. *Held*, that the assessment-list sufficiently described the estate taxed, and was not void for uncertainty owing to a lack of dollar signs.

Assumpsit. Heard by the court, jury trial being waived.

Brown & Van Slyck, for plaintiff. *Colwell & Barney*, for defendant.

STINNESS, J. Suit to collect a town tax, which the defendant resists upon two grounds.

First. That the assessment-list does not properly describe the estates taxed. The list is made up as follows:

NAME	Description.	Real.	Personal.	Tax.
Young, Cyrus,	24 a. home estate.....	800	} 12.00
	20 a. T. Young, lot	800	
	9 a. woodland, Whipple lot.....	200	

Unquestionably a valid assessment must describe the property assessed with sufficient clearness and certainty to inform the owner of the assessment and to show upon what property the tax is levied. The description must be sufficient to identify the property in case of a sale, upon which the tax has not been paid and the property which is to be sold to pay the tax. It does not follow however, that in the assessment-list a description of the property by metes and bounds is necessary. This would be both cumbersome and impracticable. But short of this it would be difficult to describe a man's estate with clearer definiteness than as his "home estate," of twenty-four acres, or his "9 a. woodland, Whipple lot."

The owner certainly could not be misled by such a description, and others would be quite as likely to know the land levied upon by these designations as by metes and bounds. In a deed a more extended and exact description would be given, but such a reference as this points out the tract that is assessed as clearly as could be expected in an assessment-list. If "*Buck Leap*," "*Far End Olose*," a house with a certain number on a certain street, and the like, are sufficient for a declaration in trespass, the description which is given in this case ought to answer for the assessment-list in a town tax.

It is suggested by counsel that without a more particular description, the assessors may have erroneously supposed that the twenty-four acres lay mostly on one side of the defendant's house, when in fact, they lay mostly on the other, and have valued it accordingly. We are bound to assume, if nothing appears to the contrary, that the officers assessed what they say they assessed, the "home estate," etc. The statute requires the tax payer, after notice given as in this case, to bring in an exact account of his ratable estate, "describing and specifying the value of every parcel of his real and personal estate," and if he fails to do so, he, "if over-taxed, shall have no remedy therefor." If the individual is denied a remedy for an error in judgment on the part of the assessors, by reason of his default, clearly the tax should not be declared void because of the same default in failing so to describe his property that the assessors might know with certainty what and where it was.

Second. That the manner in which the valuations and amount of tax are carried out, without dollar marks or other indications to show whether the figures stand for dollars, cents or mills, is so uncertain as to render the assessment void. In California, Illinois and Tennessee, it has been held that defects of this character invalidate and avoid the tax. *People v. San Francisco Savings Union*, 31 Cal. 132; *People v. Hastings*, 34 id. 571; *Lawrence v. Fast*, 20 Ill. 838, 340; *Lane v. Bommel-man*, 21 id. 143; *Dukes v. Rowley*, 24 id. 210; *Randolph v. Metcalf*, 6 Cold. 400.

It should be noticed however, that in Illinois and Tennessee, the question arose upon judgments against delinquent tax payers, where greater strictness would be required, and that the decision in each case proceeds upon the ground that nothing appeared by which it could be determined what value had been put upon the property. In other cases it has been held that a similar method of setting out values was not invalid, because what was meant, sufficiently appeared and no one could be misled thereby. *Cahoon v. Coe*, 52 N. H. 518, 524; *Bird v. Perkins*, 38 Mich. 28, 31; *State v. Eureka Consolidated Mining Co.*, 8 Nev. 15.

The case before us is somewhat different. Appended to the assessment-list is a certificate by the assessors, in which they set forth that the total valuation of the real and personal estate, each, is a certain amount in dollars and that the total tax is a certain amount in dollars and cents. This, in connection with the other parts of the list, indicates the meaning of the figures and renders them certain. "*Id certum est quod certum reddi potest.*"

We think, therefore, that the assessment is not void, upon the grounds claimed, and that the plaintiff is entitled to judgment.

Judgment for plaintiff.

CASE v. MASON.

June 13, 1885.

ASSIGNMENT FOR CREDITORS—REMOVAL OF ASSIGNEE—NEGLECT TO FILE INVENTORY.

In Pub. Stat. R. I., chap. 237, § 8, Of the removal of assignees, the words "for cause shown" are confined to neglect in filing an inventory and schedule.

The court will not peremptorily remove an assignee for neglecting to file an inventory and schedule as required by statute, when the neglect is unintentional or seems to have good excuse.

Petition for the removal of the respondents as assignees under a deed of assignment for the benefit of creditors.

The Public Statutes of Rhode Island, chap. 237, §§ 8, 11, provide:

§ 8. The supreme court shall, upon the petition of any creditor interested in

any deed of assignment made by a debtor for the benefit of creditors, upon due notice and for cause shown, remove any assignee named in such deed of assignment, who shall neglect to render an inventory and schedule as required by this chapter, or shall neglect to give a bond as required by said court, and may, upon the petition of a majority in interest of the creditors interested in any such deed of assignment, upon due notice and for cause shown, remove the assignee named therein from his office and trust.

§ 11. The assignee named in any deed of assignment made by a debtor for the benefit of creditors shall, within two months after the time of accepting the trusts created by said deed, render on oath to said court an inventory of all the effects, estates and credits conveyed by said deed and a schedule of the liabilities and creditors of said debtor so far as the same can be ascertained, and file said inventory and schedule, together with a copy of such deed, in the office of the clerk of said court in the county where said debtor resides or has his principal place of business.

Colwell & Barney, for petitioners. *James Tillinghast* and *James M. Morton*, for respondents.

PER CURIAM. In the above-entitled cause it appears that the assignees sent to the creditors individually, a statement of the assets and liabilities which they might well suppose would be satisfactory to the creditors, and which appears to have been satisfactory to a large majority of them. The assignees might, therefore, assume that the creditors would not insist upon the inventory and schedule required by Pub. Stat. R. I., chap. 237, § 11. The neglect to comply with that section is not necessarily and absolutely a ground of removal of an assignee, as we infer from the language of Pub. Stat. R. I., chap. 237, § 3, which provides that the court shall remove the assignee in such case "upon due notice and for cause shown," and which, we think, leaves it in the discretion of the court to allow the assignee to remain, if his default was unintentional or there was good excuse for it. We think that under the circumstances, there was an excuse for the assignees in the present case, and we will not remove them on condition that they file an inventory and schedule on or before Tuesday, June 23, 1885.

We are of the opinion that under the first clause of Pub. Stat. R. I., chap. 237, § 3, the assignee cannot be removed for any other cause than a neglect to render an inventory and schedule, the words "for cause shown," meaning a cause connected with such neglect.

Order accordingly.

RESDOCKER v. BOWEN.

June 13, 1885.

COSTS — PARTITION — COUNSEL FEES.

In Pub. Stat. R. I., chap. 230, § 22, of partition, the words "cost of partition" cover counsel fees as well as the costs of suit and other expenses of making partition.*

Bill in equity for partition. On motion for a final decree.

The draft decree presented by the complainants in this case contained the following clause:

"*Fourth.* That the costs of this suit to be taxed by the clerk be equally divided between, and payable by the complainants and the defendants, William Shaw Bowen and wife; that the sum of \$50 be assessed upon the said William Shaw Bowen and wife as a solicitor's fee; that the sum so assessed and one-half the costs taxed as aforesaid be a lien on the land set off as aforesaid to the said William Shaw Bowen and wife, and that in default of payment thereof within sixty days from the date of this decree, execution therefor issue in favor of the complainants to enforce said lien."

The respondents objected to this clause as not being authorized by the statute—Pub. Stat. R. I., chap. 280, § 22—which is as follows:

See Hoffman v. Smith, 61 Miss. 544.—Ed.

"In suits for partition, either at law or in equity, the costs of partition, in such proportion as the court trying the same shall adjudge to be paid by any party or parties to said suit, shall be a lien upon the interest of any party or parties in the several shares to him or them assigned, and in addition to the mode of recovery now used, may be recovered by sale of said several shares upon execution to be issued in due form therefor in favor of the party or parties who may by payment of said costs be entitled to recover the same."

Edwin Metcalf, for complainants. *Thomas C. Greene*, for respondents.

PER CURIAM. The court has heretofore, as a matter of practice, construed the phrase "the costs of partition," in Pub. Stat. R. I., chap. 230, § 22, as broad enough to include counsel fees as well as the ordinary costs of suit and other expenses of making the partition. We think the construction correct, the phrase being used to denote not simply the costs of suit, but the costs of partition itself.

Motion granted and decree entered.

WEAVER v. ARNOLD.

June 20, 1885.

CLOUD ON TITLE — VACATING TAX TITLE — REMEDY AT LAW.

A lot of land in Providence was devised to A. for life, remainder to B. and C. in fee. Pending the life estate B. mortgaged his interest to D. While the title remained thus, the collector of taxes levied on the lot, and after advertisement sold "the right, title and interest of A., B. and C. in and to an undivided seven-eighths part," and subsequently for another tax levied again, and after advertisement sold "the right, title and interest of A., B. and C. in and to three undivided eighths part." No notice of the sales were given by the collector to D., and D. was the purchaser at both sales.

Held, under the provisions of Pub. Stat. R. I., chap. 42, §§ 4, 6, and chap. 44, §§ 8, 10, 12, that the sales were void. As to annual taxes, the estate of the life tenant is first liable. As to both tax levies, the effect of the course pursued was to throw a disproportionate charge on A. and C., and to relieve *pro tanto* B. and D., thus selling one man's estates for another's taxes.

C. filed a bill in equity against D. to obtain a reconveyance. *Held*, that the bill could not be sustained. Equity will not interfere to remove a cloud upon title in favor of a party out of possession, claiming under a legal title against his antagonist who is in possession under the written title which makes the cloud. The remedy at law is sufficient.

Bill in equity for a reconveyance of realty and the removal of a cloud upon title. On demurrer to the bill. The opinion states the case.

Wilson & Jenckes, for complainant. *Benjamin N. Lapham*, for respondent.

DURFEE, C. J. This is a suit in equity to vacate a tax title which the defendant claims to have acquired in a lot of land in the city of Providence. The case set forth in the bill, which is demurred to, is as follows, to-wit: The land formerly belonged to one Solomon Arnold, who died in 1873, leaving a will by which he devised it for life to his widow, Phoebe Arnold, and after her in fee-simple in remainder to the complainant and one Olin S. Aldrich. Phoebe Arnold, after the death of Solomon, had used and enjoyed the land until her death, March 10, 1884. Olin S. Aldrich mortgaged his interest prior to 1878, to the amount of \$2,100, to the defendant by five different mortgages, which were all duly recorded. After the death of Solomon Arnold the annual taxes on the lot were assessed to "Solomon Arnold, Phoebe Arnold, executrix," and previously to 1880 had been paid by her. In 1880 a sewer tax and the usual annual tax were assessed on the lot, and were allowed to remain unpaid. On the last day of March, 1881, the collector of taxes, on account of the non-payment of the sewer tax, after advertisement and notices to Phoebe Arnold, Olin S. Aldrich and David Weaver the complainant sold at public auction "all the right, title and interest of the said Phoebe Arnold, Olin S. Aldrich and David Weaver in and to an undivided seven-eighths part" of said lot to the defendant for \$195.21, being the amount of sewer tax with interest and expenses, and afterward, April 5, 1881, gave the defendant a deed purporting to convey the estate sold to him in fee-simple. And on June 16, 1881, the collector of taxes, on account of the non-payment of the annual tax, after advertisement and notices, sold at public auction "all the right, title and

interest of the said Phœbe Arnold, David Weaver and Olin S. Aldrich in and to three undivided eighths part" of said lot to the defendant for \$97.67, being the amount of the tax with interest and expenses, and afterward, June 18, 1881, gave the defendant a deed purporting to convey the estate sold to him in fee-simple. At the time of these sales the complainant was living, in sickness and extreme poverty, in Windham, Connecticut, having removed from the city of Providence, where he had previously lived, in 1880, and he received no notice of the sale, though it is not alleged that notices were not mailed to him as required by the statute. The defendant is now in possession of the land, claiming it under the tax titles, and denying that the complainant has any right therein, though the complainant has offered to reimburse him for the sums paid by him for taxes, as aforesaid, or for his equitable portion thereof, and to pay any other legal charges on the estate incurred by him.

The first ground on which the complainant asks relief is that the sales were illegal and void. The statute in regard to the assessment of the usual annual taxes provides, "Taxes on real estate shall be assessed to the owners." "Estates in possession of a tenant for life may be taxed to the tenant for life, who, for the purposes of taxation, shall be deemed the owner." Gen. Stat. R. I., chap. 89, §§ 4, 6; Pub. Stat. R. I., chap. 42, §§ 4, 6. The statute in regard to the collection of such taxes by sale provides: "In case of a life estate, the interest of the tenants for life shall first be liable for the taxes." Gen. Stat. R. I., chap. 41, § 8; Pub. Stat. R. I., chap. 44, § 8. The statute authorizing assessments for sewers in the city of Providence provides that the assessments "Shall be collected as the ordinary taxes of the city are collected." * The complainant contends that in pursuance of these provisions the interest of the life tenant ought to have been first sold for the satisfaction of the taxes, the interest of the remaindermen being liable only in case of a deficiency."

We think there can be no question but that the complainant's claim is correct in regard to the ordinary taxes. The provisions recited, clearly show that it is the intention of the general assembly that the life tenant, who enjoys the use or income of the land, shall pay the taxes on it during the continuance of his estate, and that, if he neglects to pay them, his life estate shall be sold for their payment before any resort is had to the reversion or remainder. The provision in regard to the sale is not directory merely, but imperative, being manifestly intended for the benefit of the reversioners or remaindermen, and, therefore, if it be disregarded, the reversioners or remaindermen have a right to insist that as to them the sale is illegal and void. It is not so clear, however, in regard to the sewer tax, that the life estate must first be sold; for there is no provision that sewer taxes shall be assessed to the life tenants, the direction being that the assessments shall be on the estates themselves at the rate sixty cents for each front foot and one cent for each square foot, extending back not exceeding one hundred and fifty feet. It may be argued that, inasmuch as the assessment is for a permanent benefit, it cannot have been intended that it should fall primarily on the life tenant. We do not find it necessary, however, to decide this point; for if the life estate is not to be sold first, then the sale is to be according to the general provisions, which we think was not duly observed in the case at bar. The general provision is that "In all cases when any parcel of real estate is liable for payment of taxes, so much thereof as is necessary to pay the tax, interest, cost and expenses shall be sold by the collector," etc., in the manner there prescribed. Gen. Stat. R. I., chap. 41, § 10; Pub. Stat. R. I., chap. 44, § 10. It will be observed that what is authorized to be sold is so much of any parcel of real estate, liable for payment of taxes, as is necessary to pay the taxes, &c. Under this authority the collector might, if he had given notice to the defendant as mortgagee, as provided by section 12, have sold so much of the entire estate, including the mortgagee's interest, as was necessary to pay the tax and assessment. If he had so sold, the burden would have fallen proportionately on all interests, and the sale without doubt would have been valid. He did not so sell but advertised to sell only the right, title and interest of Phœbe Arnold, Olin S. Aldrich and the complainant, and sold at the

* Pub. Laws R. I., chap. 818, § 6, of March 28, 1873, "An act establishing a board of public works in the city of Providence."

two sales their entire right, title and interest only, the mortgagee's interest remaining intact. Now we have seen that the mortgages which were duly recorded covered only the undivided moiety in remainder of Olin S. Aldrich. Manifestly, therefore, if this moiety was no more than sufficient to pay the mortgages, the effect of the sale, if sustained, was to throw the burden of the entire tax upon the interests of Phoebe Arnold and the complainant. And if this moiety was more than sufficient, nevertheless, the effect was to charge the other interests disproportionately and *pro tanto* to exonerate said moiety of a part at least of its proper share of the burden. In other words, the effect was to sell one man's estate to pay more or less of another man's taxes. We do not think the statute authorizes this, or that it would be constitutional if it did authorize it. The statute in section 10, as we construe it, authorizes sales for taxes subject to two limitations, namely: *first*, that the only estate which is liable for the taxes shall be sold; and *second*, that only so much thereof shall be sold as is necessary to pay the taxes for which it is liable. We think, therefore, the collector exceeded his authority when he adopted a mode of sale by which, in consequence of its exemption of the mortgagee's interest, the complainant's estate was sold for more than its own taxes. The injury to the complainant is patent. It is impossible to say that if the mortgagee's interest had been included, it would have been necessary to sell his entire estate. Indeed it is scarcely conceivable that in such a sale such a result would have occurred, if there had been other bidders than the defendant, without collusion. Our conclusion is that the sales, and consequently the conveyances under the sales were as against the complainant illegal and void.

The complainant contends that, notwithstanding the invalidity of the sales, the conveyances under the sales create a cloud upon the estate which he is entitled to have removed. The defendant, on the other hand, contends that if the sales and conveyances were void, the complainant has an adequate remedy at law and cannot maintain his suit. We think the defendant is right. We think it is well settled that a court of equity will not entertain a suit for the removal of a cloud in favor of a party out of possession claiming under a legal title against a party in possession under the deed or other written or record title which is supposed to constitute the cloud. In such a case there is no necessity for the exercise of the equitable jurisdiction, as the validity of the disputed title can be determined at law. *Apperson & Co. v. Ford*, 23 Ark. 746, 756 and cases there cited; *Orton v. Smith*, 18 How. (U. S.) 263; *Herrington v. Williams*, 31 Tex. 448; *Clark v. Covenant Mut. Life Ins. Co.*, 52 Mo. 272; *Gage v. Schmidt*, 104 Ill. 106; *Gould v. Sternburg*, 105 id. 488; *Polk v. Pendleton*, 31 Md. 118, 124. The defendant here is in possession keeping the complainant out, and there is, therefore, nothing to prevent the complainant from vindicating his title at law.

In this view it is unnecessary to consider whether the complainant would still have a right to redeem the estate if the sales had been valid; for very clearly, if the estate did not pass to the defendant, the complainant cannot redeem it from him. The bill will, therefore, be dismissed, with costs.

PAWTUCKET v. BALLOU.

June 20, 1835.

WILL — EXECUTION — WITNESS — PRESENCE OF TESTATOR.

In Rhode Island the witnesses to a will must subscribe their names in the presence of the testator. Acknowledgment by a witness, in the presence of the testator, of the witness's signature affixed in the testator's absence, is a nullity.*

Appeal from the court of probate of the town of Pawtucket. The opinion states the facts.

Thomas P. Barnfield, town solicitor for the town of Pawtucket, for appellant.
Benjamin M. Bonworth, for appellee.

DURFER, C. J. The question is, whether under the agreed statement of facts,

* See *Welch v. Adams*, post.

the paper offered for probate is entitled to probate as the will of Otis J. Ballou. We think not. Our statute provides that an instrument intended to be a devise of real estate "Shall be attested and subscribed in the presence of the deviser by two or more witnesses, or else shall be utterly void and of no effect," and that personal property may be disposed of by will in the same manner as real estate. Pub. Stat. R. I., chap. 182, §§ 4, 8. The paper was not subscribed by the witnesses in the presence of Otis J. Ballou. It was subscribed by them while he was absent where he could not see them subscribe it. The execution is, therefore, clearly invalid unless the acknowledgment of subscription by the witnesses was equivalent in law to an actual subscription in the presence of Otis J. Ballou. We do not think it was. Our statutes prescribe the manner in which property, real and personal, shall descend or be distributed when not disposed of by will. A will may—this paper if admitted to probate would—make an entirely different disposition. An instrument purporting to be a will, therefore, ought not to be allowed to have effect as a will unless it fully answers the requirements of the statute. The declaration of our statute that such an instrument shall be attested and subscribed in the presence of the testator, "or else shall be utterly void and of no effect," is very significant, and demonstrates an intention on the part of the General Assembly to make subscription by the witness in the presence of the testator of the very essence of the execution. We are unwilling to speculate upon the possibilities of human action and to take the responsibility of holding that an acknowledgment of subscription by the witnesses in the presence of the testator answers all the purposes of actual subscription in his presence, and that it, therefore, shall have the same effect. Acknowledgment of subscription is not the same, in fact, as actual subscription, and, in view of the statute, we do not think we have any right to decide that it is the same in law.

The only case in which acknowledgment of subscription has been held to be equivalent to subscription itself in the presence of the testator is *Sturdivant v. Birchett*, 10 Gratt. 67, which was decided by the court of appeals of Virginia by a divided court. On the other hand, the cases which more or less strongly support the view which we have expressed are numerous. Most of them are cited and reviewed by Judge GRAY in an elaborate opinion in *Chase v. Kittredge*, 11 Allen, 49. In that case one of the witnesses subscribed the will in the absence of the testator and before it was signed by him, and after it was signed, acknowledged his signature in the presence of the testator and the other witnesses. The court decided that the execution was invalid, both because the witness subscribed the will before it was signed by the testator, and because he subscribed it in the absence of the testator, the subsequent acknowledgment in his presence being unavailing. See, also, *Hindmarsh v. Charlton*, 8 H. L. 159; *Downie's Will*, 42 Wis. 66; *Compton v. Mitton*, 12 N. J. L. 70; *Mickle v. Matlack*, 17 id. 86; *Pope's Will*, Roberts' Vt. Dig. 748, 17.

We have treated this case as if the acknowledgment was made in the presence of Otis J. Ballou by both witnesses, or by one of them, the other standing by and assenting. The case has been argued as if such was the acknowledgment. The agreed statement, however, does not show that more than one of the witnesses took part in the acknowledgment. Such an acknowledgment by one of the witnesses only, the other being absent, is not, so far as we know, supported by any authority, and it would be without question ineffectual.

Our conclusion is that the decree of the court of probate of the town of Pawtucket refusing to admit said paper to probate must be affirmed.

Order accordingly.

BAILEY, Junior, Petitioner.

June 26, 1885.

WILL—POWER TO SEVERAL COUPLED WITH TRUST—ONE RENOUNCES—OTHER CONVEYS.

When a power, coupled with a trust is given to two or more persons to be executed by them jointly, and one renounces, the other or others may execute the power as if originally given only to them, that the trust may not fail nor suffer delay.

A. by will devised and bequeathed his estate to B. and C. in trust, to sell, to invest the proceeds, and to use the income for his daughters during their lives with remainder over. In case of the death, refusal, or inability of one of the trustees, the testator desired the other to fill the vacancy. One of the trustees refused the trust; the other did not make an appointment in his stead, but alone made sales and gave deeds of the devised realty.

Held, that the sales and deeds so made and given by the one trustee were valid; that such sales and deeds were valid whether the estate devised to the trustees was a joint tenancy or a tenancy in common.*

Case stated for an opinion of the court under Pub. Stat. R. I., chap. 192, § 23, as follows:

"William E. Greene being an inhabitant of North Providence, in said county, died September 19, 1851, leaving a last will and testament, of which the following is a true copy:

"I, William E. Greene, of the town of North Providence, in the county of Providence and State of Rhode Island, being sick in body but of a sound and disposing mind and memory, do make and publish this my last will and testament as follows:

FIRST. I desire that all my just debts shall be paid my executor as soon as convenient after my decease.

"*SECOND*. I give, devise and bequeath all the rest and residue and remainder of my estate, both real and personal, to Richard J. Arnold and Zachariah Allen, Esquires, of the city of Providence, their heirs, executors, administrators and assigns forever, in trust for the uses and purposes following, to-wit:

"My will is that the said trustees shall, whenever and as soon as a sale can be judiciously made in their discretion, sell and dispose of the real estate belonging to me in the town of North Providence aforesaid, and being the farm whereon I now reside, and being the same estate purchased by me from Richard J. Arnold and Tristram Burgess, Esquires (excepting therefrom the burying place where my late wife lies buried, and containing about one-quarter of an acre bounding on the Chalkstone road) and that they invest the proceeds thereof in the stock of banks in the State of Rhode Island, or in notes secured by mortgages on real estate. I further direct my said trustees to sell and dispose of all other property belonging to me and not disposed of by this will, as soon as practicable after my decease, and invest the proceeds thereof in the manner prescribed with reference to the proceeds of my real estate, and the income arising from all my property. I desire the said trustees to collect and receive and appropriate the same as follows:

"*First*. To the support and education of my two younger daughters, Sarah L. G. Greene and Martha Ann Greene, until they shall severally arrive at the age of seventeen years or shall be married; the amount to be expended for each to be at the discretion of the said trustees.

"*Second*. I desire that the balance of the income as aforesaid shall be paid over by my said trustees to my two elder daughters, Nancy G. and Abby F. Greene, in such sums as my said trustees shall consider expedient until my two younger daughters shall each have arrived at the age of seventeen years, or have been married.

"*Thirdly*. After my daughters shall have all reached the age of seventeen years, or have been married, I desire that my said trustees shall divide the income of my said property as aforesaid equally among all my children, or in case of the death of any of my children leaving children, I desire that the share of the deceased child shall be equally divided among her children.

"After the death of all my daughters, I desire my said trustees to transfer to the legal representatives of my said daughters in the proportion to which they

* See 20 Eng. Rep. 690, note. — Ed.

would be severally entitled by law, all my property and estate to be held and enjoyed by them forever.

"I give and bequeath to my eldest daughter, Nancy G. Greene, the large looking-glass hanging in the front room down stairs and my writing desk with drawers, for her own use forever.

"I give and bequeath to my youngest daughter, Martha Ann Greene, six silver teaspoons marked with the name of "Charlotte Bradley," for her own use.

"I give and bequeath to my three eldest daughters the three large silver spoons marked A. G. to each one for their own use.

"I further desire my said trustees to change the investment of my said property from time to time, as they may judge expedient, but not to sell any of the bank stock now possessed by me unless they judge it expedient so to do. In case of the death, resignation, refusal or inability to act of either of said trustees, I desire the vacancy to be filled by the other trustee; and in case of the death, resignation, refusal or inability to act on the part of both of said trustees, I desire the court of probate of the town of North Providence, for the time being, to fill said vacancy.

"I hereby constitute and appoint the aforesaid Richard J. Arnold and Zachariah Allen, Esquires, to be executors of this my last will and testament.

"In witness whereof, I have hereunto set my hand and seal, this twelfth day of September, in the year of our Lord one thousand eight hundred and fifty-one (A. D. 1851), hereby revoking all other wills by me made.

WILLIAM E. GREENE.

"Signed and sealed and published and declared
by the said William E. Greene to be his last will and
testament in our presence and in the presence of each
other at his request; witnessed by us in his presence.

FRANCIS E. HOPPIN,

PHEBE A. WEAVER,

EDWIN H. WOOD.

"The said will was duly admitted to probate in said North Providence on the eleventh day of October, A. D. 1851. The said William E. Greene at his decease was seized and possessed in fee-simple of a tract of land on which said testator resided, situate on the northerly side of Chalkstone avenue in said Providence, then in said town of North Providence, containing about thirteen acres, which by means conveyances under the deed from Richard J. Arnold, executor, herein-after mentioned, is now owned by William M. Bailey, Jr., trustee of Harriet B. Bailey, wife of William M. Bailey, and by Thomas Brown, as claimed by them. Although Richard J. Arnold and Zachariah Allen were, by said will, named as executors and trustees thereunder, the said Richard J. Arnold alone accepted the trust as executor of said will, and qualified as such and alone accepted the trusts as trustee thereunder. He did not obtain any license from the court of probate, North Providence, to sell the parcel of real estate in question, but did convey said tract of about thirteen acres to said William M. Bailey by a deed of which the following is a true copy.

"PROVIDENCE, September 12th, 1852.

"To all persons to whom these presents shall come, I, Richard J. Arnold, of the city and county of Providence and State of Rhode Island, acting executor of the last will and testament of William E. Greene, late of the town of North Providence in said county, send greeting:

"Whereas the said William E. Greene, in order to enable his executors fully to carry out his intentions did in and by his said last will and testament, authorize and empower his said executors, at such time as they should deem proper, to make sale of the real estate of him, the said William E. Greene, situate in said town of North Providence: Now, therefore, Know ye, that by virtue of the authority to me given by the said William E. Greene, in and by his said last will and testament, I, the said R. J. Arnold, acting executor as aforesaid, in consideration of the sum of seventeen hundred and thirty dollars, to me in hand paid

by William M. Bailey of North Providence, the receipt whereof is hereby acknowledged, have given, granted, bargained, sold and conveyed, and by these presents do give, grant, bargain, sell and convey unto the said William M. Bailey, his heirs and assigns, the following described parcel of real estate which was the property of the said William E. Greene, situated in said town of North Providence, and bounded and described as follows: Bounded on the south by Chalkstone road; on the east by Farm No. 1, sold to the Owens, the division line being the middle of the road that divides the two farms laid down on said plat; on the north and north-west by Farm No. 3, also sold to the Owens this day; and on the west by the Brown farm, so called. The road mentioned above as dividing the two farms, Nos. 1 and 2, is thirty-three feet wide, and is to be owned in common by the proprietors of all the farms on said Greene plat, and by them to be maintained. The farm now sold said Bailey is Farm No. 3, on the plat of the estate made by Cushing & Farnum in 1852, under the direction of the said executors, and contains thirteen acres 60-100, more or less, with all the improvements thereon standing. To have and to hold the aforegranted premises to him the said Bailey, his heirs and assigns, to their use, benefit and behoof forever. And I, the said Richard J. Arnold, do hereby covenant to and with the said Bailey, his heirs and assigns, that I am lawfully the executor of the last will and testament of the said William E. Greene; and that I have not made or suffered any incumbrance on the hereby granted premises since my appointment as executor as aforesaid; and that I have acted in all respects in making this conveyance in pursuance of the authority granted to me in and by the said last will and testament of the said William E. Greene.

"In testimony whereof I have hereunto set my hand and seal this 12th day of [L. s.] September, A. D., 1852.

R. J. ARNOLD, *Executor.*

Signed, sealed and delivered in presence of

R. J. ARNOLD, JR.
A. S. GALLUP.

"PROVIDENCE, Sc. In the city of Providence, this 28th day of September, A. D. 1852, then personally appeared Richard J. Arnold and acknowledged the foregoing instrument, by him signed in his capacity as executor of William E. Greene, to be his free act and deed in his said capacity. Before me,

T. A. JENCKES,

Justice of the Peace."

"The said Zachariah Allen did not accept the trust as trustee under said will nor did he exercise any power nor do any act thereunder; that on the 27th day of June, A. D. 1868, he also made affidavit that he always refused to act as trustee under said will, which affidavit is recorded in the probate records of said North Providence, in volume 12 at page 31, and that said Arnold did not appoint any trustee in the stead of said Allen prior to making said deed.

"It is further agreed that the proceeds of said sale were duly applied under the provisions of said will, and that the parties interested thereunder have duly received the income thereof, and that no objection has been raised by any party interested under said will as to said sale and deed, until these questions raised by Goff as intending purchaser of said parcel of land from Bailey, Jun., trustee, and Brown.

"And these petitioners differing as to the true construction of said will and of the power of said Richard J. Arnold to convey the said estate either as executor or as sole trustee, the said Goff claiming that said executor had no power to sell and convey the same as executor of said will; and that if said Richard J. Arnold did by virtue of said will convey said estate he had no power so to do, inasmuch as the discretionary power to sell said estate given to said Arnold and Allen by said will did not pass to said Arnold upon said Allen refusing to act as trustee under said will, and could not be exercised by said Arnold alone.

"And said William M. Bailey, Jr., trustee as aforesaid, William M. and Harriet B. Bailey and said Thomas Brown claim that taking all the parts of said deed together, considered with reference to said will and in view of the declaration of

Zachariah Allen, and especially after this lapse of time, that their title to said parcel so sold as aforesaid is saleable, and such a title as a court of equity, on a bill for specific performance, would compel a purchaser to take.

"The said parties, therefore, request the opinion of the honorable court as to:

"*First.* Whether the aforesaid deed from Richard J. Arnold, executor, to William M. Bailey, did convey a good title to the land described therein.

"*Secondly.* Whether said title of said Bailey, Jr., trustee, and Brown, is a saleable title in view of the circumstances hereinbefore set forth.

W. M. BAILEY, JR., Trustee.

W. M. BAILEY,
HARRIET B. BAILEY,
THOMAS BROWN,
DAVID F. GOFF."

The Public Laws of Rhode Island, Digest of 1844, page 197, § 16, provide, see, also, Pub. Stat. R. I., chap. 172, § 1:

"All gifts, grants, feoffments, devises and other conveyances of any lands, tenements and hereditaments which shall be made to two or more persons, whether they be husband and wife or otherwise, and whether for years, for life, in tail or in fee, shall be taken, deemed and adjudged to be estates in common, and not in joint tenancy, unless it is or shall be therein expressly said that the grantees, feoffees or devisees shall have or hold the same lands, tenements or hereditaments as joint tenants or in joint tenancy, or to them and the survivors or survivor of them, or unless other words be therein used clearly and manifestly showing it to be the intention of the parties to such gifts, grants, feoffments, devises or other conveyances, that such lands, tenements and hereditaments shall vest and be holden as joint estates, and not as estates in common."

Joseph C. Ely, for Baileys and Brown. *Joseph Spink*, for Goff.

DURFEE, C. J. We do not find it necessary to decide whether our statute extends to devises and conveyances in trust or not, for assuming that it does and that the devise to Arnold and Allen must be construed as a devise to them as tenants in common, and that consequently Arnold acquired title to only an undivided half of the real estate devised, we are, nevertheless, of the opinion that Arnold, on disclaimer by Allen, had power to sell the entire estate, and that his deed to Bailey, therefore, vested in Bailey the entire estate in land described in it. The reason which has led us to this conclusion is that the power to sell which is given by the will to Arnold and Allen was not a mere power to be exercised, or not at their pleasure or discretion, but a positive direction, a duty imposed on them to convert the land into money for use and investment in a manner which is plainly declared for the benefit of the *cestuis que trustent*, a duty so distinct, so obligatory, so imperative, that if it had been neglected the *cestuis que trustent* could have resorted to this court in equity to enforce its execution. In other words, the power is of that class of powers which are denominated powers coupled with a trust; and we think that where such a power is given to two or more to be executed by them jointly, if one renounces, the other or others will take the power as if it were originally given only to them, to the end that the trust may not fail of execution, or suffer detriment or delay. *Houell v. Barnes*, Oro. Car. 382; *Lessee of Zebach v. Smith*, 8 Binn. 69; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Franklin v. Osgood*, 14 Johns. 527; *Jackson dem. Hunt v. Ferris*, 15 id. 846; *Peter v. Beckerly*, 10 Pet. 532; *Putnam Free School v. Fisher*, 30 Me. 523. A review of some of these cases will set the doctrine in a clearer light.

Houell v. Barnes was a question out of chancery propounded to the common-law judges. "The case was," says the report, "one Francis Barnes, seized of land in fee, deviseth it to his wife for her life, and afterward orders the same to be sold by his executors hereunder named, and the money thereof coming to be divided amongst his nephews; and of the said will made William Clerk and Robert Cheffy his executors. William Clerk dies; the wife is yet alive. Two questions were made. *First.* Whether the said William Clerk and Robert Cheffy had an interest by this devise or but an authority. *Secondly.* Whether the surviving executor hath any authority to sell." The judges all resolved "that they

have not any interest, but only an authority, and that the surviving executor, notwithstanding the death of his companion, may sell." And so the judges certified their opinions. The questions were answered without reasons, but if the judges had given their reasons they probably would have said that the power survived, not because it was coupled with a trust, but because it was official, not merely personal, and, therefore, followed the office to the surviving executor, being essential to the performance of a duty imposed upon the executors as such for the purpose of carrying the will into effect. The meaning, however, would have been essentially the same as if they had used the language of the chancery courts, and said that the power survived because it was a power coupled with a trust. The law is quoted in *Osgood v. Franklin*, 2 Johns. Ch. 1, in support of the doctrine that a power given to two or more goes to the survivor when coupled with a trust. See, also, *Lessee of Zebach v. Smith*, which is very similar to *Houell v. Barnes*.

In *Osgood v. Franklin*, 2 Johns. Ch. 1, the power was given by a will which appointed the wife of the testator and his three brothers executors. The power was given in these words, to-wit: "I give to my executors that may act, and to the major part of them, their heirs or executors, full power to sell any or all my real estate not already devised." The will gave the residuary estate to eight persons, four of whom were the four persons appointed executors, one-eighth to each. This devise was coupled with the following directions, to-wit: "I order that the money or effects be distributed and divided from time to time, as it can be raised from my debts and estate by my executors, hereinafter named." One of the brothers declined to act; the other two accepted the appointment and acted until they died. After their death the widow qualified. The principal question in the case was whether she had power under the will to sell the real estate. Chancellor KENT decided that the executors were charged with a trust, relative to the estate, depending on the power to sell, and that the power, therefore, survived. "The intention of the testator," he remarked, "is much regarded in the construction of these powers, and they are construed with greater or less latitude in reference to that intent." The case was carried to the court of errors and there affirmed, the court holding that where the provisions of a will evince a design in the testator that, at all events, the lands are to be sold, in order to satisfy the whole intent of the will, then the power survives.

In *Peter v. Beverly*, 10 Pet. 532, David Peter left a will in which he appointed his wife, his brother, George Peter, and his wife's brother, Leonard H. Johns, executors, and provided that portions of his real estate should be sold for the payment of his debts. All the executors qualified. The widow and the brother entered upon the execution of the will and subsequently died, leaving debts still unpaid. The question was, whether under the will George Peter, as surviving executor, could sell the real estate for the payment of the debts. The court decided that he could, the power being coupled with a trust. The court say: "When power is given to executors to be executed in their official capacity, and there are no words in the will warranting the conclusion that the testator intended, for safety or for some other object, a joint execution of the power, as the office survives the power ought also to be construed as surviving; and courts of equity will lend their aid to uphold the power for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from an extinction of the power; and where there is a trust charged upon the executors in the direction given them in the disposition of the proceeds, it is the settled doctrine of courts of chancery that the trust does not become extinct by the death of one of the trustees."

In the cases above cited the power was given to the donees as executors. In the case at bar the power was given to Arnold and Allen as trustees. The difference is not material; for in equity executors are regarded as trustees in so far as they are invested with dominion over the testate estate for the benefit of others, and independently of any statute, the reasons for the continuance or survival of the power are as strong in favor of trustees as of executors. It will be observed that the courts in the cases cited build largely upon the presumed intent of the testator, and argue that the testator must have intended to have the power continue to exist without interruption, so long as any or either of the donees of the

power continued to exist to exercise it, because it was through the exercise of it that he contemplated having his will carried into effect. The argument from presumed intent is very cogent in the case at bar. Evidently the testator here meant to have the real estate sold at all events and to have the proceeds of the sale invested so as to yield an income to be applied by the trustees as directed for the benefit of his daughters. The power is given to the trustees jointly, even if the estate, under our statute, goes to them as tenants in common. And see *Randall v. Phillips*, 8 Mason, 378. It is true the testator expresses his desire in case of the death, resignation, refusal or inability to act of either of the trustees, that the vacancy shall be filled by the other trustee; but the expression is not in our opinion equivalent to an absolute command, and we think, therefore, that it does not warrant any inference that the testator did not intend to have the power go to the sole accepting or surviving trustee, to be executed by him alone, if he should not think it expedient to appoint an associate. It will be noticed, moreover, that the will makes no provision for vesting in the new trustee, if appointed, his proper portion of the estate, and therefore, if it be supposed that the power did not go to the sole accepting trustee because the entire legal estate did not go to him, that is a defect which his appointment of a new trustee could not remedy. Clearly such a construction would defeat the intention of the testator. Under the will, the *cestuis que trustent* were entitled to the benefit of the provision made for them immediately and without intermission. If, therefore, the acting trustee did not appoint a new trustee and could not execute the power without one, they would have had to come to this court to supply the execution. It seems to us that the better view is that the power survived because it was coupled with a trust.

We declare it to be our opinion that the deed of Richard J. Arnold to William M. Bailey did convey to said Bailey a good title to the land described therein.

SUPREME COURT OF NEW HAMPSHIRE.

STATE v. MEGIN.

July 31, 1885.

OFFICE AND OFFICER — QUO WARRANTO — TITLE.

In *quo warranto* to determine the right to an elective office the record of the declared election is not conclusive.*

A person declared elected and inducted into office is a *de facto* officer, though not lawfully elected.†

Information, in the nature of a *quo warranto*, filed by the attorney-general at the relation of James H. Libbey to determine the right of the defendant to the office of prudential committee of School District No. 2, in Hooksett. Facts found by a referee.

The record of the school-meeting held March 7, 1885, showed that the defendant had a plurality of votes and was elected. Upon evidence tending to show how individuals voted, received subject to the defendant's exception, and upon other evidence, it was found that the relator had a plurality of votes and was elected. The defendant assumed the duties of the office, and about April 1, hired a competent teacher for the year at a stipulated salary. The relator and the defendant are equally suitable to fill the office.

Chase & Streeter, for relator. *Osgood & Prescott*, for defendant.

CARPENTER, J. Upon the question which of the parties received a plurality of votes for the office, the record of the declared vote is, in this suit, merely evidence. If the record of the declaration of the moderator in the case of town and school district officers and of the canvassing board appointed by law in the case of other officers were conclusive, this proceeding could never be maintained to test the

* 55 N. Y. 525.

† 28 Eng. Rep. 540.

right to an elective office. It cannot be instituted until possession of the office is taken, *Osgood v. Jones*, 60 N. H. 232, and no one can take possession until his election is declared. The exception to the reception of evidence outside the record must be overruled. *People v. Vail*, 20 Wend. 12.

Whether there may be cases in which the law does not require an information to be issued or the writ to be granted, although it appears that the defendant is not entitled to the office, as where a determination of the proceedings cannot be reached until after the expiration of the term of office, or where greater public mischief would be done by granting than by refusing the writ *People v. Sweeting*, 2 Johns. 185; *People v. Loomis*, 8 Wend. 226; *Commonwealth v. Athearn*, 2 Mass. 285; *Howard v. Gage*, 6 id. 432; *State v. Jacobs*, 17 Ohio, 143; *State v. Schnierle*, 5 Rich. (S. C.) 299; *King v. Parry*, 6 Ad. & El. 810; *State v. Mead*, 56 Vt. 353; *State v. Tolan*, 38 N. J. L. 195; *Commonwealth v. Jones*, 12 Penn. St. 365, is a question not necessary to be considered. No sufficient reason here appears why the defendant should not be removed. He was not, and the relator was, lawfully elected; a part only of the term of office has expired, and no public mischief can result from the removal. By virtue of his declared election and induction into the office, the defendant became, and until judgment rendered, will remain a *de facto* officer. His official acts are valid. His contract with the teacher, if made in good faith by both parties, will have the same force and validity as if the judgment in this case were for the defendant. The prudential committee is charged with various duties besides the employment of teachers—Gen. Laws, chap. 86, § 27; chap. 87, § 14; chap. 88, § 15; chap. 91, §§ 1 and 2—all of which may as well be performed, during the remainder of the term, by the relator as by the defendant, both being equally competent. No more inconvenience can result to the district from granting the information, than is met in the ordinary case of the death, resignation, or removal of the committee, and the election or appointment of another.

Information granted.

All concurred.

HARRINGTON v. WADSWORTH.

July 31, 1885.

SHERIFF—FAILURE TO MAKE ARREST—EVIDENCE.

In an action against a sheriff for neglecting to arrest, upon execution, a surrendering debtor, evidence of the latter's intention to take the poor debtor's oath may properly be excluded.

JUDGMENT—EFFECT AS TO THIRD PERSONS.

A judgment is evidence against third persons of the fact of its rendition, but not of the facts which were in issue between the parties to it.

Case, against the defendant, a deputy sheriff, for neglecting to arrest, on an execution in favor of the plaintiff, one T., upon his surrender at the jail.

The plaintiff recovered judgment against T. in an action of trover. The judgment record, admitted in evidence, showed that the property converted by T. consisted, to a considerable extent, of promissory notes. The defendant claimed that the plaintiff suffered no damage by the failure to arrest T., and introduced evidence tending to show that T. had no property, and that the converted notes were of no value. The court permitted the plaintiff's counsel to comment, in his argument to the jury, upon the judgment as tending to prove property in the hands of T. at the date of the conversion and as fixing the value of the notes at that time, and the defendant excepted.

As bearing upon the question of damages, the defendant offered to show that T. proposed, in case he was arrested, to apply to take the poor debtor's oath, and that his counsel prepared an application for that purpose. The evidence was excluded and the defendant excepted.

Burns and Briggs & Huse, for plaintiff. *Copeland & Jones and Burnham & Brown*, for defendant.

CARPENTER, J. If T. was possessed of no attachable property, and had been guilty of no fraud, he was entitled to take the poor debtor's oath — Gen. Laws, chap. 241, §§ 86 and 87—and the damages caused to the plaintiff by the defendant's neglect of duty were merely nominal. It is difficult to see what bearing T.'s intention to apply, or even his actual application, to take the oath could have upon the question whether he was entitled to take it; but if the evidence might properly have been received, it was so remote that no exception lies to its exclusion. *State v. Railroad*, 58 N. H. 410.

The plaintiff's loss by reason of the defendant's failure to perform his duty could not exceed the amount of her judgment against T., of which the record is the only competent evidence. The defendant being neither a party nor privy to the judgment, it is evidence against him of the fact of its rendition and of the amount for which it was rendered—1 Greenl. Ev., § 527—but not of the facts which were in issue between the parties to it. Between these parties it is no more evidence of the conversion or possession of property by T., or of the value of any property by him converted, than would be a like judgment against him to which both the plaintiff and defendant were strangers. Permitting the plaintiff's counsel to comment to the jury upon the judgment as tending to show property in the hands of T., and as fixing the value of the notes, was equivalent to a ruling that the judgment was competent evidence of those facts and was erroneous.

Exceptions sustained.

ALLEN, J., did not sit; the others concurred.

CLARK v. SLAYTON.

July 31, 1885.

A suit in equity is not commenced until the bill is filed.

Bill in equity, to recover money verbally promised in support of a base-ball club. The defendant in his answer alleges that there is no equity in the bill, that the plaintiff has an adequate remedy at law, and sets up the statute of limitations.

In 1877 the plaintiff was the manager of a base-ball club in Manchester. He, the defendant, and three others verbally agreed to pay each one-sixth part of the excess of the expenses over the receipts of the club. The plaintiff as manager advanced the expenses and at the end of the season, in the fall of 1877, demanded payment of the defendant of his share of the excess over the receipts, which the defendant refused to pay. About the 1st of June, 1883, the plaintiff drew the bill and sent it to the clerk, who notified him that by the rule it could not be filed and entered until the entry fee was paid. February 12, 1884, the necessary fees having been provided, the bill was filed and an order of notice issued, which was served upon the defendant February 28, 1884. The court dismissed the bill and plaintiff excepted.

Fellows, for plaintiff. *Burnham & Brown*, for defendant.

CARPENTER, J. An action at law is in general regarded as commenced, so as to avoid the statute of limitations, when the writ is completed with the purpose of making immediate service. But where there is no intention to have it served, or it cannot be served, until some further act is done, the action is not deemed to be commenced until such act is performed. *Robinson v. Burlleigh*, 5 N. H. 225; *Graves v. Ticknor*, 6 id. 537; *Hardy v. Corlis*, 21 id. 356; *Mason v. Cheney*, 47 id. 24; *Brewster v. Brewster*, 52 id. 60. The same rule is applicable to suits in equity. *Leach v. Noyes*, 45 N. H. 864. A bill in equity must be filed in the clerk's office and an order of notice obtained before it can be served upon the defendant. Rules 11 and 13. The date of the filing is, therefore, the earliest time which can be taken as the commencement of the suit.

The plaintiff's action is barred by the statute of limitations. This result makes it unnecessary to consider other questions raised by the case.

Exceptions overruled.

ALLEN, J., did not sit; the others concurred.

WELCH v. ADAMS.

July 31, 1885.

WILL — EXECUTION OF — PRESENCE OF WITNESSES.

It is not necessary to the legal execution of a will that it be signed or sealed in the presence of the subscribing witnesses, nor that the witnesses sign in the presence of each other. (*Note, p. 548.*)

APPEAL — PROBATE OF WILL — APPELLANT AS WITNESS.

On the trial of an appeal from the probate of a will the appellant cannot be a witness unless the executor testifies.

Appeal, from a decree of the probate court allowing the will of Isaac Adams. The only issue joined was whether the testator was of sound and disposing mind. Verdict for the appellees, which the appellant moved to set aside. Neither of the appellees testified.

The appellant by the exercise of discretion under the statute was permitted to testify generally, but, subject to exception, was excluded as to conversations and matters occurring between himself and the deceased, and as to which the latter, if alive, could have testified, it not appearing to the court that injustice was done thereby, but quite the contrary. Neither of the executors testified, and no devisee or legatee was called by them as a witness.

The appellant requested the court to instruct the jury as follows:

1. "There is no legal definition, or test of insanity, or soundness of mind, or of the mental capacity to make a valid will. Soundness of mind, such as will enable a person to make a will, has reference to the business to be transacted, namely, the disposition of property by will; his mind must have been sound with reference to whatever is involved in this transaction. If it shall appear that he is able to understand the nature and situation of his property, and his relations to those persons in whom and those things in which he has been mostly interested, the nature of the act he was doing, and the relations in which he stood to the natural objects of his bounty, this condition of his mind is evidence to be considered upon the question of his mental capacity to make a will; but such evidence furnishes no legal test of his capacity to make a will — it is simply evidence to be weighed in connection with all the other testimony in the case as to the testator's soundness or unsoundness of mind. The court does not instruct you as to what in point of law is mental capacity to make a will."

2. "The mind of the testator must have been free from any condition which was the effect of disease, and which would or might lead him to dispose of his property otherwise than he would have done but for the effect of such mental disease. All the testimony which you have heard concerning his domestic relations and his feelings of like or dislike toward the members of his family; all the testimony as to what he said and what he did; all the testimony concerning his disposition and temperament, and concerning any change in these respects between the earlier and later portions of his life, concerning his troubles, griefs and disappointments, concerning his manners and habits, and any change in them between the earlier and later portions of his life; all the eccentricities and peculiarities, if you find he had any, should be considered so far as they may aid you in ascertaining the condition of his mind at the date of the will."

3. "All infirmities, though not necessarily a disqualification, awaken caution to see if mental capacity is impaired or gone."

4. "Partial insanity or unsoundness of mind will not alone always and inevitably destroy the will, but whenever the insanity, partial or general, or mental disease or derangement, modifies the disposition of the testator in the will, enters into the will and forms a part of it, it will destroy the will, even though some faculties of the mind are sound."

"If you find from all the evidence the existence and effect in the will of unsoundness of mind, general or partial, such infirmity destroys the will; while it does not require universal perfection and soundness of mind to make a will, neither does it require absolute unsoundness of mind to destroy a will. If mental unsound-

ness or disease lurks in the will, has produced its effects there, changed or modified the disposition of the property, it is not a valid will."

The specific instructions asked for were not given, and the appellant excepted. Instructions covering the ground of the requests were given, to which no exception was taken. The other exceptions sufficiently appear in the opinion.

Wm. L. Foster, Geo. B. French and Paul Wentworth, for appellant. *E. A. Hubbard, Copeland & Edgerly and Thomas J. Whipple*, for executors.

SMITH, J. 1. The statute does not require a will to be signed or sealed in the presence of the subscribing witnesses, nor that they sign in the presence of each other — Gen. Laws, chap. 193, § 6 — although this is usual and generally advisable. The testator may have sufficient reasons for not disclosing the fact that he has made his will. *Swinburne on Wills*, 27. His acknowledgment that the seal and signature are his, with a request to the witnesses to attest the instrument, is sufficient. *Osborn v. Cook*, 11 Cush. 532. The fact that the will in this case was signed, sealed and witnessed as such in the presence of the testator and subscribing witnesses was evidence from which the jury might find that the will was attested by the subscribing witnesses at the request of the testator.

2. Prior to the passage of the act of 1857 — chap. 1952 — the contestant of a will was excluded from testifying on the trial of an appeal by reason of his interest. The general rule of the common law then in force here was, that a party to the record in a suit, and persons directly interested in the result of a suit, could not testify. The rule was founded partly on the general expediency of avoiding the multiplication of temptations to perjury. 1 Greenl. Ev., § 329. Our statute, first enacted in 1859, reads thus: "No person shall be excused or excluded from testifying or giving his deposition in any civil cause by reason of his interest therein as a party or otherwise." Gen. Laws, chap. 228, § 18. "Neither party shall testify in a cause where the adverse party is an executor or administrator, or an insane person, unless the said executor, administrator, or the guardian of the insane person elects to testify, except as provided in the following section." "When it clearly appears to the court that injustice may be done without the testimony of the party in such case, he may be allowed to testify; and the ruling of the court admitting or rejecting his testimony may be accepted to and revised." Gen. Laws, chap. 228, §§ 16, 17. In *Moore v. Taylor*, 44 N. H. 370, 375, we said: "The reason why the exception was made that where one party is an executor or administrator, and did not elect to testify, the other party should not testify, was to place the parties upon an equal footing, and not to allow the living party to a trade or transaction to be a witness to it when the other party to the same transaction, being dead, cannot testify." And in *Chandler v. Davis*, 47 N. H. 462, 464, decided in 1867, after the enactment of the amendment which now constitutes section 17, we said: "Where the deceased had personal knowledge of the matter in dispute, and might, if living, be a witness, it would be unequal and unjust to allow the survivor to testify, inasmuch as the other party, being dead, could not contradict or explain the evidence." Also (on p. 465): "But as a general rule when the deceased had knowledge of the facts and might, if living, be a witness, it would be unequal and unfair to allow the survivor to give his uncontradicted and unexplained account of the transaction.

But we think that for ordinary cases, the safe guide and the decisive test is found in the inquiry, whether the deceased, if alive, could testify to the same matters." These observations have been approved in numerous subsequent cases. *Harvey v. Hilliard*, 47 N. H. 551; *Brown v. Brown*, 48 id. 90; *True v. Shepard*, 51 id. 501; *Stearns v. Wright*, id. 600, 611; *Fosgate v. Thompson*, 54 id. 455; *Hoit v. Russell*, 56 id. 559; *Page v. Whidden*, 59 id. 507, 511; *Bailey v. Harvey*, 60 id. 152; *Burns v. Madigan*, id. 197; *Cochran v. Langmaid*, id. 571; *English v. Porter*, 61 id. 206. In these cases the matter in dispute or the transaction about which the deceased, if living, might testify, was in relation to some contract entered into, or tort, done or suffered by the deceased in his lifetime, the cause of action accruing in the life-time of the deceased party. In the action prosecuted after his decease the executor or administrator was a party in his representative capacity. But we think the reason which forbids the surviv-

ing party to testify in that class of cases, unless the executor or administrator elects to testify, is equally applicable in a trial of an appeal upon the probate of a will. The executor represents all the devisees and legatees, and prosecutes or defends the appeal in their interest. In a certain sense also he may be said to represent the testator, who can no longer speak for himself. The right of a person to dispose of his estate at his pleasure is destroyed or endangered unless some one shall act as his representative when it is offered for probate. It is the duty of the executor to cause the will to be proved, or file it in the probate office with his refusal in writing to accept the trust. Gen. Laws, chap. 194, § 3. He has sufficient interest in the estate of the testator to give him a right under the statute to claim and prosecute an appeal from a decree of the probate court refusing to admit the will to probate. *Shirley v. Healds*, 34 N. H. 407; *Richardson v. Martin*, 55 id. 45. The probate of a will does not give him any interest or title either to things in action or possession, for he has the whole title and interest by the will and not by the probate. *Henslow's Case*, 9 Coke, 38, a; *Webster v. Spencer*, 3 B. & Ald. 363. The property in the goods is vested in him before probate. Comyn's Dig., Executor, B. 9; Bacon's Abr., Executors, E. 14. "Before probate of the will, not only is the person named as executor seized of all the personal estate of the deceased, as trustees of the legatees and others, but he is the representative of the whole estate disposed of by the will. He is not only the sole trustee for all persons having an interest under the will, but he is the only legal representative of the estate of the deceased. As such, it is his duty to cause the will to be proved, and he is aggrieved in his rights and in his property by any decree which divests him of his title in the estate of the deceased under the will." FOWLER, J., in *Shirley v. Healds*, *supra*, 412; *Wiggin v. Sweett*, 6 Metc. 197.

The testator must be represented in court by some one, and the executor is the person appointed by him to represent him in the execution of his will. He is necessarily made a party in the probate of the will, as executor. Unless he is regarded as executor for the purpose of establishing the will, he is not a party, and has no right to appear. The same injustice that the statute seeks to prevent in other actions in which the executor is a party, by excluding the surviving party from testifying, will often be done in the trial in an appeal upon the probate of a will if the contestant can testify to matters about which the testator if living might testify, and perhaps contradict or explain the testimony of the contestant. A literal construction of the statute includes this case. "Neither party shall testify in a cause when the adverse party is an executor . . . unless the executor . . . elects to testify," etc. The contestant is a party, the executors are the other party, and the appeal is a cause. The spirit and reason of the statute being to prevent injustice and exclude the contestant because the testator's lips are closed in death. Even in matters of accounting, at common law, the admission of a party was not a matter of right. It was permitted in no case, where, from the position of the parties, an unfair advantage would be given by it to one party over the other. 3 Greenl. Ev., § 338; *Page v. Whidden*, 59 N. H. 507, 511.

Nash v. Reed, 46 Me. 168, decides that the heirs of a testator who contest the probate of his will are not excluded as witnesses, "as heirs of a deceased party," as being within the exception in the statute which provides that "no person shall be excused or excluded from being a witness in any civil suit or proceeding at law, or in equity (including special proceedings before courts of probate), by reason of his interest in the event thereof as party or otherwise, except at the time of trial, the party prosecuting or the party defending, or any one of them, is an executor or an administrator, or made a party as heir of a deceased party." Me. Rev. Stat., chap. 82, §§ 78, 83, 84.

Millay v. Wiley, 46 Me. 230, was an appeal from a decree of the probate court allowing the will of the testator. At the time of the appeal the executor was called by his counsel as a witness and was excluded. It was held that a person named in a will as executor is not "a party prosecuting or defending" within the meaning of the statute, so as to exclude him as a witness. The court said "he (Wiley) never has been executor at any time and never may be."

In *McKeen v. Frost*, 46 Me. 239, which was an appeal from a decree of the probate

court allowing a will, it was held that a person named as executor in a will is not really and legally such until the will is proved, and he has given bond, and in a contest as to its execution he is not within the exception of the statute. The court said "if the will should not be approved, he never becomes an executor."

In Rhode Island under a statute which provides that "when an original party to the contract or cause of action is dead, or when an executor or administrator is a party to the suit, the other party may be called as a witness by his opponent, but shall not be admitted to testify upon his own offer, or upon the call of his co-plaintiff or co-defendant, otherwise than now by law allowed, unless a nominal party merely" — R. I. Gen. Stat., chap. 203, § 83 — it has been held that a party appealing from a decree of a court of probate establishing a will and admitting it to probate is not disqualified from testifying upon his own offer. Among other reasons given for the decision is this, that the operation of the decree admitting the will to probate is suspended by the appeal except so far as it admits the executor on giving bond to collect, receive and take possession of the estate of the testator, and it is not, therefore, as an executor that the appellee is a party to an appeal, for he has no capacity as executor for any purpose except to collect, receive and take possession of the estate of the testator. *Hamilton v. Hamilton*, 10 R. I. 538.

The Massachusetts statute — Mass. Gen. Stat., chap. 131, § 14 — is materially different from ours, and the Missouri statute is said to be identical with that of Massachusetts. *Shailer v. Bumstead*, 99 Mass. 112, 130; and *Garvin v. Williams*, 50 Mo. 208, are not, therefore, in point.

In Georgia a legatee on probate of a nuncupative will which is *caveated* by the heirs at law is a competent witness in favor of the validity of the will. The term "other party to the contract," used in the statute, is held not to include an executor of a will. *Brown v. Carroll*, 36 Ga. 568; *Deupree v. Deupree*, 45 id. 415, 424.

In Pennsylvania, by the express terms of the statute, neither a party nor any person interested is excluded from testifying in this class of cases. *Bowen v. Gornanflo*, 73 Penn. St. 857; *Frew v. Clarke*, 80 id. 170, 179.

In Tennessee it has been held that a contest over a will is not a suit by or against an executor in such a sense as to bring the parties within the exception in the statute which provides that: "In actions or proceedings by or against executors, administrators or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other to any transaction with or statement by the testator, intestate or ward, unless called to testify by the opposite party." *Orr v. Cox*, 3 R. J. Lea (Tenn.), 617.

However much these cases and the reasoning of the opinions may conflict with the views we have expressed, the question can hardly be regarded as an open one in this State. In *Lord v. Lord*, 58 N. H. 7, this precise question, among others, was raised at the trial; but the law was regarded as so well settled that no mention was made of the point in the opinion or in the briefs on either side. In this case the will was admitted to probate in the probate court, and the appeal is by the contestant. The appeal does not vacate the decree of the probate court allowing the will, nor the decree appointing the appellees executors. The decree remains in force from the time it was made, unless reversed in this court. Gen. Laws, chap. 207, § 12. This provision of our statute may, perhaps, constitute a sufficient reason why, in construing our own statute as to the competency of the contestant of a will as a witness, we should not follow the decisions in other jurisdictions cited above. Our statute does not exclude a party when injustice would be done by the exclusion. He is not admitted as a matter of legal right. In this case it is found that injustice would be done by admitting the contestant to testify. In *Drew v. McDaniel, Adm'r*, 60 N. H. 480, the defendant was a nominal party. The defense was made by the plaintiff's brothers, one of whom claimed title to the mortgaged premises in question, and the other was a creditor of the intestate, and both of whom elected to testify. The plaintiff was rightly allowed to testify under certain restrictions, it clearly appearing that injustice might be done without her testimony. The statute was made elastic that exact justice might be done in every case, and under the circumstances of each case. There was no error in excluding the contestant from testifying as to conversations and

matters occurring between himself and the testator as to which the latter, if alive, could have testified.

3. For the same reason the appellant's testimony, in regard to copies of certain letters, was properly excluded. If the letters were in the hands of the plaintiffs, he might have called them to the witness stand and compelled their production, if competent. If they were in the hands of persons without the jurisdiction, their depositions might have been taken. The testator, if living, might deny that he wrote the letters of which the papers offered purported to be copies.

4. The objection to the appellant's testifying to the condition of certain real estate in Boston having been withdrawn during the trial, the exception to the exclusion of the evidence was thereby removed.

5. The answer of a witness to the question whether the appellant wrote the will of the testator's widow appears to have been wholly immaterial upon the issue tried, and as it does not appear that the jury was prejudiced by the evidence the verdict will not be set aside because the evidence was not ruled out.

6. Whether the testimony of Fitzsimmons was the statement of a fact or the expression of an opinion as to the sanity of the testator, it was admissible. *Hardy v. Merrill*, 56 N. H. 227.

7. The copy of the record in the Suffolk registry of deeds of a deed from the testator to the appellant, was admissible. *Homans v. Corning*, 60 N. H. 418; *For-saith v. Clark*, 21 id. 409, 422; *Harvey v. Mitchell*, 31 id. 575, 582; *Wendell v. Abbott*, 48 id. 68, 77. A document purporting to be a copy of a public registry of deeds, kept in another State, and purporting to be duly made and attested by the proper officer, is *prima facie* evidence that the person assuming to act as register was such in fact, and that the signature is genuine. For some purposes common convenience regards as sufficient such proof as would come from a registry of this jurisdiction.

8. No exceptions were taken to the instructions given, and it must be presumed they were satisfactory. They were correct and appear to have been appropriate under the circumstances of this case. The first request related to the extent of mental capacity required for the valid execution of a will. The instructions given upon this point were full, and it is no ground for exception that the instructions were not given in the language requested. *Clark v. Wood*, 34 N. H. 447. We have no occasion, therefore, to inquire whether the request was objectionable in any respect.

The second instruction requested was in itself correct, and was substantially given, though not in the language of the request.

The third request may as a general proposition be correct, but if given without explanation or qualification might be misleading. It was not limited to mental infirmities, and it is possible there may be mental infirmities that would not "awaken caution." Whether the infirmities in any given case are such as require caution on the part of the jury is not a question of law. But the request understood in the sense in which it was probably intended was covered by the general scope and tenor of the instructions given.

The fourth request was included, in substance, in the instructions given.

The exceptions are overruled and the decree of the probate court affirmed.

BLODGETT, J., did not sit; the others concurred.

NOTE.—See *Punctuated v. Ballou*, ante, 534; 4 Eng. Rep. 680; 32 id. 354; 46 Am. Rep. 464; 2 Am. Dec. 20, note; 36 id. 319; 38 N. J. Eq. 597; 1 Broom & Had. Com. (Wait's ed.) 778; 6 Alb. L. J. 176; affirming 40 How. Pr. 318.

The formal execution of a will may not be presumed, in opposition to positive testimony, merely upon the ground that the attestation clause is in due form. The attestation to the codicil to a will, presented for probate, was in due form, and beneath it were the signatures of the two witnesses, with their places of residence; one of them testified that he did not see the testatrix sign the codicil and did not think she acknowledged to him that she had signed it; that the signature beneath the attestation clause was his; that he did not know, but presumed the clause was there when he signed; that he signed in the presence of the testatrix and of the other witness at her request, and the other witness then signed in his presence; that he was a lawyer and knew it was not customary unless the instrument was a will to place the residence of a witness after his name. The other witness testified that one of the signatures following the attestation clause was hers; that she did not remember seeing the testatrix sign the paper; that the latter did not in the presence of witness acknowledge it to be a codicil to her will, and

witness did not remember her saying any thing about it. Witness further testified that she remembered signing and that the other witness was present and signed; that she signed at the request of the testatrix, who said: "I have a paper here I want you to sign," that she put her place of residence after her name, because the other witness told her it was necessary because she saw he had added his place of residence; that she knew the testatrix did not state it was a codicil, and that witness did not know it was, but supposed she knew she was signing as a witness. The testimony was given within a year after the alleged codicil was executed. *Held*, that the testimony was insufficient to authorize the admission of the codicil to probate. *Wooley v. Wooley*, 95 N. Y. 281.

Where the testimony of the witnesses to a will fails to prove any request by the testator to the witnesses to sign as such, but the attestation clause contains a recital of such request, such recital supplies the defect especially where the will was executed in the presence of an attorney, who signed as one of the witnesses, but was not called, being deceased. *Walsh v. Walsh*, 4 Redf. 165.

The mere lack of recollection of one subscribing witness as to material points does not impair the force of affirmative evidence as to the same points furnished by the other subscribing witness and the attestation clause.

The statute does not confine the proponent of a will to the testimony of the subscribing witnesses, nor compel him to examine them as to testator's testamentary capacity. *Whitfield v. Whitfield*, 19 Week. Dig. 386.

The fact that one of the subscribing witnesses fails to remember some of the facts declared by a regular attestation clause, is by no means conclusive against the due publication of a will. Such publication may be established on the evidence of one attesting witness in opposition to that of the other. *Johnston v. Hayfield*, 12 Week. Dig. 398; S. C., mem., 24 Hun, 582.

It is not essential to the due publication of a will, that the testator shall declare in express terms, in the presence of the subscribing witnesses, that the instrument is his last will; it is sufficient if he in some way makes known to them by acts or conduct, if not by words, that it is intended and understood by him to be his will.

Where, therefore, a testator subscribed the will in the presence of the witnesses, and by his conduct made known to them its nature, and requested their attestation, *held*, that there was a substantial compliance with the statutes, sufficient to entitle the will to probate. *Lane v. Lane*, 95 N. Y. 494.

In *Matter of Bogart's Will*, 20 Week. Dig. 141; affirming 67 How. Pr. 313, the will was in the handwriting of testator and contained the usual attestation clause. One of the witnesses testified that all the statutory requirements were complied with; the other testified that he signed at the request of testator, but did not know what the instrument was. *Held*, that the proof was sufficient to establish the will.

In *Conselyea v. Walker*, 4 Redf. 117, upon an application to probate the will of a decedent, it appeared that the same was in the handwriting of decedent; that he was familiar with the requisite formalities of execution, and that the witnesses did not subscribe in each other's presence. The witness, first signing, testified to facts constituting a due publication. According to the other, at the time when he was requested to sign, the name of decedent was in plain view at the end of the will, but the latter neither acknowledged the signature nor made a declaration of the testamentary character of the instrument; there was, however, an attestation clause, reciting such declaration. This witness appeared unworthy of credence. *Held*, that the testimony of the second witness was insufficient to overthrow the presumption arising from the circumstance, and that the proof was such as to justify the admission of the will to probate. The same presumption in respect to the observance of the prescribed formalities of execution of a last will, as one available under the English statute, may be indulged by the courts of this State.

In proceedings for the probate of the will of H., it appeared that the testator presented the will, which was written by himself, to J., who drew the attestation clause and signed it as a subscribing witness, as did also S. The latter testified that the testator, in answer to questions of J., stated that the instrument was his last will and testament, and thereupon, at his request, the two witnesses signed their names in his presence, and in the presence of each other, and that at that time it had been signed by the testator. J. testified that he did not recollect all that occurred, but that the testator came to him with a paper which he thought was the one in question, and desired him to witness his will, and in answer to questions put by the witness, he acknowledged it to be his last will and testament, and requested witness, and S. to sign, and both did so in the presence of the testator and of each other; that he could not swear the testator said that was his signature. *Held*, the evidence sufficiently established the due execution of the will to authorize its admission to probate, and this, although other witnesses who were present contradicted the testimony of the subscribing witnesses. In *Matter of Higgins' Will*, 94 N. Y. 564.

Where a testator exhibited his will, and his signature attached thereto, to two persons whom he requested to sign as subscribing witnesses, at the same time declaring the instrument to be his last will and testament, and the witnesses, in his presence, and with the intention of becoming attesting witnesses, signed their names beneath that of the testator, with the word "witnesses" opposite their names,—*Held*, that this was a sufficient execution and attestation of the will to authorize its admission to probate, although there was no attestation clause, and the residence of each witness was omitted. Also *held*, that there was a sufficient compliance with the statute where, as in the case of one of the witnesses, he had commenced to sign as a witness to the instrument without knowing it was a will, and before he completed his signature the testator made the necessary declaration and acknowledgment,

and, therefore, the witness completed his signature as an attesting witness. *Philips' Will*, 98 N. Y. 267.

Where the testator, after reading the will, states in the presence of the witnesses, "evidently I give all I possess to my mother," and the attestation clause, which recites that the testator declared to the witnesses that it was his testament, and the expression of his last wishes, is read to and by the testator, and he requests the witnesses to sign as such,—*Held* to be a sufficient publication of the will. *Von Hoffman v. Ward*, 4 Redf. 244.

Where the testatrix, a German, was able to speak broken English, and one of the subscribing witnesses testifies that he was unacquainted with German, that he asked the decedent in English whether the instrument was her last will, and she answered "Ja" in German, and that he had previously been requested by the decedent to become a witness to her will,—*Held* to be a sufficient request to sign as a witness, and a sufficient publication of the will.

It seems, that the subscription as a witness to the will by a person who is unable to understand the testator, or make himself understood by him, and to whom the declaration and request of the testator must be translated, is not a compliance with the statute. *Stein v. Wilinski*, 4 Redf. 441.

An imperfect or indistinct subscription of the testator's name may be regarded as his mark, and thus constitute a compliance with requirements of the statute. *Hartwell v. McMaster*, 4 Redf. 889.

A subscription to a will, after the attestation clause, is "at the end of the will," within the meaning of the statute. *Younger v. Duffie*, 94 N. Y. 535; S. C., 46 Am. Rep. 156.

In drawing an instrument presented for probate as a will, a printed blank consisting of four pages, was used. The formal commencement was printed on the first page, and the formal termination printed at the foot of the third page. The entire blank space was filled in, in writing, and apparently for want of room, a portion of a paragraph containing material provisions was carried over, and the paragraph finished at the top of the fourth page; the two portions were not however sought to be connected by means of a reference or any thing indicating their relation to each other. The name of the testator was written at the end of the printed form, and the names of the witnesses written below, under the formal attestation clause on the third page. *Held*, that this was not a subscription "at the end of the will," such as is required by the Revised Statutes (2 R. S. 63, § 40); that the parts of the will preceding the signatures could not be received, as so far as its execution was concerned, the will was valid or invalid as a whole, and that probate was properly denied. *Matter of O'Neill's Will*, 91 N. Y. 516.

If a testator is in a state of insensibility when his will is attested, the will is not duly executed according to the meaning of the statute of frauds, although he be corporally present. *Right v. Price*, 2 Doug. 241.

PEARSON v. NORTON.

July 31, 1885.

ELECTION—PRODUCTION OF BALLOTS—WHO ENTITLED TO A RECOUNT.

The act of June 14, 1881, relating to the production of packages of votes by the secretary of State, before the court or other proper authority, was not intended to give every body, or every citizen, or every voter of the county, an absolute right to a recount without due cause shown.

Petition presented to the court at the October trial term, 1884, as follows:

Respectfully represents John C. Pearson, of Boscawen, in said county of Merrimack, that on the first Tuesday of November, 1884, he was, and for a long time prior thereto had been, a resident of said Boscawen; that at the biennial election held on said Tuesday of November he was a candidate for the office of sheriff of said county of Merrimack, and as such received a large number of legal votes for said office; that he apprehends that errors have been made in counting the ballots cast for said office in the various towns throughout said county, and that he has made due request, in writing, to-wit, on the 8th day of December, 1884, upon each and every town clerk in said county to send to the secretary of State the packages or envelopes of votes cast for your petitioner, as well as all other ballots given in for any person for said office of sheriff, at said election, pursuant to the provisions of chapter 57, section 40, of the Laws passed at the June session, 1879; wherefore, your petitioner prays this court to make an order, in writing, upon the secretary of State to produce before said court such package or packages of votes as may be in his custody given in for your petitioner, or for any other person, for said office of sheriff of said county of Merrimack on said first Tuesday of November, 1884, and in the presence of this court open the same and permit said votes to be examined and correctly counted, pursuant to the provisions of chapter 1, section 1, of the Laws passed at the June session, 1881.

JOHN C. PEARSON.

An order of notice was issued to the defendant, who appeared and objected, 1, that the court cannot order a recount before the state of the votes is declared by the court at the law term acting as a canvassing board; 2, that the court cannot go behind the returns and declare any person elected; 3, that the petition does not allege any fraud or error in the count or returns; 4, that the grounds of the petitioner's apprehension, that errors in the count have been made, are not set forth; and 5, that the petition is not sworn to.

J. H. Albin, for petitioner. *George & Shirley* and *Henry Robinson*, for defendant.

CARPENTER, J. If some proceeding were pending in this court for settling the claims of these parties to the office of sheriff, there would be a question whether, as a matter of law, either of them would be entitled to such an order as the plaintiff asks. It might be claimed that an examination, including a recount of the votes, was their legal right. But no such proceeding has been instituted; and the act of June 14, 1881, was not intended to give every body or every citizen, or every voter of the county an absolute right to a recount without due cause shown. There may be a question whether the act authorizes the court to order a recount at the request of any voter or other person interested in the public welfare, or either of the candidates having a private interest in the election, for the purpose of discovering evidence on which a suit could be begun for contesting the election, or for the purpose of satisfying persons specially concerned, or the public in general. However it might be if the legislature should appoint a committee of investigation for the discovery of facts of which, for some legislative purpose, information might be desired, there is no presumption that they intended to impose upon the court an imperative duty of ordering a recount for the mere purpose of quieting the public mind, or enabling a candidate to discover whether it would be expedient for him to contest an election. A recount for such a purpose would not be within the usual range of judicial action; and so wide a departure from the ordinary course of judicial duty cannot be fairly inferred as the legislative intent from any thing less than a plain expression of that intent. A design to require the court, without any exercise of judgment upon any question of law or fact, to order a recount merely because it is desired by one of the candidates, is not plainly expressed in the statute, and cannot be reasonably held to be its meaning.

It is not necessary to inquire whether the court have power to make the order in this case. If the power exists, we think the statute does not require its exercise for the cause alleged by the plaintiff. Without examining the question of power, the petition is dismissed on the ground that the statute does not make it our duty to grant it without other cause than that alleged by the plaintiff, and that if we are authorized to grant it in the exercise of a discretionary power, sufficient cause is not alleged for the exercise of the power in this case.

Petition dismissed.

SMITH, J., did not sit; the others concurred.

AHEARN v. MANN.

July 31, 1885.

APPEAL — DECREE ALLOWING SETTLEMENT — ADMINISTRATOR'S ACCOUNT.

Leave to appeal from a decree of the probate court allowing the settlement of an administrator's account cannot be granted when the terms of the settlement were agreed to by counsel for the petitioners, and there was no fraud, and the only errors in the account were such as would have been discovered by reasonable diligence on the part of the petitioners and their counsel.

Petition for leave to appeal from a decree of the probate court allowing the settlement of the defendant's account as administrator of the estate of John Briony on the ground that the petitioners were prevented from appealing therefrom within sixty days through mistake, accident or misfortune.

Cooke & Kiehl, for petitioners. *T. J. Smith & J. G. Hall*, for defendant.

ALLEN, J. The reasons assigned for leave to appeal from the defendant's settlement of his administration account are that one inventory having been made and filed, other assets, for which no inventory was made, were discovered, and that neither at the settlement of the account nor subsequently within the time for taking an appeal did the administrator produce his books and vouchers for examination, and the petitioners were deprived of the opportunity of various errors and frauds, which it is claimed were made in the settlement.

The only errors in the account which the referee has found are, a charge by the administration of money paid for services by his attorney. \$13 of which were for services rendered while the attorney was register of probate, and an excess, how much is not found, taken by the administrator as commissions upon money collected and disbursed. These charges were examined and agreed to by the plaintiffs' attorneys at the time the account was settled. The assets, of which no appraisal was made, were accounted for at their value. At the time the vouchers were called for by the plaintiffs the administrator could not find them, but they were subsequently discovered and produced before the referee, and corresponded with the items of the account. After the settlement, the plaintiffs gave a receipt for the balance found, and a release under seal of all further claims against the administrator. There was no fraud or concealment on the part of the administrator, and there were no errors in the account which, by reasonable diligence, might not have been discovered in season for correction or appeal. There being no fraud or concealment, and all matters having been open to examination, or so situated that by reasonable diligence they might have been examined, there is no such mistake, accident or misfortune as warrants the granting of leave to appeal to prevent injustice.

Petition dismissed.

All concurred.

SPRAGUE v. BRISTOL.

July 31, 1885.

NEGLIGENCE — INJURIES ON HIGHWAY — EVIDENCE — HORSE IN HABIT OF STUMBLING.

In an action for injuries to a traveler on the highway, evidence that the plaintiff's agent had directed her horse, which she was driving at the time of the accident, to be shod in a way to remedy the fault of stumbling, is admissible.

Case, for injuries upon a highway. Trial by a referee, who returned a general finding for the defendant, with a statement of several exceptions taken by the plaintiff to his rulings at the trial, one of which was as follows:

The defendant claimed that the plaintiff's horse had the habit of stumbling, and that the accident was caused by his stumbling and not by any defect in the highway. It appearing, in fact, that the plaintiff's husband was her agent for the purpose of getting the horse shod, and that the horse was shod as a stumbling horse, the defendant was permitted to put in evidence in connection therewith, that on one occasion the plaintiff's husband directed the blacksmith to shoe the horse so as to prevent stumbling; and that on another occasion he directed the blacksmith to pare the horse's hoofs down, because he was a "stumbling old cuss."

The other exceptions appear in the opinion of the court.

Chase & Streeter, Bingham, Mitchell & Bachellor, Dearborn, Barnard & Barnard, Pike & Parsons, for plaintiff. *Fling & Chase and W. S. Ladd*, for defendant.

CLARK, J. 1. The evidence tending to show that the witness has made statements inconsistent with his testimony at the trial was competent and relevant as affecting the credit of the witness.

2. There was no error of law in receiving evidence of the plaintiff's habit of driving in places similar to the place of the accident. *State v. Railroad*, 52 N. H. 528; *State v. Railroad*, 58 id. 410; *Plummer v. Ossipee*, 59 id. 55; *Aldrich v. Monroe*, 60 id. 118.

3. Evidence that the plaintiff was driving rapidly before reaching the place of the accident tended directly to contradict her testimony that she drove slowly.

4. Upon the question of the condition of the highway at the place of the accident, evidence that travelers had encountered no difficulty in passing, was competent as tending to show that the highway was suitable for the public travel.

5. Upon the question whether the plaintiff's horse was a stumbler, and whether the plaintiff knew it, it was competent to show that the horse was shod as a stumbler; as it would be competent to show that he was shod in a peculiar manner to prevent interfering, if it was a question whether he was addicted to that fault. It was also competent and material to show that the horse was shod as a stumbler by direction of the plaintiff, and for this purpose it was competent to show that it was done by direction of the plaintiff's agent who was charged with the duty of getting the horse shod. "Whatever is done by an agent in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as a civil case, in all respects, as if the principal were the actor and the speaker." *Cluquet's Champagne*, 3 Wall. 114; *Burnside v. G. T. Railway*, 47 N. H. 554. In this case the declarations of the agent were competent not as admissions of the plaintiff, but as showing that the shoeing was by the direction of the plaintiff's agent, and that the direction was emphatic and not a mere casual or frivolous remark; and the fact that the horse was shod as a stumbler by direction of the plaintiff's agent was an evidentiary fact tending to prove that the horse was in fact a stumbler and that the plaintiff knew it.

6. This exception is frivolous. The plaintiff having inquired of the witness the price at which he sold the horse could not object to the question being answered correctly.

Exceptions overruled.

ALLEN, J., did not sit; the others concurred.

QUIMBY v. WOODBURY

July 31, 1885.

ANIMALS — INJURY BY DOG — CONTRIBUTORY NEGLIGENCE.

The doctrine of contributory negligence applies in an action to recover double damages under Gen. Laws, chap. 115, § 11, for an injury done by a dog.

Debt, on the statute — Gen. Laws, chap. 115, § 11 — to recover double damages sustained by the plaintiff from being bitten by the defendant's dog.

It appeared that at the time of the injury the dog was in the plaintiff's pasture barking by a hole in the wall, and that the plaintiff went to drive it away; but as to what he did in his efforts to effect that purpose, and whether his conduct and treatment of the animal were proper and reasonably necessary to that end, or whether he brought the injury upon himself by his ill-treatment of the dog and by want of due care to avoid the injury, the evidence was conflicting.

The jury were instructed that "The plaintiff had the legal right to expel the dog from his premises, doing whatever was reasonably necessary to effect his expulsion, and acting with due care to prevent being injured; and if in the attempt to expel the dog he acted with due care, using such means only as were reasonable, necessary, and was bitten, he can recover.

"If the plaintiff was bitten in consequence of not using due care in his conduct toward the dog; or if he willfully, recklessly, or needlessly irritated or aggravated the dog, and in consequence of such conduct was bitten, he cannot recover, because the injury he received would be the result of his own carelessness or recklessness."

The plaintiff excepted to that part of the above instruction which required proof of due care from him, and requested the court to charge that "the burden of proof is upon the defendant to establish the fact that the plaintiff, at the time he was bitten, was in the commission of a trespass or other tort." This instruction was refused, and the plaintiff excepted.

The jury did not agree, and, on motion of the plaintiff, the questions raised by the foregoing exceptions were reserved for the opinion of the court.

Copeland & Jones, for plaintiff. *Chase & Streeter*, for defendant.

CLARK, J. The principle of law which requires the exercise of reasonable care to avoid doing injury to others requires also the exercise of reasonable care to avoid being injured by the negligence of others, and as a general rule one cannot recover compensation for an injury occasioned by the mere negligence of another, which he might have avoided by the exercise of reasonable care. If the injury would not have happened to him but for his own want of ordinary care, he cannot legally charge to the negligence of the other party the consequences of his own carelessness. And this doctrine of contributory negligence applies to cases of injury by animals. *Cooley Torts*, 846; *Addison Torts*, § 281; *Shearm. & Redf. Neg.*, § 199.

It is contended that the common-law rule has been changed by Gen. Laws, chap. 115, §§ 10, 11, and that the doctrine of contributory negligence does not apply to cases arising under the statute. The provisions of the statute are as follows: "§ 10. Any person to whom or whose property any damage may be occasioned by a dog not owned or kept by said person shall be entitled to recover of the person who owns or keeps or has said dog in possession, all damages which may be so occasioned, except in cases where the same have been occasioned to the party suffering such damage while engaged in the commission of a trespass or other tort." "§ 11. Every owner or keeper of a dog shall forfeit to every person injured by it double the amount of the damages sustained by him, to be recovered in an action of debt." The action is brought under section 11, and it is claimed that under this statute the liability of the owner or keeper of a dog is not affected by the negligence of the person injured. It is said that the statute is penal and should be construed strictly, and that its terms impose an absolute liability.

The statute is neither distinctively penal nor remedial. It is so far penal that it is not unconstitutional by reason of authorizing the recovery of double damages. *Craig v. Gerriah*, 58 N. H. 513. But it is not within the statute limiting the time within which suits founded on penal statutes must be brought. *Whitaker v. Warren*, 60 N. H. 20. It is penal so far as it imposes the payment of double damages as a forfeiture, and remedial so far as it provides for the recovery of damages as compensation for the injury done. But by whatever name it is called, whether penal or remedial, the statute is substantially remedial. It furnishes a statutory remedy for enforcing the common-law right of recovery of damages for the actual injury sustained, and a recovery under the statute is a bar to any subsequent action for the recovery of damages. The statute must receive a reasonable interpretation whatever its nature. The rule requiring penal statutes to be construed strictly, means only that they are not to be extended by implication so as to embrace cases or acts not fairly and reasonably within the prohibition or penalty of the statute; and in cases of doubtful construction that interpretation should be adopted which restricts the operation and enforcement of the forfeiture. Where there is such an ambiguity as to leave reasonable doubt of the meaning, the penalty is not to be inflicted. Disregarding the general principle of contributory negligence, the language of section 11 imports an absolute liability. This interpretation gives a broader application to the statute than is contended for. It is said that sections 10 and 11 are to be construed together, and that the exception in section 10 of the right of a party to recover damages for injuries received while engaged in the commission of a trespass or other tort, is to be regarded as applicable to section 11 also; and it is argued that the express mention of this exception is to be construed as excluding any other exception to the absolute liability implied in the language of the statute.

In *Orne v. Roberts*, 51 N. H. 110, 113, it is said in considering this statute that it apparently originated in the idea that much damage was done by dogs, for which the injured person had no remedy, by reason of the practical difficulty of charging the owner with knowledge of the mischievous character of the dog; and therefore it was thought best to make the owner or keeper absolutely liable for the injuries caused by his dog, without regard to the fact whether he had knowledge of the vicious character of the animal or not. Assuming this view to be correct,—that the purpose of the statute is to obviate the difficulty of showing the

owner's knowledge of the vicious propensities of the dog, in an action for damages, — a reasonable interpretation limits it to the accomplishment of that object, and the language of the statute is to be construed with reference to the established rule of law that a party cannot recover for injuries resulting from his own negligence. In the interpretation of a statute the general purpose is entitled to great weight in ascertaining the meaning of particular words; and if the literal meaning of particular words is inconsistent with the general purpose, or if the language used, if understood literally, is inconsistent with a well-settled principle of law of general application, there is grave reason to doubt whether the literal sense is the sense intended by the legislature.

A construction of the statute making the owner of a dog absolutely liable for injuries, regardless of the conduct of the party injured, might in some cases hold the owner responsible for injuries occasioned solely by the reckless carelessness of the party injured. It would make the owner liable to a person injured while intentionally exposing himself by worrying and irritating a dog for the purpose of testing his temper and disposition. Such a construction would be unreasonable. We think the rule of interpretation applicable to this statute is analogous to that applied to the statute making towns liable for damages happening from defective highways, which although literally imposing an absolute and unqualified liability, is construed with the qualification that the party injured is not entitled to recover if his own negligence contributed to the injury.

As the statute is to be interpreted with reference to the general principle that a party cannot recover damages for the negligence of another if his own negligence contributed to the injury, the expressed exception that the injured party cannot recover, if the injury is received while he is in the commission of a trespass or other tort, is not to be regarded as excluding the doctrine of contributory negligence. The purpose and effect of the exception is to limit the right of recovery, and not to extend it. The fact that the party injured is in the commission of a trespass or tort may or may not contribute to the injury. The fact that a person injured by a dog is trespassing on the premises of the owner of the dog at the time of the injury may not in any respect contribute to the injury. He might be injured in the same manner if he was rightfully on the premises by the owner's permission. The effect of the exception is to limit the liability of the owner by prohibiting a recovery in all cases where the party injured is engaged in the commission of a trespass or tort, regardless of the fact whether he is chargeable with contributory negligence or not. It merely imposes the condition upon the injured party's right of recovery that it must appear that he was not a trespasser when the injury was received, and the doctrine of contributory negligence is applicable to cases under the statute as at common law.

Case discharged.

SMITH, J., did not sit; the others concurred.

YOUNG v. CURRIER.

July 31, 1885.

NEGOTIABLE INSTRUMENT — RELEASE OF INFANT MAKER — OTHER SIGNER LIABLE.

A release to an infant co-signer of a joint note after he has repudiated the contract and reconveyed his interest in the land for which the note was given within a reasonable time after reaching majority has not the effect to discharge the other signer.

Bill in equity, heard upon bill and answer. The material facts were: June 30, 1883, one Wadleigh conveyed a farm in Sunapee to Carlos S. Bingham and Fred. S. Hart, and for part of the purchase-money took a note signed by Bingham and Hart for \$1,039, and a mortgage of the farm to secure its payment. November 13, 1883, Wadleigh sold and assigned the note and mortgage to the defendant, and on the same day the defendant entered to foreclose the mortgage, and has ever since been in possession, receiving the income. At the time of executing the above note and mortgage Hart was an infant, and within a reasonable time after arriving at the age of twenty-one he refused to be held liable on the note, or to ratify and affirm the same, and thereupon by deed, June 7, 1884, released

to the defendant all his right and interest in the farm; and in pursuance of an agreement then made the defendant erased his name from the note. June 24, 1884, Bingham quit-claimed his interest in the farm to the plaintiff. The bill prays for partition; for an account of the rents, profits, waste and damage; and for permission to redeem the mortgage if any thing should be found due upon it.

A. S. Wait, for the plaintiff. *S. L. Bowers and Brown*, with whom was *Jeremiah Smith*, for defendant.

CARPENTER, J. Hart could not avoid his liability upon the note and mortgage without giving up the property conveyed to him. *Heath v. West*, 28 N. H. 101; *Heath v. Stevens*, 48 id. 251; *Hall v. Butterfield*, 59 id. 854; s. c., 47 Am. Rep. 209; *Bartlett v. Bailey*, id. 408. His quit-claim to the defendant of his interest in the farm was an essential part of his rescission of the contract expressed by the note and mortgage. Whether one-half the mortgage debt was extinguished by the transaction is a question unnecessary to be determined, inasmuch as the defendant consents that the plaintiff may redeem her one-half of the farm by paying one-half of the mortgage debt. The recital in Hart's quit-claim that in consideration of it he is released from liability upon the mortgage note had no legal effect. The contract was avoided and Hart's liability upon it ended by his refusal within a reasonable time after he became of age to be bound by it, and restoring the property. What would be the effect of the technical release of an infant from his unrepudiated contract upon the liability of his joint promisor is a question which does not arise.

The erasure of Hart's name from the note by the defendant after the contract was rescinded was an immaterial alteration. *Bridge v. Mathes*, 8 N. H. 140; *Burnham v. Ayer*, 35 id. 851; *Cole v. Hills*, 44 id. 227, 232.

Case discharged.

BLODGETT, J., did not sit; the others concurred.

BALL v. DANFORTH.

June 31, 1885.

PLEADING—AMENDMENT—NEW CAUSE OF ACTION.

An amendment introducing a new cause of action cannot be allowed against a defaulted defendant without notice.

Assumpsit, upon the common counts. Facts found by the court. The defendant was defaulted. Subsequent attaching creditors appeared and objected to the allowance of a bank note for \$500 which the plaintiff had signed as surety for the defendant, but on which he had paid nothing at the time of the trial.

The plaintiff moved to amend by inserting in his declaration two additional special counts, the first alleging a promise on the part of the defendant to pay to the plaintiff \$500 in consideration of a promise by the plaintiff to pay the bank note; the second that the plaintiff assumed and agreed to pay the bank note and that, in consideration of such promise, the defendant promised to pay the plaintiff \$500.

The amendment was allowed and the creditors excepted.

A. S. Wait and *H. W. Parker*, for plaintiff. *Ira Colby*, for subsequent attaching creditors.

CARPENTER, J. The amendment contained in the new counts on the special contract could not be allowed against the defaulted defendant without notice. Although it is found that it was "agreed that the writ should be made large enough to cover all the indebtedness of the defendant to the plaintiff including the bank note," yet, so far as appears, the defendant was not a party to the hearing upon which the finding was made, and is not affected by it.

Whether the parties understood that the defendant promised to pay the amount of the bank note on demand before the plaintiff paid the bank, or whether upon any ground there was at the commencement of the suit a breach of the contract on which the counts could be maintained are questions upon which the reserved case is not explicit or satisfactory, and on this point a new trial is granted.

Case discharged.

All concurred.

BARTON v. CROYDON.

July 31, 1885.

NEGOTIABLE INSTRUMENT — SECURITIES.

The payee of a note is entitled in equity to the securities held by a surety on the note.

Bill in equity, for an injunction to restrain the defendants from proceeding at law in the collection of a note given by the plaintiff upon a purchase of a farm which was mortgaged to the defendant to secure the same. The cause was heard upon a demurrer to the bill.

H. P. Rolfe, S. L. Bowers, for plaintiff. *A. S. Wait*, for defendant.

CARPENTER, J. Including the note and mortgage to the defendant the plaintiff paid the stipulated price for the farm. He was not injured by his mistaken supposition, however caused, that the farm was mortgaged directly to the defendant. It was immaterial to him by what means — whether by fraud or otherwise — his vendor was induced to require, or to consent, that a part of the purchase-money should be paid to the defendant. Upon the allegations of the bill, as it stands, the plaintiff, however it might be with his vendor, who is not a party and makes no complaint, has received no injury and is entitled to no relief.

To save delay and needless expense to the parties the case has been considered as if the amendment to the bill making George Barton a plaintiff, and all other amendments proposed by the plaintiff in his brief were already allowed. Thus amended the material allegations of the bill are as follows: September 18, 1846, Peter Barton gave to Martin A. Barton a mortgage of his farm conditioned to save him harmless for signing as surety Peter's note to the defendant, and in 1862 died insolvent, leaving substantially no estate. Prior to 1862, Martin A. failed, and in 1867 obtained his discharge in bankruptcy. George Barton, a son of Peter, in some way (in what way is not stated) acquired a title to the farm. He became insane before 1862, and so remains. His guardian about July 1, 1874, sold the farm to this plaintiff, and laboring under the mistake that Peter gave the mortgage of September 18, 1846, directly to the defendant to secure the payment of the note, instead of to Martin to save him harmless for signing it as his surety, induced this plaintiff to give, in part payment of the agreed price, his note for the same amount to the defendant with a mortgage of the farm to secure its payment; whereupon the defendant surrendered the old note. Upon this state of facts the mistake is quite as immaterial as before. The defendant was legally entitled to the benefit of the mortgage from Peter to Martin, and the guardian, in paying, or providing for the payment of the original note out of the avails of the farm, did no more than equity would compel him to do. *Bank v. Herrick*, 61 N. H. ; *Holt v. Bank*, 62 id.

Demurrer sustained.

BLODGETT, J., did not sit; the others concurred.

LAKE v. PAGE.

July 31, 1885.

HOMESTEAD — RIGHT OF WIDOW IN — LIFE ESTATE.

The right of a widow in premises set out to her as a homestead under the act of 1868, is an estate for life.

Writ of entry for land in Deerfield. Facts agreed. November 15, 1882, the demanded premises were set out to Sarah W. Lake, widow of John Lake, by the probate court as her homestead, and she continued to occupy the same until October 8, 1883, when she purchased another place in Deerfield, where she has lived from that time to the present. April 24, 1884, she conveyed her interest in the demanded premises to the defendant, who has since been in possession.

John Lake left a will whereby, among other things, he gave to his wife, Sarah

W., one undivided half of his real estate for life with remainder to a residuary legatee, and to the plaintiff the other undivided half of the same premises for life to be held in common with his wife. The widow waived the provisions of the will, and the question is whether the plaintiff is entitled to the possession of the demanded premises during her life.

Marston & Eastman, for plaintiff. *Briggs & Huse*, for defendant.

CLARK, J. The question in this case is whether the estate vested in the widow by an assignment of a homestead in the estate of her deceased husband is conditional or absolute — whether it is a mere personal right of occupancy, or an unconditional life estate which she may recover.

The homestead law of 1851 provided that the homestead should not be assets in the hands of an administrator for the payment of debts, nor subject to the laws of distribution or devise, so long as the widow or minor children, or any or either of them, should occupy the same. Under the act of 1851 the homestead right of the widow was held to be no more than a conditional life estate, — a mere right of occupancy, — a right to use and occupy for life. *Norris v. Moulton*, 84 N. H. 392, 397. In *Judge of Probate v. Simonds*, 46 id. 363, 368, PERLEY, C. J., says of the widow's right of homestead under the act of 1851: "Her interest was a mere personal right to occupy during her life. It was no estate that she could transfer to another. . . . The purchaser, at an administrator's sale, of land subject to a homestead right of the widow, when she ceased to occupy in person, would hold the land discharged of her right."

By the act of 1868 the homestead law was materially changed. Under this act the homestead right is secured to the wife, widow and children of every person owning and occupying a homestead, for and during the life of such wife or widow and the minority of such children. Laws of 1868, chap. 1, § 33. Instead of being limited to "so long as the widow or minor children, or any or either of them, shall occupy the same," as in the act of 1851, the homestead right under the act of 1868 extends during the life of the wife or widow and the minority of the children, without any condition as to actual occupancy. The omission of the limitation as to occupancy by the widow and children, and the substitution of the words "for and during the life of such wife or widow and the minority of such children," in its stead, was designed to abolish the condition of actual occupation upon which the continuance of the estate of the widow and minor children in a homestead set off and assigned to them out of the estate of the husband and father, was made to depend under the act of 1851.

The homestead right is merely an inchoate right which is not assignable until the homestead is set out and assigned in specific property. It then becomes a vested estate. The interest of the widow in the homestead premises bears some analogy to her right of dower. The language of the act of 1868 is similar to the statute relating to dower. "The widow of every person deceased shall be entitled to her dower in the real estate of which her husband died seized." . . . Gen. Laws, chap. 202, § 2. "The . . . widow . . . of every person who is owner of a homestead . . . shall be entitled to so much of said homestead . . . as shall not exceed in value five hundred dollars . . . for and during the life of such . . . widow . . ." Gen. Laws, chap. 138, § 1. "The judge of probate on petition . . . may cause such homestead to be set off in the same manner as dower may be assigned by him." Gen. Laws, chap. 138, § 4. And when a homestead is set off and assigned to the widow, her inchoate and imperfect right becomes a vested estate for life in the premises set off, which she may occupy as a homestead, or, if she chooses, she may sell her estate therein, or exchange it for other premises better adapted to her wants and convenience.

By the assignment of the demanded premises to her as a homestead out of the estate of her deceased husband, Sarah W. Lake acquired a vested life estate therein, which was not defeated by her ceasing to occupy, nor by her conveyance to the defendant; and the defendant has a valid title to the demanded premises during the life of Sarah W. Lake.

Judgment for the defendant.

SMITH, J., did not sit; the others concurred.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

JENKINS v. WOOD, Executor.

September 8, 1885.

EXECUTOR AND ADMINISTRATOR — LIABILITY FOR TESTATOR'S DEBTS — PROBATE BOND — SURETIES.

The only mode in which an executor can be held personally liable for the debt of his testator, and an execution on a judgment for such a debt issue against him personally, is that prescribed by Pub. Stat., chap. 166, §§ 5, 10; Stat. 1784, chap. 32, § 9.

Contract upon a judgment. The defendant is executor of the will of Abigail Barker, and residuary legatee, and as such executor, gave a bond to pay all debts and legacies of the testatrix, as prescribed by Pub. Stat., chap. 129, § 6. The plaintiff, in an action on a debt of the testatrix, recovered judgment against the defendant, as executor. Execution on the judgment was issued and partly satisfied by levy on real estate of the testatrix. An action was then brought upon defendant's bond, judgment obtained and execution issued for the penal sum of the bond, which amount was paid and applied in part satisfaction of the original judgment. More than two years after the defendant had filed his bond and published notice as required by law, the plaintiff brought an action against the defendant as executor to recover the balance of the first judgment then unpaid. The case was heard by the superior court which found for the plaintiff and ordered judgment accordingly. The defendant alleged exceptions, and the exceptions were sustained on the ground that the action was barred by the special statute of limitations in favor of executors. *Jenkins v. Wood*, 134 Mass. 115. Thereupon the plaintiff filed an amended declaration, charging the defendant as personally liable for the amount of the original judgment, then unpaid. The case was heard by the superior court upon an agreed statement of facts. Judgment was ordered for the defendant, and the plaintiff appealed.

W. S. Knox, for plaintiff. *D. C. & C. G. Saunders*, for defendant.

W. ALLEN, J. It having been decided that the special statute of limitation is a bar to the action on the judgment against the executor, the plaintiff now attempts to hold the defendant personally as the judgment debtor. It is argued that the bond given by the defendant to pay debts and legacies implies a promise to pay debts and legacies, and rendered the defendant liable for them, as debtor. But this is inconsistent with the liability of the defendant, as executor. That he is so liable, and that the bond is collateral to that liability, is too obvious and well settled to be questioned. *Jones v. Richardson*, 5 Metc. 247; *Colwell v. Alger*, 5 Gray, 67; *Holden v. Fletcher*, 6 Cush. 235; *National Bank of Troy v. Stanton*, 116 Mass. 435; *Jenkins v. Wood*, 134 id. 115. The debt was due from the testator, and the statute prescribes the only mode in which the executor can be held personally liable for the debt of his testator. Pub. Stat., chap. 166, §§ 5-10; Stat. 1784, chap. 32, § 9. The re-enactments of this last statute, down to the public statutes though dividing it into separate sections, and changing the phraseology, have not changed its meaning. This excludes the anomalous action of debt on a judgment against an executor or administrator on a suggestion of waste, which was sustained in England but has never been adopted in this State. *Wheatley v. Lane*, 1 Wms. Saund. 219; 3 Wms. Exrs. 1983 *et seq.* The mode prescribed by statute is the only mode in which an execution on a judgment against an executor for a debt of his testator can be issued against the executor personally. What will be evidence of waste, to charge under its provisions an executor who has given bond to pay debts and legacies, is a question which does not arise and which we have not considered.

Judgment for defendant.

GRAY v. RAYMOND.

September 8, 1885.

ATTACHMENT — SPECIAL JUDGMENT — EXECUTION.

Plaintiff sued defendant and attached certain personal property; defendant defaulted and the plaintiff, suggesting the pendency of certain insolvency proceedings against defendant, moved "that judgment be entered on said default against the property attached." The motion was granted and execution issued accordingly. The property attached proving insufficient to satisfy the full amount of the debt, plaintiff applied to the court for a judgment or an execution against defendant for the unsatisfied balance. *Held*, that the judgment was final; that plaintiff having elected to take the special judgment there was no authority in the court to change it into a general judgment or to authorize execution on it as such.

Action of contract brought in the superior court to recover upon four promissory notes, each made by the defendant, payable to the plaintiffs' order. An attachment was made on the writ of certain personal property of the defendants. More than four months after making the attachment the defendants filed a petition in insolvency. The defendants, after having answered in the action by a general denial and making no representation of insolvency, were defaulted. The plaintiffs thereupon suggested the pendency of insolvency proceedings, and moved that judgment be entered on said default against the property so attached, which motion was allowed. The property having proved insufficient to satisfy the full amount of the debt, the plaintiffs sought for a judgment or an execution against the defendants for the unsatisfied balance. The superior court ruled that, one judgment having been entered in the action, no other judgment could be entered therein, and that no further process could be issued upon the judgment which had been entered. The plaintiffs alleged exceptions.

Boardman & Tyng, for plaintiffs. *O. T. Gray* and *W. C. Cogswell* for defendants.

W. ALLEN, J. The proceedings in insolvency, of themselves, had no effect upon the plaintiffs' attachment or upon the action. They did not dissolve the attachment, and the defendant could have no benefit of them in the action except by pleading a discharge, obtained during its pendency, and, in aid of that, by obtaining a continuance of the action before a discharge was granted on a representation of the pendency of the proceedings. The defendant, after having answered in the action by a general denial, and having made no representations of insolvency, was defaulted. The action and the attachment then stood as if there had been no proceedings in insolvency, and, if nothing more had been done, judgment against the defendant could have been entered at the close of the term under the general order, and the property attached might have been taken on the execution without regard to the insolvency. But after the defendant had been defaulted the plaintiff suggested the pendency of the insolvent proceedings, and moved "that judgment be entered on said default against the property attached," which motion was allowed, and the entry on the docket made "Special judgment v. the property attached on M." The property having proved insufficient to satisfy the full amount of the debt, the plaintiff now seeks for a judgment or an execution against the defendant for the unsatisfied balance, contending that the judgment may be taken as a general judgment against the defendant, upon which the plaintiff is entitled to an alias execution; or, that the judgment against the property was an interlocutory judgment, leaving the action against the defendant, pending for further proceedings, and that the entry of the judgment should be amended in conformity therewith. We think that the judgment was, in effect, against the property only, and that it was final. The precise form of the proceeding is not material; the substance of it is, a judgment for the amount of the debt, to be executed only in preserving and enforcing the lien on the property. The same judgment may be entered while the question of discharge is pending, on a suggestion of insolvency and on motion of either party. In this case after the defendant had been defaulted, upon a suggestion of the insolvency of the defendant, by the plaintiff and upon his motion, judgment was entered against the defendant, for the amount of the debt and costs, to be enforced

only against the property attached, and execution was issued, reciting the judgment against the defendant for said sums, to be levied only on the property attached. We think the judgment was a final disposition of the case. It was a final judgment and it authorized an execution only against the property attached, and cannot be treated as a general judgment against the defendant. The plaintiff having elected to take the special judgment, and judgment having been entered, there was no opportunity or occasion for the defendant to plead his discharge and no authority in the court, at a subsequent term, to change the judgment into a general judgment, or to issue execution on it as such. Stat. 1885, chap. 59, having been enacted after the judgment was entered, can have no effect upon it.

Exceptions overruled.

HALEY v. BOSTON BELTING Co.

September 8, 1885.

LANDLORD AND TENANT—SUB-LESSEES—RENT—BANKRUPTCY.

T. leased a building for a term of years intending it to be used by a manufacturing company, he being their agent for that purpose, and it was so understood by the lessor; but the lease was made directly to T. and the company was not named or referred to in it. The company took possession, and T. subsequently became insolvent. In an action to charge the company on the covenants in the lease—*Held*, that the lease being under seal and nothing to show that the company did business in the name of T. or used that name as describing itself, they must be deemed to have occupied under T. and not as lessees in the lease.

Held, also, that T. having become a bankrupt and his assignees electing not to assume the lease, the rent due from the sub-lessees at the time of the bankruptcy, belonged to the assignees, and that which accrued subsequently could be reached in equity by the lessor.

Bill in equity by the executors of the will of Charles L. Haley against the Boston Belting Company, Elisha S. Converse, its treasurer, and William H. Furber, its clerk and manager, and others, seeking to hold the corporation responsible as the party beneficially interested in, or as equitable assignee of a lease of an estate in Boston made by Haley, as lessor, to John G. Tappan, as lessee, January 1, 1872; and also seeking to have various sub-lessees or tenants held for the amount of the rent due from them respectively. The case was twice heard by a master, and was reserved on the master's reports for the consideration of the full court.

R. Olney and *F. I. Amory*, for plaintiff. *E. Avery*, for Belting Company.

W. ALLEN, J. Haley, in 1871, executed a lease for ten years of a building in Boston to Tappan. Tappan was the general agent and treasurer of the Boston Belting Company, with authority to hire buildings for it. Tappan took the lease with the intention that the building should be used by the belting company, and his agency and purpose were known to the lessor. The plaintiff seeks, in this bill, to charge the belting company on the covenants of the lease, on the ground that it was the real or beneficial lessee under obligation, which can be enforced, either at law or in equity, to perform the covenants of the lease. The belting company clearly is not liable at law. The lease is under seal, and the company is not named or referred to in it. *Seaver v. Coburn*, 10 Cush. 324; *Barlow v. Congregational Society in Lee*, 8 Allen, 460; *Schaefer v. Hankel*, 75 N. Y. 378. It is not shown that the company did business in the name of Tappan, and used that name as describing itself in the lease. The plaintiff argues that the lease was procured by the company and taken for its benefit, and that the company entered under it, and that it is, therefore, bound by its provisions either as having authorized its execution in the name of Tappan, or by force of a resulting or constructive trust in Tappan. *Wright v. Pitt*, L. R., 12 Eq. 408; *Van Schaick v. Third Avenue Railroad Company*, 38 N. Y. 346; *Lees v. Nuttall*, 1 Russ. & M. 58. Tappan's authority was to hire and pay for all necessary stores and warehouses. He had no special authority or duty in regard to the leased premises, and there was no act of the company, respecting the lease, except so far as his acts were those of the company. That he took a lease to himself with the intention that the company should occupy the premises shows that he intended that it should occupy

under him, and not as the lessee in the lease. There is no evidence that, when the lease was executed, either party, the lessor, the lessee, or the belting company, understood that the company were to occupy, as the lessee under the lease. On the contrary, the inference is that the lease was made to Tappan, in order that the company might occupy under him and not as lessee. There is no evidence that the company entered as lessees or occupied otherwise than under Tappan. Certainly there is nothing in the subsequent conduct of the parties, which can control the terms of the lease, or show that the company is bound by the covenants. As Tappan became a bankrupt and his assignees elected not to assume the lease, the rent due from the sub-lessees at the time of the bankruptcy belongs to the assignees. That which has accrued subsequently can be reached in equity by the lessor, Tappan, his assignees in bankruptcy, and his executors being proper parties, and the plaintiff is entitled to a decree that it be paid to him. 1 Story Eq. Jur., § 687; 1 Fonb. Eq., Bk. 1, chap. 5, § 5, and chap. 3, § 3; *Goddard v. Keate*, 1 Vern. 87.

The bill should be dismissed as to the Boston Belting Company, Converse and Furber.

BAGNALL v. DAVIES.

September 3, 1885.

INJUNCTION — ENCROACHMENT BY PIAZZA AND DORMER WINDOW — RESTRICTION IN DEED.

The roof of a piazza and a dormer window therein are extensions of a building, and a part of it, within the restrictions of a deed prohibiting the owner from erecting a building within a certain distance of the street.

Bill in equity to restrain the defendant from erecting a building on her lot on Clifford street in Boston, in violation of a restriction contained in a deed to the defendant, which provided that no building should be erected within twenty feet of Clifford street. It was admitted that the plaintiff had a right to enforce the restrictions contained in defendant's deed, and the only question in the case was whether the defendant's house was within twenty feet of the street. The case was reserved upon agreed facts, by a single justice, for the consideration of the full court.

Hutchins & Wheeler, for plaintiff. *C. W. Turner* and *L. L. Scaife*, for defendant.

W. ALLEN, J. The front of the defendant's house is toward Clifford street, and the front wall is twenty feet from the street. A part of the roof, which slopes toward the street, is extended to within less than fourteen feet of it, covering a piazza and supported by posts six feet from the front wall of the house. In this part of the roof is a dormer window, by which a room in the second story is extended to within seventeen feet of the street. We think that the portion of the roof and of the dormer window, which extend beyond the front wall toward the street, are extensions of the building and a part of it, within twenty feet of the street, within the meaning of the restrictions. *Sandborn v. Rice*, 129 Mass. 388; *Lord Manners v. Johnson*, 1 Ch. Div. 673; 8 C., 16 Eng. Rep. 690, 698, *note*.

Decree for the plaintiff.

SCANLAN v. CITY OF BOSTON.

September 3, 1885.

MUNICIPAL CORPORATION — DEFECTIVE HIGHWAY — RAILROAD CROSSING — DUTY OF COMPANY.

A city is not liable for damages occurring by reason of a defect in a highway at the crossing of a railroad at grade, it being the duty of a railroad company to maintain a safe passageway across its road. This is so whether the highway was located before or after the construction of the railroad.

Action of tort to recover damages for personal injuries, alleged to have been caused by a defect in A street, in Boston. At the trial in the superior court, the court refused to allow the case to go to a jury, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. A. Maxwell, for plaintiff. *T. M. Babson*, for defendant.

W. ALLEN, J. A highway in the defendant city crossed a railroad at grade. There were two tracks of the railroad, the inner rails of which were eight feet apart, and the railroad planked the whole space between and eight inches outside of the outer rails. The plaintiff claimed that he was injured in consequence of the defective condition of the planking between the two rails. The question is, whether a ruling that the defendant was not responsible for the condition of the planking was correct. The defendant was bound to keep the highway in repair, and was responsible for defects in it, where other provision was not made therefor. Pub. Stat., chap. 52, §§ 1, 18. By Pub. Stat., chap. 112, § 124, "a railroad corporation whose road is crossed by a highway or other way, on a level therewith, shall, at its own expense, so guard or protect its rails by planks, timber or otherwise, as to secure a safe and easy passage across its road." So far as this provides for keeping the surface of the highway in repair, by the railroad company, the defendant is not liable therefor. *Rouse v. Somerville*, 130 Mass. 361, and cases cited. The plaintiff contends that the provision applies only to pre-existing ways, over which a railroad is located, and not to ways located over a railroad after its construction. We think it applies to both cases. Stat. 1857, chap. 287, §§ 6, 4; Gen. Stat., chap. 63, §§ 60, 57; Stat. 1874, chap. 372, §§ 90, 95; Pub. Stat., chap. 112, §§ 124, 128.

The plaintiff further contends that the statute does not apply to the space between the two tracks; that the statute should be construed as requiring such guards and protections as will secure a safe and easy passage over each rail, and that a single plank on each side of each rail would meet the requirement. This construction is not only inconsistent with the language of the statute, but with any reasonable application of it to the subject-matter. The effect of the construction contended for is obvious; it would limit the obligation and the right of the railroad company to a narrow space at the sides of each rail, and require the city or town to make the space between the rails to conform to this. Without deciding that the railroad company is to keep the whole of the highway within its location in repair, or that under all circumstances the obligation would extend to the whole of the space between separate tracks upon the same location, we think that, in this case, there can be no question of the obligation of the railroad company to keep both of the tracks and the space between them in repair. In planking the whole space between the rails and tracks, the company did no more than was needful, so to protect and guard its rails, by plank, as to secure a safe and easy passage-way across its road, and the obligation to keep the planking in repair was upon it. The ruling of the court was correct.

Exceptions overruled.

COUNTY OF BRISTOL v. GRAY.

September 3, 1885.

MONEY HAD AND RECEIVED — COUNTY COMMISSIONER — EMPLOYMENT OF BY MASTER OF HOUSE OF CORRECTION — TRAVELING EXPENSES.

The employment of a county commissioner by the master of a house of correction to make sales of goods manufactured by the prisoners, is not forbidden by any statute. Such employment is not within the scope of his duties as county commissioner and he is entitled to receive his actual traveling expenses.

Contract for money had and received to the plaintiff's use. The defendant is one of the county commissioners for Bristol county, and was employed by Charles D. Burt, master of the house of correction for the county, to go to Boston and sell shoes, manufactured in the house of correction, and his actual traveling expenses, while so employed, were paid him. The amount so paid the plaintiff sought to recover in this case. The question in the case was, whether a county commissioner has a right to charge the county with the expenses so incurred. The case was heard on agreed facts. The superior court gave judgment for the defendant, and the plaintiff appealed.

E. J. Sherman, attorney-general, for plaintiff. *Morton & Jennings*, for defendant.

FIELD, J. Pub. Stat., chap. 22, § 14, provides that "The commissioners and special commissioners of the several counties shall receive from the respective county treasuries in full payment for all their services and travel the following annual salaries," . . . "to be divided among the county commissioners in proportion to the services rendered, the travel performed and the expenses incurred by each; and no other or additional compensation shall be paid to them for any service performed by them for the respective counties." By the Revised Statutes — Chap. 84, § 4 — they were to be paid one dollar for every ten miles traveled, and three dollars a day "for the time employed in discharging the duties of their office." By statute 1859, chap. 163, § 1, they were to be paid "out of the treasury of each county a fixed annual salary, which shall be in full payment for all services rendered and travel performed by them, in discharge of their duties, in their respective counties." See, also, Gen. Stat., chap. 17, § 29; and Stat. 1863, chap. 185, § 1. Stat. 1864, chap. 280, § 1, provided that "The salaries provided for the county commissioners of the several counties, by chapter 185 of the acts of 1860, shall hereafter be taken to be in full payment for all services rendered, travel performed and expenses incurred, etc." . . . "And no other additional compensation shall be paid them for any service performed by them for their respective counties." Stat. 1867, chap. 340, provided that "The commissioners and special commissioners of the several counties of the Commonwealth shall receive, etc.," . . . "in full payment for all their services and travel, payable as now provided by law, the following annual salaries" etc. Stat. 1871, chap. 236; Stat. 1872, chap. 151; and Stat. 1879, chap. 295. We think these statutes, and the public statutes, mean that the annual salaries shall be in full payment for all their services and travel as county commissioners, and that no other compensation for such services and travel shall be paid to them.

The county commissioners provide a house or houses of correction for the counties — Pub. Stat., chap. 220, § 7 — and suitable materials and implements, and establish needful rules, etc. — Id., § 11 — and examine all accounts of the master, relating to the earnings of the prisoners, and all expense of the institution, etc. Id., § 12. They may make contracts for work to be done or for letting out to hire the prisoners. Id., §§ 13, 14. The sheriff, except in the county of Suffolk, has the custody, rule and charge of the house of correction, and of all prisoners therein, "and shall keep the same, by himself or by his deputy as jailer, master or keeper, for whom he shall be responsible." Id., §§ 23 and 33. The county commissioners, "without extra charge or commission to themselves or to any other person," shall procure the necessary supplies for the house of correction. Id., § 53. The charges and expenses, etc., "shall be paid from the county treasury, the accounts of the keeper or master being first settled and allowed by the commissioners, etc. Id., § 54. By section 56, it is provided that "each master or keeper shall cause the article manufactured by the prisoners in his custody, or the produce of the labor to be disposed of to the best advantage, and under the direction of said commissioners;" "shall cause accounts to be kept of the proceeds thereof, and shall present such accounts to them for settlement semi-annually." "He shall pay into the treasury the amount of sales, and the proceeds of the labor and earnings of the prisoners in his county, or the balance thereof." These provisions are derived from Stat. 1834, chap. 115, § 18. The commissioners do not appoint the master and they cannot remove him. Id., § 24. And we cannot see that it is any part of the duty of the commissioners to make sales of the articles produced by the labor of the prisoners. The necessary and reasonable expenses of making such sales should, of course, be allowed the master. The defendant, therefore, in making the sales, was not acting as county commissioner, and whatever may be the propriety of forbidding by law any such employment of a commissioner by the master, a majority of the court think it is not forbidden by existing statutes.

Judgment affirmed.

ALLEN v. LIBBEY.

September 3, 1885.

PARTITION—TENANTS IN COMMON—TENANT FOR LIFE—ESTATE IN REVERSION.

A tenant in fee simple of land, subject to a life estate, in an undivided half, may maintain a petition for partition, under the statute, against the tenant for life.

Petition for partition of land. The case was heard by a single justice and reported for the consideration of the full court.

A. E. Pillsbury, for petitioner. *C. A. Welch*, for respondents.

W. ALLEN, J. This is a petition for partition of land, of which Joseph Libbey died seized, brought by a purchaser of the shares of certain of his heirs, against the widow and the other heirs. The widow alone defends. Joseph Libbey died childless and intestate, and his widow, by force of the statute, became seized, as tenant for life, of an undivided half of the land, of which partition is sought. *Sears v. Sears*, 121 Mass. 267. The other respondents and the petitioner hold the entire interest in the land, except the life estate of the widow. The widow could have had part set off on a petition for partition by her. *Sears v. Sears*, *ubi supra*. The objection made to the maintenance of the petition against her is that the petitioner has not an estate in possession. If the widow had a life estate in the whole land, the estate of the petitioner would be only a reversion and he could not have partition; if she had a life estate in an undivided half, with remainder to some person other than the petitioner, it is settled that the petitioner holding the undivided half could maintain the petition against her. *Taylor v. Blake*, 109 Mass. 513. In this case the petitioner, claiming the interest of an heir, has an estate in the reversion, like all the other heirs, and the question must be decided as if all the heirs were petitioners, or as if the petitioner were sole heir. The question may then be stated thus: Can a tenant in fee-simple of land, subject to a life estate, in an undivided half, maintain a petition for partition, under the statute, against the tenant for life? We think that he can. He has an estate in possession in an undivided half of the land, and an estate in remainder in the other half, expectant on the termination of the life estate. The tenant for life is entitled to the possession of an undivided half, and the right of possession of the other half must be in the tenant in fee-simple. This unity of possession makes them tenants in common, as to their estates in possession, and carries with it the right of partition of such estates. *Taylor v. Blake*, *ubi supra*; *Hazard v. Little*, 9 Allen, 260.

In this case the petition alleges that the petitioner and the respondents, other than the widow, are seized in fee and in possession of the whole land in common and undivided, and that the widow has a life estate in an undivided half of the land. These allegations are inconsistent. As the widow has an estate in possession in one-half of the land, the estate of each of the heirs must be one-half in possession and one-half in reversion. As to the estates in possession, the heirs or their assigns and the widow are tenants in common, and each has a right to a partition. The estates in reversion cannot be divided and must be excluded from the partition. A partition between all, of all the estates, subject to partition, would give to the widow one-half of her life-estate, and divide the other half amongst the other parties in fee in proportion to their interests. There is no way in which the share of the widow can first be set off to her under this petition without making her a petitioner.

It is in the discretion of the court, on her application, to allow her to obtain partition. It is also for the court to determine whether a case is shown for a sale of the land under Pub. Stat., chap. 178, § 65. The petitioner is, therefore, entitled to maintain the petition against the widow, as well as the other respondents, for the half of his interest, in which he has an estate in possession, that is sixty-five six hundredths of the land. And the court has authority under the statute to order a sale of the land.

Ordered accordingly.

SUPREME JUDICIAL COURT OF MAINE.

PERCY v. PATTEN.

May 1, 1885.

SHIP AND SHIPPING — MASTER — PART OWNER.

The master of a vessel may recover of a part owner of the vessel any sum found due him on settlement for wages and primage, though he may have remitted to the ship's husband the freight money exceeding in amount the sum thus found due him.

Assumpsit for balance due the plaintiff for wages and primage as master of ship "Transit," in 1877 and 1878, of which vessel the defendant was a part owner, but not the ship's husband. The plaintiff testified that he remitted the freight money earned to the ship's husband as directed. The sum thus remitted was greater than the amount sued for in this action.

C. W. Larrabee, for plaintiff. *Adams & Coombs*, for defendant.

PER CURIAM. This is not, as the defendant seems to suppose, an action to recover back a sum of money, inadvertently paid to the ship's husband in excess of what was due the owners, but to recover a balance due the plaintiff upon an express contract for his wages as master of the ship "Transit." By virtue of that contract he was to be paid for his services \$20 per month and five per cent upon the amount of the freight earned. The whole of the freight belonged to the owners, and to the result in this case it is immaterial whether more or less than the correct sum was remitted. Its actual amount is of no consequence except for the purpose of ascertaining the amount to which the plaintiff is entitled under his contract. Upon this point there seems to be no question. The plaintiff testifies that the balance, as shown by the account annexed to his writ, is correct. There is in this respect no conflicting testimony. It is conceded that the defendant was an owner in the ship during the entire period of the plaintiff's services.

Judgment for the plaintiff for the sum of \$490.25, and interest from the date of the writ.

PATTEN v. PERCY.

May 1, 1885.

SHIP AND SHIPPING — EARNINGS — MASTER.

It is not the duty of the master of a vessel to ascertain how much of the earnings belong to any part owner. He may remit the freight money to the managing owner, though he has received notice from one of the part owners to remit his "one-fourth" to himself.

Adams & Coombs, for plaintiff. *C. W. Larrabee*, for defendant.

DANFORTH, J. The plaintiff was a part owner in the ship "Transit," of which the defendant was master and had been from 1869 up to June, 1878. He was engaged as master by George F. Patten, the ship's husband, or managing owner. Mr. Patten continued as such until his death, and was succeeded by his sons, under the name of George F. Patten's Sons, who continued as such until near the beginning of the year 1878, when the firm was dissolved, and James T. Patten, one of the members of the firm, acted and was recognized as such until the sale of the ship. To George F. Patten's Sons the defendant had remitted all the freight money belonging to the owners without objection from any one until 1877, when the plaintiff, by a letter which is in the case, requested the defendant to remit his "one-fourth" of the freight then due the owners, to his credit; and after another voyage wrote another more urgent letter to the same effect. Neither of the requests or demands were obeyed; hence this action. The defendant acknowledges having received these letters, but whether before or after the remittances to which they refer, he is not sure. Assuming that it was before, what are the rights of the parties?

This money was received for freight. It was, therefore, a part of the earnings of the ship. As such it was the joint property of the owners. "Although part owners are tenants in common of the ship, they are jointly interested in her use and employment, and the law as to her earnings, whether as freight, cargo, or otherwise, follows the law of partnership." 3 Kent (12th ed.), 155, note; Story on Part., § 442, note 2. The ship's husband is the agent of all the owners and represents this money not as belonging to the part owners as tenants in common, but as partnership property. His duties necessarily involve the expenditure of more or less money as well as receiving it. He has the care of the ship, must procure its outfit, enter into the charter-parties, procure and collect freights, adjust contracts, and for these and such like purposes disburse as well as receive money. "His acts for these purposes are considered to be the acts of all the owners, who are liable for all contracts entered into by him, for the conduct of their common concern—the employment of the ship." Abbott Shipping (7th Am. ed.), 140; Story Agency, § 35, note. To secure him for this liability for these expenditures he has a lien upon the freight money. Flanders Shipping, § 388; Colby Part., § 1214; Story Part., § 443.

Thus it will be seen that until the accounts of the managing owner are settled, it will be impossible to ascertain what portion of the earnings of the ship is due to the several part owners, or any one of them. Over these accounts the master has no control. He is hired by, and amenable to the ship's husband. The master in many instances must first receive the freight from necessity. He may undoubtedly deduct from it his own proper expenses, but can go no further. He may not know the expenses of the ship's husband, or if he does, he can have no authority to adjust them so as to divide the net proceeds among the several owners. It is said there were in this case no expenses of the ship's husband to be adjusted, but it appears that the plaintiff, after the settlement of the accounts, claims a very much smaller sum than would have been his share of the earnings remitted by the master. Nor can the master know the share in the ship of any particular owner, except from the register, and that, as in this case, does not always speak the truth.

From these principles it follows that the master, if not required, was authorized to remit to the managing owner, as he had before done, with the knowledge of, and without objection from, the plaintiff; and in the notices for a change of the remittance to himself, there is no intimation of any change in, or revocation of, authority of the ship's husband, but a subsequent as well as a prior recognition of it. *Grant v. Carver*, 75 Me. 524.

Judgment for defendant.

PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

FLETCHER v. BELFAST.

May 4, 1885.

MONEY HAD AND RECEIVED — CITY PHYSICIAN — EVIDENCE.

A city ordinance of Belfast provides that the city physician in addition to a stipulated salary should "receive, when collected all sums for medical services rendered by him for paupers of other cities and towns." *Held*, (1) that an action for money had and received would lie by such physician against the city for money thus collected; (2) that the want of plenary proof of the qualification of the physician, under Rev. Stat., chap. 13, § 9, could not be invoked as a defense to such an action.

Assumpsit for money had and received. The opinion states the facts.

Philo Hersey, for plaintiff. *Thompson & Dunton*, for defendant.

FOSTER, J. *Assumpsit* for money had and received by the defendants to the plaintiff's use. In actions of this kind the remedy is equitable, and lies in favor of one person against another, when that other person has received money, or what is treated as money, either from the plaintiff himself, or from some third person, under such circumstances that in equity and good conscience he ought not to retain the same, but which *ex æquo et bono* belongs to the plaintiff. In this

case the plaintiff claims to maintain his action on the ground that the defendants have received money that equitably belongs to him.

In March, 1876, the plaintiff was elected city physician under the ordinances of the city of Belfast, for the ensuing municipal year. One of those ordinances provided that there should be elected annually a city physician, and that it should "be the duty of the physician . . . to attend upon all sick paupers, whether permanent or temporary." Section second of the same ordinance provided that "the city physician shall be paid thirty dollars, which shall be in full for all services for which the city is properly chargeable, and he shall receive, when collected, all sums for medical services (rendered) by him for paupers of other cities and towns, and said salary shall be paid annually."

In the fall of that year the plaintiff was called upon by the overseers of the poor of Belfast, to attend one Solomon McFarland, a person found destitute in Belfast and having no settlement therein. The services thus rendered amounted to \$23.

Subsequently an action was brought by the city of Belfast against the town of Knox, where the said McFarland had his settlement, for supplies furnished, and judgment was recovered by Belfast in 1883. From the evidence before us, we are satisfied that Belfast, in that judgment, recovered for the services of this plaintiff the above-named sum, together with the sum of \$7.74, witness fees, of this plaintiff, attendant upon the trial in said action. The execution which issued upon that judgment was placed in the hands of an officer, who collected the full amount of the judgment and paid it over to one Harrison Hayford, with whom the city of Belfast had contracted for the support of the poor in 1876, and each year since that time.

One of the grounds of defense in this action is, that the defendants have not received the money; that it was paid over to said Hayford and not to the defendants, and that, therefore, they are not liable to the plaintiff in this form of action. But by the terms of the contract which was thus made with the said Hayford, Belfast was to furnish all medicines and medical aid to the paupers without expense or cost to him; and as a part of the consideration named in the agreement for the support of the poor, he was to receive "all sums of money received and collected by said city of Belfast from any other city or town, for the relief or support of any pauper." And while by the same contract the question of the necessity for supplies lay with the overseers of the poor, and such supplies were to be furnished by said Hayford under the direction of said overseers, it was also therein provided, that he was authorized to have suit brought in the name of the city, and to receive pay for such supplies of the cities or towns liable to the city of Belfast.

Therefore, whether the money collected on the judgment against the town of Knox was received by the city directly and then passed over to Harrison Hayford, or was received by him with the sanction and approval of the city, and appropriated as a part of that consideration to which he was entitled by virtue of his contract with the city, can make no difference. In either case it would inure to the benefit of the defendants as the actual parties benefited by the payment of their contract liability. The suit upon which the money was collected was brought by the city of Belfast. It was authorized to be brought by the contract of which we have spoken. The judgment was collected. The money was paid, and from all that we can gather in the case, appears to have been applied in accordance with the contract which the city had made with the party who was to take the care of the poor, and who received the money from the officer.

The ordinance which measures the duties of these defendants to the plaintiff, stipulated that the plaintiff was to receive, "when collected," all sums for medical services rendered by him for paupers belonging to other cities and towns. It was the sums "collected" which the plaintiff was to receive. It was in the nature of a portion of his salary. The defendants have collected, and received the benefit of that money which was to go to this plaintiff. The payment over to the plaintiff was postponed till collected from the town liable under the statute to these defendants; and that they have by contract with a third person subsequent to the ordinance aforesaid, seen fit to appropriate it to other uses, is no defense to this action.

Nor do we think the facts authorize the defendants in invoking, as a defense, the want of plenary proof of the qualification of the plaintiff as a physician under Rev. Stat., chap. 13, § 9. The defendants have collected the money due this plaintiff in a suit against another town. They availed themselves in that suit of his bill for services rendered. This action is not a suit for medical services, as such, but it is to recover the money which has been received by these defendants, and which in equity and good conscience they ought not to retain.

The plaintiff should receive interest on the amount legally due him only from the time the same was collected by the defendants.

Judgment for plaintiff for \$38.50.

PETERS, C. J., DANFORTH, VIRGIN, LIBBEY and EMERY, JJ., concurred.

MILFORD v. GREENBUSH.

May 4, 1885.

TOWN CLERK RECORDS.

A record made by a town clerk of a document which the law does not require to be recorded is not admissible as evidence that it is a copy of the original, even though the town clerk is deceased.*

TAXES, ABATEMENT OF — ADJUTANT-GENERAL'S REPORTS.

The fact that a tax has not been abated is no evidence that it has been paid.

The appendices to the report of the adjutant-general of the State, printed by the State printer, are admissible as copies of returns made to that officer.

Davis & Bailey, for plaintiff. *C. P. Stetson* and *J. A. Blanchard*, for defendant.

EMERY, J. I. The voting lists of the town were shown to be lost, and the plaintiffs offered in their stead what they alleged to be copies of those lists. These alleged copies were found apparently recorded from year to year upon the book of the town records, and in handwriting of the successive clerks of the town. Proof that they were in fact copies of the originals was essential to their admission in evidence. It was no part of the duty of the town clerk to copy such lists upon the town records. Such work would have been purely voluntary and unauthorized. Hence the alleged copies were not admissible as official copies or records. The plaintiffs do not contend that they were.

As to the alleged copy of the list for the year 1869, the plaintiffs were able to prove and did prove it to be a copy, by the testimony of the man who made it, and it was admitted as a copy. As to the other alleged copies, there was no evidence from any one who could say that he made them, or saw them made, or had compared them with the originals, or that they were according to his recollection of the originals. Evidence that the man who made the writings was dead, was no proof that he made true copies. The fact that he was town clerk, at the time, and had interjected these unauthorized writings into the town records, gave them no evidential value. The plaintiffs simply found some writings in the handwriting of one deceased, which they believe to be copies of the papers lost, but which they were unable to prove to be copies. Their only witness was dead. It was their misfortune.

The authorities cited by the plaintiffs' counsel are not applicable. This is not a question of the admissibility of a record, or of an entry, where the maker is dead. It is a question of the sufficiency of evidence that a certain writing was a copy of a lost document. We think the evidence was not sufficient.

II. Upon the issue, whether the pauper had paid any tax assessed against him for several years in the defendant town, the plaintiffs offered the assessors' books of the defendant town, containing what purported to be a list of the abatements for those years, in which the name of the pauper did not appear. We think it was incompetent. The assessors have nothing to do with the collection of the taxes. The collector's accounts might afford evidence upon that issue, but the assessors' list of abatements do not. *Non constat* that every tax is paid, or abated.

* A parish or church record, the keeping of which is optional and not by authority, is not competent evidence on the question of the legitimacy of a child. *Bradford v. Bradford*, 51 N. Y. 669.

The collector often fails to collect where there is no abatement. His own neglect, the insufficiency of his warrant, the poverty of the person taxed, may be the cause of non-collection.

III. The pauper was a private in a Maine regiment during the war of the Rebellion. The captain of his company made in each of the years of 1861 and 1862, an official return to the State adjutant-general of the members of his company, with dates, places of residence and enlistment, etc. That these returns, or duly proved copies of them, might be evidence of any fact properly stated therein, the plaintiffs do not now dispute, but they contend that what were offered as copies, were not admissible as such without further proof. The offered papers were the printed reports of the adjutant-general for those years, with the usual accompanying appendices, in which appear what purport to be copies of all such returns from all the Maine regiments. The reports, with the appendices, were made to the governor, and, we may assume, were by him laid before the legislature. The printed books purport to be printed by the State printer under legislative authority. The real value of the reports was in the appendices; all else was merely general statement and comment. The actual and desired facts and data, to promulgate which the reports were made and printed, were in the annexed papers. These were in effect a part of the reports.

Being printed by the official printer, under official supervision, they are presumably compared and correct copies of the originals. They have become *prima facie* copies, and we think are within the principle admitting printed public documents in evidence as copies of the original documents. *King v. Holt*, 5 Term R. 436; *Radcliff v. United Insurance Co.*, 7 Johns. 88; *Bryan v. Forsyth*, 19 How. 338; *Watkins v. Holman*, 16 Pet. 58; *Whiton v. Albany Ins. Co.*, 109 Mass. 30.

The legislature has not suspended the use of these printed copies of the records and files in the adjutant-general's office as evidence. Section 113 of chapter 82, Rev. Stat., referred to by the plaintiff's counsel, does not specify any mode of making or proving copies of such papers. It does not require that all copies used in evidence shall be certified by the adjutant-general. It only provides that certain particular facts may be certified by the adjutant-general as found upon the records, without the whole record being copied. There is no prohibition against using a full copy, if a party desires it.

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

STEVENS v. STEVENS.

May 5, 1885.

DEED — MORTGAGE — LEVY.

March 8, 1875, S. conveyed to Z. a small lot of land out of a larger parcel then owned by S. September 2, 1875, he conveyed to Z. the whole parcel by metes and bounds that embraced and included the small lot first conveyed, and on the same day Z. mortgaged to S. the same premises by same metes and bounds, and on April 23, 1878, Z. conveyed to S. the same premises which S. conveyed to him September 2, 1875. July 30, 1879, a creditor of Z. attached and, by due proceedings, subsequently levied upon the small lot first conveyed by S. to Z. as the property of Z. *Held*, that the creditor acquired no title by the attachment and levy which could be enforced in law.

Action of trespass to try title. The opinion states the facts.

A. L. Simpson, for plaintiff. Barker, Vose & Barker, for defendant.

PER CURIAM. This is an action of trespass, involving the title to a small lot of land included in and a part of the former homestead of the late Sumner Stevens, under whom, through mesne conveyances, both parties claim. The case shows that March 3, 1875, the title to the homestead, including this lot, was in Sumner, and on that day he conveyed the lot to Zypa S. Stephens.

This deed was not recorded until December 29, 1883. July 30, 1879, the town of Dixmont, in an action against Zypa, attached this lot, subsequently obtained judgment, levied upon and conveyed it to the plaintiff. It is conceded that what-

ever title Zypha had at the date of this attachment the plaintiff obtained by the subsequent proceedings. On the second day of September, 1875, Sumner gave to Zypha another deed conveying the whole of the homestead by metes and bounds, thus including the lot in question without excepting or in any way alluding to it. This was a deed of warranty. On the same day Zypha, by a mortgage deed of warranty, reconveyed the same premises with the same description by metes and bounds, leaving out that part of the description which calls the land conveyed the homestead of Sumner. Both these deeds were recorded, the first September 11, 1876, the mortgage November 18, following. Hence, whatever may be the effect upon the lot in question, of the deed of Sumner to Zypha, beyond all controversy the mortgage included and conveyed it to Sumner.

On the 28d day of April, 1878, Zypha, by a deed of warranty, not having redeemed or in any way procured a discharge of his mortgage, again conveys to Sumner the same premises Sumner had conveyed to him September 2, 1875. This deed was recorded April 25, 1875. Thus before the attachment by the town of Dixmont, the title to the homestead, including the lot in question, had again vested in Sumner Stevens both by deed and upon the record. This title he conveyed to the defendant May 1, 1878, who, on the same day, conveyed a life estate to Sumner and his wife, Mary A. Stevens. Before the commencement of this action Sumner died leaving the life estate in his widow, under whom the defendant justifies, and the reversion in the defendant. It may be that the parties intended to keep the lot in question separate from the homestead. But if so, they not only failed to express that intention in their deed, but did express the contrary, and the remedy, if any, is in equity alone.

Whether there is any estoppel as against the defendant is not now material. Mary A. Stevens is the owner of the freehold, and there is no evidence of an estoppel as against her.

It is not now necessary to settle the question of title to the house as separate from the land or as personal property. There is no evidence in the case sufficient to show such an interference with the house, or goods in it, as would sustain an action of trespass.

Judgment for the defendant.

LEWISTON STEAM MILL COMPANY v. RICHARDSON LAKE DAM COMPANY.

May 19, 1885.

WATER AND WATER-COURSE — FLOATABLE STREAMS — DRIVING LOGS — CORPORATIONS.

A corporation was chartered by the legislature, and authorized to make such improvement in the upper waters of Androscoggin river, as would "facilitate and render more convenient the drifting, or driving of the logs, masts, spars and other timber, by removing obstructions, building dams, wing dams, gates, piers, booms and so forth," and further authorized to demand and receive a specified toll upon every log that should pass its dam at the outlet of Big lake. *Held* (in an action by a log-owner, who had paid the toll, for damages for so unreasonably managing their dams as to deprive the plaintiff of the advantages for which he had paid), that the wants, desires or demands of a particular shareholder in the defendant corporation could not abridge or modify the duties and obligations of the defendant; that it was not material who was the owner of the lands upon which the dams were built.

Strout & Holmes and Savage & Oakes, for plaintiff. *Josiah G. Abbott and Frye, Cotton & White*, for defendant.

HASKELL, J. Prior to the date of the defendant's charter, the Androscoggin river and the chain of lakes and their connecting streams, from which that river takes its rise, were navigable by the usual methods of lumbering and had been so used for many years. The distance by these waters from Big Lake to the Topsham boom is more than one hundred and seventy miles, and the usual time required to accomplish a drive their entire length was four years.

To facilitate the lumber navigation of these waters, the legislature chartered the defendant company by special act approved March 22, 1853. It was authorized to make such improvement in them as would "facilitate and render more convenient the drifting or driving of the logs, masts, spars and other timber, by

removing obstructions, building dams, wing dams, gates, piers, booms and so forth," and to take and hold real and personal estate for the purpose, to an amount not exceeding \$10,000. It was authorized to demand and receive a specified toll upon every log that should pass its dam at the outlet of Big lake, and an additional toll for passing the dam at the outlet of Richardson lake. The purpose of these dams is to store water for aid in the driving of shallow and rocky places below them. They make it possible to deliver a boom of logs from Big lake into the Topsham boom in one season, that ordinarily, without them, it would require four seasons to accomplish.

The object, scope and purpose of this corporation is to facilitate navigation for the benefit of lumbermen, from whom it may demand and receive its tolls. Its functions are to benefit the lumbering industry from whence its revenues are to come. It can exact tolls, and in return is bound by law to grant and render in a reasonable manner to the industry burdened by them, all the facilities that it has acquired and controls, in derogation of the common right by authority of its charter. Of course it cannot be required to discharge so great a flood of water, as to endanger other interests lawfully existing below its dams on the Androscoggin waters. Nor can it withhold water to diminish the natural flow, that each riparian owner has a lawful right to enjoy.

The plaintiff drove these waters in the years 1879, 1880 and 1882, and paid to the defendant tolls amounting to \$2,626.32. The plaintiff claims that the defendant, by virtue of its charter, was required to give such facilities for the driving of lumber during those years, as its resources afforded. The defendant, on the other hand, contends that other interests than those of lumbermen were to be considered in determining what were the reasonable facilities that it was required by law to afford the plaintiff. It claims that the mills at Lewiston were interested in retaining a store of water in the lakes by means of its dams, and that such interests ought to be considered in fixing the amount of water that the plaintiff could lawfully demand; and in order that such consideration might be weighed and considered by the jury, it offered in evidence proof, that another corporation, organized for the benefit of the mill-owners at Lewiston, by authority of law had acquired and owned all the stock of the defendant company, and the land upon which its dams at the outlets of Big and Richardson lakes, respectively, are built. To the exclusion of this evidence the defendant has exception.

No authority has been cited at the bar showing the admissibility of the evidence excluded. Under its charter the defendant corporation is authorized and required by law, in consideration for the receiving of tolls, to confer increased facilities in the enjoyment of a common right. To this purpose and end its functions go. So long as it gathers from the public a toll for the navigation of a public stream, just so long must it contribute an equivalent to those burdened with the toll. They have a right to demand and receive from the defendant the full advantage of whatever it can reasonably give them from the resources, that it has been allowed by law to accumulate and retain. The wants, desires or demands of a particular shareholder in a corporation, charged by law with duties and obligations to the public, cannot abridge or modify such duties or obligations. They are fixed by law, and the corporation, so long as it assumes to perform the functions authorized by its charter, must respond, regardless of the private interest of any one, or all of its shareholders. Suppose a large manufacturer should acquire the major part of the stock of a railway company, would it be competent for the company in a suit against it for the denial of proper transportation facilities, to show in defense that the manufacturer was an owner of the controlling portion of its stock, and thereby had a right in furtherance of his own purposes to deny such reasonable facilities for transportation as the law requires? Would the fact that he was a shareholder, either increase or diminish the liability of the corporation to the public? If not, then the fact would be wholly immaterial. The law gives to each shareholder an equal right with others to the uses and benefits the railway can afford, regardless of his interest in the stock of the company, and that fact could have no bearing upon the liability of the corporation to others. So in the case at bar, it is of no consequence, who are the shareholders in the defendant company. Whatever liability the law casts upon it toward the public can

neither be increased nor diminished at the will or by the devise of any shareholder. Its functions are to facilitate the lumber navigation of the Androscoggin waters, and as an equivalent for the collecting of tolls, it must yield its whole resources to that end and purpose.

Nor is it material who are the owners of the lands upon which the dams are built, so long as the defendant company maintains them for the purposes expressed in its charter. If, in order to acquire the right to maintain the dams, the defendant became under obligations modifying its full and complete control and use of the water for the purposes expressed in its charter, such obligation might have to be regarded, because its tenure would be subject to such limited use. No evidence of this sort has been excluded. The defendant simply offered, in this behalf, to show that another was the owner of the land upon which its dams are built. That naked fact has no bearing upon the issue decided by the jury. The evidence excluded, does not tend to prove any material fact in defense of the plaintiff's case.

That the Union Water Power Company was authorized by the legislature to acquire and hold the stock of the defendant company does not, in any degree, modify or change the functions of the corporation. Its duties and obligations continue the same that its charter under the law originally imposed; and so long as it continues to exercise corporate functions under its charter, it must do so in accordance with its terms, burdened with those duties and obligations which the law imposes. True it is, that the mill-owners below, as riparian proprietors, may require of the defendant the natural flow of the waters of the stream as they may need them, but the defendant owes them no duty to retain and store waters up for their use in times of drought.

A careful consideration of the evidence fails to show that the jury has erred in its verdict. The defendant manifestly had means to afford the plaintiff greater facilities in the driving of its logs during the years 1879, 1880 and 1882, than it accorded to it. It had a right to demand from the defendant more water than it received during each of those years. The denial to it of this use was an injury for which the law gives damages. A careful, lengthy trial, with plenary instructions and rulings in matters of law, to which no exceptions, other than those noticed in this opinion, were taken, resulted in a verdict for the plaintiff. It is hard to say whether the measure of damages, fixed by the jury, is precisely commensurate with the plaintiff's injury, but it does not appear from the evidence that the jury were misled, or influenced by any improper motive or consideration in reaching their verdict; nor is it clear that a new trial would end in a more satisfactory result.

Motion and exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and EMERY, JJ., concurred.

PLACE v. BRAUN.

May 29, 1885.

PLEADING — DEMURRER — AMENDMENT.

The statute abolishing the distinction between actions of trespass and trespass on the case relates to distinctions of form, and a special demurrer in such case, relating merely to form, is not available to the defendant.

The court may, in its discretion, allow an amendment after a demurrer has been filed and acted upon.

Trespass *quare clausum*. The opinion states the point.

S. C. Whitmore, for plaintiff. L. M. Staples, for defendant.

FOSTER, J. The declaration in this case was for an alleged breaking and entering the plaintiff's close; the action may be properly termed one of trespass *quare clausum fregit*.

As first drawn, the writ commanded the defendant to answer unto the plaintiff in a "plea of the case." The defendant believing the plaintiff had misconceived his form of action, and that the command should have been to answer in a plea

of trespass *quare clausum*, filed a special demurrer to the plaintiff's writ. The court overruled the demurrer, and, we think, properly.

It will be noticed that the declaration in itself was correct, and alleged a breaking and entering the plaintiff's close. The demurrer related not to any matter of substance, but merely to form; and this is not available to the defendant on special demurrer. The statute has abolished the distinction between actions of trespass and trespass on the case. This relates to the distinction in form only. In cases where the distinction is really of substance, the provision of statutes is inapplicable. *Sawyer v. Goodwin*, 34 Me. 419; *Kelly v. Bragg*, 76 id. 207.

Nor was there error in allowing the amendment after the demurrer was disposed of. If the amendment was regarded as proper, it was allowable under Rev. Stat., chap. 82, § 10, in the discretion of the presiding judge; and on such terms as he saw fit to impose, or without any, as justice might require. *Kelly v. Bragg*, *supra*, which is decisive of this case. To the exercise of this judicial discretion exceptions do not lie. *Bolster v. China*, 67 Me. 551; *Cameron v. Tyler*, 71 id. 28; *Solon v. Perry*, 54 id. 493.

By this amendment no new cause of action was introduced, as was the case in *Farmer v. Portland*, 63 Me. 46, cited by the counsel for the defendant. It was an amendment in matter of form only, and clearly such as was contemplated by the statute relating to amendments "when the person and case can be rightly understood." *Harvey v. Cutts*, 51 Me. 607.

Exceptions overruled.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

WASHBURN v. ALLEN.

June 1, 1885.

PRACTICE — AS TO NONSUIT.

A plaintiff, at any time before opening his case, may become nonsuit as a matter of right. After the case is opened, and before verdict, it is within the discretion of the court to grant leave to become nonsuit. After verdict there can be no nonsuit.

G. C. Vose and *G. W. Heselton*, for plaintiff. *Baker, Baker & Cornish*, for defendant.

FOSTER, J. This action was tried before the presiding justice without the intervention of a jury. The parties upon both sides had introduced their evidence, and at this stage of the trial the plaintiff claimed to become nonsuit, to which the defendant objected. Thereupon the court ruled, as a matter of law, that the plaintiff could not become nonsuit against the defendant's objection.

Before proceeding to consider the authorities that bear upon this question, it may be remarked that nonsuits may be classed under two divisions: (1) Involuntary, as when ordered by the court against the plaintiff's objection; (2) voluntary, when allowed by the court on the plaintiff's own motion. Into the one or the other of the two classes the decided cases fall. The case under consideration comes within the last, and brings us to consider the rule of practice applicable in such cases.

The English practice differs somewhat from that of our own courts. At common law, as early practiced in the English courts, upon every continuance or day given over before judgment, the plaintiff was demandable, and upon his non-appearance might have been nonsuit. Bacon Abr., Nonsuit, D.; Co. Litt. 139 b. And no verdict could be returned and given, unless in his presence or that of his counsel, but the plaintiff was said to be nonsuit. Therefore it was usual for a plaintiff, when he or his counsel perceived that he had not given evidence sufficient to maintain his issue, to withdraw himself and be voluntarily nonsuited. 8 Bl. Com. 376; *Murphy v. Dolan*, 5 B. & C. 178; 11 Eng. Com. Law, 195. And whenever the plaintiff ought to appear in court, he was at liberty to withdraw. Co. Litt. 138 b, 139 a; *Robinson v. Lawrence*, 7 Exch. 125. The plaintiff had a right to be nonsuited at any stage of the proceedings he might prefer, and thereby preserve to himself the power of bringing a fresh action for the same subject-matter; and this right continued till the last moment of the trial, even

till after verdict rendered, or where the case was tried by the court without the intervention of a jury, until the judge had pronounced his judgment. *Outwater v. Hudson*, 7 Exch. 880. Consequently, if he was not satisfied with the damages given by the jury, he might become nonsuit. Bacon Abr., Nonsuit, D.; *Keat v. Barker*, 5 Modern, 208.

But by statute 2 Henry IV, chap. 7, A. D. 1400, it was ordained and established that, if the verdict passed against the plaintiff, he should not be nonsuited, which before that time was otherwise at common law.

Notwithstanding the statute, which was an amendment of the common law, it was held that the plaintiff might be nonsuited after the finding of a special verdict, and the reason of this would seem to be that a special verdict is in the nature of a statement of facts; and also, after a demurrer and argument thereon, and a rule for judgment for defendant, though it could not be done at the same term. Bacon Abr., Nonsuit, D.; *Alderly v. Alderly*, Cro. Jac. 85. And this statute was afterward construed as applying only to cases where the jury had passed upon the whole matter. *Earl of Oxford v. Waterhouse*, Cro. Car. 575; Com. Dig., Pleader, W. 5. Except in the cases above stated, the plaintiff could always become nonsuit upon any continuance.

In 1740 the English practice was further regulated by statute of 14 Geo. II, chap. 17, which provides "that where issue is, or shall be, joined in any action or suit at law in any of his majesty's courts of record, and the plaintiff or plaintiffs, in any such action or suit, hath or have neglected, or shall neglect, to bring such issue on to be tried according to the course and practice of the said courts respectively, it shall and may be lawful for the judge or judges of the said courts, respectively, at any time after such neglect, upon motion made in open court (due notice thereof having first been given), to give the like judgment for the defendant or defendants in every such action or suit, as in the case of nonsuit."

It would seem that the practice in England under the common law, as well as since the more modern statutes, has been perhaps, more liberal in favor of allowing nonsuits to plaintiffs as matter of right than is prescribed in this country. According to the practice there, as appears by the decisions of their courts, a plaintiff could not be nonsuited on the trial against his assent, but might insist as matter of right on the cause going to the jury, and thus take his chance of a verdict. *Dewar v. Purday*, 4 Ad. & El. 683.

In New York there are but two cases, and those among the early decisions of that State, so far as we have been able to find, that incline toward the English practice. In one, where a verdict was received without the assent of the plaintiff, the court set it aside, remarking that it was the right of a plaintiff to submit to a nonsuit. *People v. Mayor's Court of Albany*, 1 Wend. 36. In the other it was held that a plaintiff has the right to submit to a nonsuit on the coming in of a jury, although they are prepared to render a balance in favor of the defendant, in an action of *assumpsit*, and where a notice of set-off had been given. *Wooster v. Burr*, 2 Wend. 295.

Whatever may be the practice elsewhere, the courts of Massachusetts and New Hampshire have never adopted the early English practice, but, on the contrary, have declared that after a cause has been opened to the jury, the plaintiff cannot become nonsuit, as a matter of legal right, but the court might allow it at that stage of the case in its discretion.

In *Haskell v. Whitney*, 12 Mass. 47, JACKSON, J., in pronouncing the opinion of the court, says: "The plaintiff or demandant may, in various modes, become nonsuit, or discontinue his suit, at his pleasure. At the beginning of every term, at which he is demandable, he may neglect or refuse to appear. If the pleadings are not closed, he may refuse to reply, or to join an issue tendered; or, after issue joined, he may decline to open his case to the jury. The court also may, upon sufficient cause shown, allow him to discontinue, even when it cannot be claimed as a right; as after the cause is opened and the evidence submitted to the jury."

Also in *Locke v. Wood*, 16 Mass. 817, the court were of the opinion "that there was no such right; and that after a cause is opened to the jury, and begun to be proceeded in before them, the parties are entitled to a verdict, unless the court should, in its discretion, allow a nonsuit or discontinuance."

These cases, decided in the early history of the jurisprudence of this country, and which are cited as leading decisions upon this subject by the courts of several States, were first referred to by the court in *Means v. Wells*, 12 Metc. 361, decided more than thirty years later, and in which the principle decided by them, defining the distinction between the plaintiff's right and the discretion of the court, is there clearly recognized and affirmed.

And in another case the court says: "A party may become nonsuit before going to a jury." *City of Lowell v. Merrimack Mfg. Co.* 11 Gray, 382.

Again in *Shaw v. Boland*, 15 Gray, 572, METCALF, J., in beginning the opinion of the court, says: "These exceptions must be overruled on the authority of *Locke v. Wood*, 16 Mass. 317. In that case it was decided that after a cause is opened to the jury, and is begun to be proceeded in before them, the plaintiff has not a right, of his mere pleasure, to discontinue his suit, or to become nonsuit. Mr. Justice JACKSON had previously expressed an opinion to the like effect in *Haskell v. Whitney*, 12 Mass. 48. Such, therefore, is now the law of this Commonwealth, whatever it may be elsewhere, or may have been here under the colonial ordinance of 1641, which is found in Anc. Char. 46. And this law seems to us to be eminently just. As a nonsuit is no bar to another suit for the same cause of action, a plaintiff might harass a defendant by unlimited litigation, if the court had no authority, in any case, to prevent a nonsuit."

In still another later case in the same court Chief Justice GRAY affirms the doctrine that a plaintiff has the right to become nonsuit at any time before trial, but after the trial has begun, he cannot become nonsuit, except by the leave and at the discretion of the court. *Inhab. of Truro v. Atkins*, 122 Mass. 418; *Burbank v. Woodward*, 124 id. 358.

New Hampshire has followed the decisions of Massachusetts notwithstanding the court there, in the earliest decision on this question, fully recognized what had been the practice under the common law in the English courts. Chief Justice PARKER, in delivering the opinion of the court, states the rule of law as follows: "At any time before the plaintiff opens his case to the jury, he may become nonsuit, as a matter of right. The entry of his action does not oblige him to proceed with it. Even if issue be joined, this does not entitle the defendant to a verdict, if he elect to abandon his action." *Haskell v. Whitney*, 12 Mass. 47.

"After the plaintiff has proceeded to open his case to the jury, he can no longer become nonsuit, as a matter of right. The court may require that the case shall proceed; and, if the plaintiff do not put in his evidence, may direct the jury to return a verdict against him. But the court, in the exercise of its discretion, may permit him to become nonsuit at any time before the return of a verdict; and ordinarily does so, if it appear that no injustice will thereby be done to the adverse party." *Locke v. Wood*, 16 Mass. 317; *Howe's Practice*, 268." *Judge of Probate v. Abbott*, 13 N. H. 21. And the court further remark that a party ought not to be permitted to lie by, take the chance of success, and then deprive the other party of the benefit of his verdict by a nonsuit.

The same court in a more recent opinion adheres to the rule established in the last case, and states that "it may now be assumed to be the general practice in the courts of law in this country, that a plaintiff may at his own pleasure, or by right, either discontinue his suit, or become nonsuit, at any time before his cause is opened to the jury." *Wright v. Bartlett*, 45 N. H. 290; *Judge of Probate v. Abbott*, 13 id. 22; *Pollard v. Moore*, 51 id. 191; *Fulford v. Converse*, 54 id. 544; *Parker v. Burns*, 57 id. 602; *Farr v. Cate*, 58 id. 367; *West v. Furbish*, 5 Rep. 285.

In our own State the question has never been directly before the court, but it would seem that the doctrine enunciated by the decisions of Massachusetts, before our separation, and by those of New Hampshire, has been admitted and recognized in several cases.

The first of these was *Prop. of Kennebec Purchase v. Davis*, 2 Me. 356, where Chief Justice MALLIN, in speaking of the demandants' rights, in a writ of entry, to accept the offer of the tenants, says: "They certainly are not bound to proceed any further in a cause of judicial investigation; they have a right to become nonsuit at any time before the cause be opened to the jury or the trial commenced." *Locke v. Wood*, 16 Mass. 317."

So in the case of *Theobald v. Colby*, 85 Me. 180. In that case, before the plaintiff had offered any testimony, the defendant moved in writing for leave to withdraw his account in set-off, which was objected to by the plaintiff, the motion refused and the full court sustained exceptions, saying: "The right of a defendant in such a case is similar to a plaintiff's right to become nonsuit. *Muirhead v. Kirkpatrick*, 5 Watts & Serg. 508. And the plaintiff may become nonsuit as of right, at any time before trial. *Haskell v. Whitney*, 12 Mass. 47. At common law he might become nonsuit at any time before verdict."

So far as we have been able to discover, this is the only intimation given by our court in the decisions upon this question of voluntary nonsuit, as to the extent of the plaintiff's legal right as such, aside from the exercise of judicial discretion in granting it, which is everywhere recognized, and which should not be here confounded.

That at any time before the cause is committed to the jury, it is discretionary with the presiding judge to permit the plaintiff to become nonsuit, on motion and for cause shown, where a nonsuit or discontinuance is not a matter of right, will not be doubted, and this has been the state of the law for a long period, both in England and in this country. *Philips v. Echard*, Cro. Jac. 85; *Means v. Wells*, 12 Metc. 362.

But that, after verdict for the defendant, a nonsuit will not be allowed as of right, or in the discretion of the court, was settled in our own court in *Larrabee v. Rideout*, 45 Me. 193.

We have carefully examined not only the authorities cited, but many others, in support of the extension of the rule to authorize a nonsuit, as matter of right, up to the time of verdict, but we are not satisfied that as against the decisions of our own courts, the English practice or the old common-law doctrine should prevail. In the cases to which we have referred, our courts have fully recognized, though they have not seen fit to follow, the ancient common law as laid down many years ago in England. Many of the customs of our courts are different from those existing at that time, when no verdict could be returned for or against a plaintiff unless he or his counsel was present in court, and to avoid which, or, if in his favor, and the damages were not satisfactory to him, he might withdraw himself and become nonsuit. "*Cessante ratione legis, cessat ipsa lex.*"

Hence, not only upon principle, but authority, we may safely found this rule: That the plaintiff, before opening his case to the jury, or to the court, when tried before the court without the intervention of a jury, may become nonsuit of a matter of right; after the case is opened, and before verdict, leave to become nonsuit is within the discretion of the court; after verdict there can be no nonsuit.

The reason of the rule is apparent and needs no discussion. It is founded upon principle. If there were no place at which a party defendant could have any rights, save as to costs, till after verdict, great injustice might oftentimes result, with no power in the court to correct or restrain it. As a nonsuit is no bar to a future action for the same cause, a plaintiff, if so disposed, might harass the opposing party, whose residence or situation might be such as to necessitate great expense in the preparation or defense of a cause, with continued litigation, and the costs recoverable would be absolutely inadequate to compensate him for either. Courts of law are instituted for the administration of justice, and in so doing must be governed by wise and salutary rules that will neither afford improper advantage to one party nor work injustice to the other.

In this case both parties had introduced their evidence. The plaintiff thereupon stated that he voluntarily became nonsuit. The defendants objected. The court then ruled, as matter of law, that the plaintiff could not become nonsuit against the defendants' objection, and ordered judgment for defendants.

This we think was error. It was in effect, expressly denying that the trial court had the power, in the exercise of its discretion, to grant the nonsuit asked for by the plaintiff, and which, as we have stated, could have been done, in the discretion of the court, at that stage of the case.

Exceptions sustained.

PETERS, C. J., WALTON, DANFORTH, LIBBY and EMERY, JJ., concurred.

NOBLE v. MILLIKEN.

June 8, 1885.

INNKEEPER — JEWELRY OF GUEST.

Revised Statutes, chap. 27, § 7, limiting the liability of an innholder for losses sustained by a guest specifies the following exceptions, "wearing apparel, articles worn or carried upon the person, to a reasonable amount, personal baggage and money necessary for traveling expenses and personal use."

Held, that a gold watch, a pair of gold bracelets, a gold thimble, three gold rings and a gold neck pin, lost by a guest who had taken them along for her personal use, and for no other purpose, were within the exceptions specified in the statute.

S. & L. Titcomb, for plaintiff. *G. C. Vose*, for defendant.

EMERY, J. In section 7 of chapter 27, Revised Statutes, limiting the liability of an innholder for losses sustained by his guest, there are specified the following exceptions: "Wearing apparel, articles worn or carried upon the person, to a reasonable amount, personal baggage and money necessary for traveling expenses and personal use." The plaintiff lost from her trunk at the defendant's inn, among other articles, the following: one gold watch, valued at \$50, one pair of gold bracelets, valued at \$65, one gold thimble, valued at \$8, one gold ring, valued at \$20, one gold ring, valued at \$5, one hair ring (gold mounted), valued at \$8, and one gold neck pin, valued at \$2. The only question is, whether the articles enumerated are within the exception in the statute.

From the case it seems that all these articles were taken along by the plaintiff for her personal use, and for no other purpose. They were not merchandise, nor business articles. They were not taken along simply for transportation of them. They were such articles as she might properly use daily while traveling, or resting. The amount does not appear to be unreasonable in view of the plaintiff's situation. Such articles, we think, are within the exception. *Macrow v. Great Western R. R. Co.*, L. R., 6 Q. B. 622; *Bruty v. Grand Trunk R. R. Co.*, 32 Upper Canada, 66, and cases there cited.

The plaintiff's trunk and pocket-book were damaged to the amount of \$5.

Judgment for plaintiff for \$163, and interest from date of the writ.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and FOSTER, JJ., concurred.

[See 21 Eng. Rep. 565; 41 Am. Rep. 777; 47 id. 754. — Ed.]

NORTON v. VOSE.

June 8, 1885.

INSOLVENCY — ASSIGNEE — LEVYING CREDITOR.

An officer may be allowed to amend his return in accordance with the fact, when the rights of third parties have not intervened, other than an assignee in insolvency.

The fact that a judgment against sureties was levied upon the property of one surety at the instance of the other surety does not affect the title acquired by the levy.

If a co-surety receive payment from the principal of any portion of a judgment against the sureties, the assignee in insolvency of the other surety who paid a portion of the judgment has a clear and adequate remedy for an equitable share of the payment by the principal.

Action of trespass to determine title to real estate. Defendant claimed title as assignee in insolvency of one Nathan B. Saunders, an insolvent debtor. Plaintiff claimed title by virtue of a levy upon the real estate of said Saunders, made upon a judgment in favor of one Betsey S. Elder against Harlow E. Harvey, the plaintiff, and said Saunders, and a conveyance by said Elder to one Augustine Simmons, her attorney, and from said Simmons to plaintiff. The judgment and levy were subsequent to the adjudication of the insolvent court, that said Saunders was insolvent, made March 20, 1881, upon a petition by his creditors filed March 6, 1881.

At the trial, upon the motion of plaintiff's attorneys the deputy sheriff who served the writ, though not an officer at the time of trial, was allowed by the court to amend the return upon the writ by adding to the figures "188" a zero

or cipher, so that the return should bear date "Sept. 6, A. D., 1880," instead of "Sept. 6, 188," as it was before the amendment was made. He was allowed to amend his certificate, filed with the register of deeds, by the same addition to the three dates therein found. The officer testified before the amendments were made, that in making his returns he inadvertently omitted the zero in stating the year, and that the date, as now amended, correctly states the time when the real estate attachment was in fact made.

The action of Elder against Harvey, Norton and Saunders was brought upon a note given by Harvey as principal, with Norton and Saunders as sureties. After the judgment was recovered, Norton, one of the sureties, and plaintiff in this action, obtained from Harvey, property to the amount of \$75, which the defendant claimed was to be allowed upon this transaction, but which the plaintiff denied. Norton, as the jury found, afterward made an arrangement with Augustine Simmons, the attorney for Mrs. Betsey S. Elder, to pay one-half of said judgment, and to deposit the other half of the same as collateral security for the payment of said one-half if it was not otherwise obtained. Thereupon, Norton paying the expenses for his benefit, a levy was made upon the real estate of Saunders for the amount of the one-half so collaterally secured, without any deduction for the amount of \$75, received by Norton from Harvey. The real estate was subsequently conveyed to Norton.

Brown & Carver, for plaintiff. *Walton & Walton*, for defendant.

PER CURIAM. The defendant, as assignee in insolvency of Saunders, had no better title as against Mrs. Elder, the levying creditor, than the insolvent debtor, Saunders had, and as against the defendant, the officer's return of the attachment on the original writ was legally amendable.

The alleged arrangement between the plaintiff and the attorney of Mrs. Elder, by which the levy was made on the land of Saunders, who was co-surety with the plaintiff, for the half of the judgment remaining unpaid, in no way affects the title acquired by the levy, and the plaintiff acquired the legal title to the land by his deed from Simmons.

If the plaintiff has received from the principal debtor, payment of any portion of the judgment, the defendant, as assignee of Saunders, has a clear and adequate remedy for an equitable share thereof.

Exceptions overruled.

STRATTON v. STRATTON.

June 8, 1885.

MARRIAGE — DIVORCE — AGREEMENT AS TO ALIMONY — DOES NOT CEASE ON HUSBAND'S DEATH.

While a libel for divorce by the husband was pending, the parties agreed in writing that in case a divorce should be decreed on that libel, two referees were named, who should determine what the wife should receive from the husband, in what way and manner, how it should be secured to her, and that the report of the referees should be made a part of the agreement of the court, be binding on the parties and enforced as such. The wife then brought a cross-libel. The court entered a divorce in each case at the same time, and, in the proceedings on the husband's libel, ordered that alimony be paid to the wife in accordance with the award of the referees. *Held*, that the judgment of the court was valid.

Where the decree of the court as to alimony expressly provides that it is to continue during the natural life of the wife, it will continue during her entire life, though the husband should die.

W. P. Young, for plaintiff. *Baker, Baker & Cornish*, for defendant.

FOSTER, J. In 1860, at the March term of the court for the county of Kennebec, cross-libels for divorce were pending between this plaintiff and her husband. During the pendency of the husband's libel, and prior to said term of court, the parties thereto entered into an agreement in writing, signed by each of them, that in case a divorce should be decreed upon said bill, two referees named in said agreement should determine what the libelee should receive from the libellant, in what way and manner, how it should be secured to her, and how she should receive it. It was also agreed that the report of the referees should be made a part of the decree of the court, and should be binding on the parties, and

enforced as such. The referees accordingly heard the parties and made their report to the court. Their award, which, together with said agreement, was extended upon the records and made a part of the proceedings in said action, provided, among other things, that the said libellant should pay to the libelee — the present plaintiff — “during her natural life, an annuity of \$250, to be paid quarterly in advance,” etc. Upon the same day of the said March term a divorce was decreed to each libellant in each of said actions; in that wherein the husband was libellant, the court “ordered that alimony according to the award of Nathan Weston and Lot M. Morrill, on file, be received and paid as therein provided.”

From that time forward till April 2, 1881, the plaintiff received the sum thus awarded, and ordered by the court to be paid; since which time nothing has been paid to her. William M. Stratton died August 6, 1883, and this action of debt upon judgment is brought against the administrator of his estate to recover the installments accruing since the last payment, both prior to and since the death of said William M. Stratton.

The defense set up is two-fold: first, that the court had no jurisdiction to grant alimony, and therefore that the payment is void; and second, that the court had no authority to grant alimony beyond the life-time of said William M. Stratton, and that said judgment became inoperative and void at his decease.

I. We are not satisfied that the defense here set up should prevail. Both parties were in court as petitioners in separate proceedings, and from any thing that appears to the contrary, the court entered its decrees in each case, not only on the same day but at the same time. While the libel of the husband was pending, and before proceedings were commenced on the part of the wife, the parties voluntarily entered into the agreement hereinbefore named, submitting to referees the question of what sum the libelee should receive from the libellant, and agreeing that their award should be made a part of the decree of the court, and should be binding on the parties.

Such agreements, where there is no collusion for procuring a divorce, have been sanctioned by the courts, not only in this but in other States. *Snow v. Gould*, 74 Me. 54; *Carter v. Carter*, 109 Mass. 809. The agreement and award related to the proceedings in which the husband was libellant and the wife was libelee. The court as well as the parties, must have so understood it, and acted upon it, as it has been spread upon the records of the court in that action, and in express terms refers to it. Was the judgment of the court rendered void by incorporating into it, the award of referees mutually agreed upon by the parties, and which, by that agreement, was to be made a part of the decree?

The objection raised is, that it was beyond the jurisdiction of the court to allow alimony to the wife on the libel of the husband.

This is undoubtedly true in cases where there is no waiver by the husband of his strict legal rights, and the decree is made in opposition to his will. It may be conceded to be settled in this State that the jurisdiction and authority of the court in matters pertaining to divorce, are derived from the provisions of the statute. *Henderson v. Henderson*, 64 Me. 419. But the court being invested with jurisdiction in reference to alimony, there is nothing whereby parties are prohibited from entering into a proper agreement in reference thereto, or the court from rendering judgment in accordance with the agreement of the parties, which they have seen fit to make, as in other cases. In relation to such judgments, the court in *Fletcher v. Holmes*, 25 Ind. 458, says: “It is well settled that a judgment by agreement of a court of general jurisdiction having power in a proper case to render such judgment, and having the parties before it, will bind the parties, notwithstanding proceedings in a contested case would not authorize such judgment.”

And by this it should not be understood that we mean to hold that the consent of the parties can give the court jurisdiction of the subject-matter in controversy, where no jurisdiction has been conferred upon it by the legislature. But that when the court has jurisdiction of the general subject-matter in controversy, — “power to adjudge concerning the general question involved,” as said by FOLGER, J., in *Hunt v. Hunt*, 72 N. Y. 217; S. C., 28 Am. Rep. 129, there the consent of the parties may authorize the court to render a valid judgment in accordance

with such agreement. In the case at bar, so much of the judgment or decree as relates to the question of alimony was rendered in accordance with the agreement and consent of the parties, upon the award and report of the referees mutually chosen by them. A divorce was decreed in favor of the wife on her libel as well as in favor of the husband on his, and at the same time. The court had jurisdiction to award alimony on the wife's libel, but if the husband preferred that such decree should be made on his libel instead of hers, it was perfectly competent for him to so agree as a condition on which a divorce should be decreed to him, and having so agreed, and the court having so decreed, it is binding upon him and his legal representatives. If the defense relied upon is to prevail, then the plaintiff was prejudiced by the action of her husband in entering into that agreement with her relating to the amount he was to pay her, in case a divorce should be obtained upon his libel. She desired a decree for alimony. Divorce was decreed to her — as well as to her husband — and for his fault. She might have obtained such a decree in the case in which she was plaintiff, where its validity would not have been questioned, had not the husband agreed that such decree should be made in the action commenced by himself, and be "binding on the parties." Relying upon that agreement, she accepted the decree as made. The husband's rights were not violated, nor was he in any way prejudiced by the entry of the decree for alimony, in strict accordance with his own agreement, in the one case rather than in the other. His acts in accordance with that decree for more than twenty-one years thereafter are strongly indicative of this fact.

And the facts in this case clearly distinguish it from those in which it is held that alimony can be granted only upon a bill in favor of the wife, as in *Stilphen v. Stilphen*, 58 Me. 515; S. C., 4 Am. Rep. 305; *Stilphen v. Houdlette*, 60 Me. 447; and *Henderson v. Henderson*, 64 id. 419. In those cases the court was called upon to decide as to the strict legal rights of the parties, and where there had been no waiver or agreement, as in the case at bar.

But assuming that the decree was irregular, it was at most but error, and the husband being in court and represented by counsel might have excepted, and not having excepted he may be considered as having waived the error or irregularity. *Convay Ins. Co. v. Senell*, 54 Me. 357; *Prescott v. Prescott*, 59 id. 153.

Furthermore, whenever from the record a want of jurisdiction is not apparent, and a judgment remains unreversed, it is conclusive upon the parties and those in privity with them whenever any question arises in reference to it before any judicial tribunal. And "where a want of jurisdiction actually exists in a domestic tribunal of the general jurisdiction," says WHITMAN, C. J., in *Granger v. Clark*, 22 Me. 130, "and is not apparent upon the record, there must be some appropriate mode of ascertaining it. This mode is by writ of error. And until such appropriate mode has been resorted to, and has proved effectual, the judgment must be considered as conclusive, and importing absolute verity."

II. The court in adopting the award of the referees as a part of the decree, gave alimony to the wife "during her natural life." That the court has the power so to do, where it may be granted at all, seems to be very strongly implied by the terms of the statute which provide that the court may order so much of the husband's real estate, or the rents and profits thereof, as is necessary, to be assigned and set out to the wife for life. Moreover, where the language of the decree expressly states that it is to continue after the death of the husband, the authorities hold that it will so continue. *Miller v. Miller*, 64 Me. 489; Bishop Mar. and Div., § 601. In *Burr v. Burr*, 10 Paige, 20, in the chancellor's court, and afterward affirmed in the court of errors, 7 Hill, 207, it was held that alimony could be decreed to continue after the husband's death, during the entire life of the wife. And in *Carson v. Murray*, 3 Paige, 483, the husband and wife agreed to separate, and in the agreement was a provision for the payment of an annuity of \$175 to the wife yearly, as alimony during her life, and the court held that it did not cease at the death of the husband.

The supreme court of Iowa in *O'Hagan v. O'Hagan*, 4 Iowa, 509, say: "In decreeing her sums of money in the first instance, or in making the proper and equitable order in relation to this property and her maintenance, the decree may

provide for the payment thereof from year to year for a specific period, or may provide even that it shall continue during her life."

The authorities cited by the defendant's counsel do not support the position claimed by him. Where examined they will be found to relate to cases wherein the court did not in express terms provide for the payment of alimony during the life of the wife. Thus in the case of *Lenahan v. O'Keefe*, 107 Ill. 620, the court, referring to *O'Hagan v. O'Hagan*, *supra*, hold that in the absence of language in the decree showing an intention to bind the heir of the husband after his death, the allowance of alimony will terminate with the life of the husband.

In *Knapp v. Knapp*, 134 Mass. 353, there was no provision in the decree that the alimony should continue during the life of the wife; the decree was for alimony, with no words expressive of any intention for its continuance beyond the life of the husband.

III. But in the decree in the case before us, even adopting the language of the award, there is no sufficient designation of real estate upon which any lien for alimony can attach. The estate is not set out or described in terms that give sufficient identification. *Hills v. Hills*, 76 Me. 486.

In accordance with the stipulation in the report of the case, the decision of the court is that the action is maintainable, not only for the installments due before but subsequent to the death of William M. Stratton.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

NOTE.—In *Field v. Field*, 15 Abb. N. C. 434; S. C., 66 How. Pr. 346, a final decree had been made in an action for divorce on the ground of adultery, directing the payment of alimony by the defendant during the life of the plaintiff, *held*, that the obligation to pay such alimony was a personal one, and upon the death of the defendant the right to the same was at an end, and no action could be maintained by the wife against the representatives of the husband's estate for alimony which might subsequently accrue. BRADY, J., said: "*In Francis v. Francis*, 81 Gratt. 283, it was said that alimony was a proportion of the husband's estate allowed to the wife for maintenance and support during the period of their separation, and ended with the death of either. See, also, *Gaines v. Gaines*, 9 B. Monr. 299; *Wallingsford v. Wallingsford*, 6 Har. & J. 485, for similar views. *Burr v. Burr*, 10 Paige, 20, affirmed. 7 Hill, 238, is not in conflict with these views." In *Miller v. Miller*, 64 Me. 484, cited in principal case, it was held that a decree made in a divorce suit that the mother shall have the care and custody of her minor children, and that the father shall pay a certain sum quarterly toward their support, which by its terms is to continue in force till the further order of the court, is not discharged by his death; and a bond given to secure the performance of such a decree is binding upon the surety, notwithstanding the death of the principal obligor.

In *Beach v. Beach*, 29 Hun, 181, the defendant's testator, by a decree entered in 1869, dissolving his marriage to the plaintiff, was required to pay her alimony during her life-time and while she remained unmarried. In 1871, the testator was discharged in bankruptcy from his debts existing May 6, 1870. The testator paid, during his life-time, all the installments of alimony falling due. *Held*, that the claim of the plaintiff for alimony, after the testator's death, was on the debt created by the judgment, and that was discharged by the bankruptcy proceedings. See, also, *Stewart's Mar. & Div.*, § 378.—Ed.

WILSON v. PAGE.

June 4, 1885.

ASSIGNMENT—CHOSE IN ACTION.

A general assignment in writing of a part of miscellaneous demands to be selected by the assignee is not such an assignment as the statute requires, to authorize the assignee to maintain an action thereon in his own name.*

Davis & Bailey, for plaintiff. *Barker, Vose & Barker*, for defendant.

PER CURIAM. A general assignment in writing of a part of miscellaneous demands, to be selected by the assignee, is not such an assignment in writing as the statute requires to authorize an assignee to maintain an action in his own name, although the assignee selected the particular demand in suit before the action was commenced.

Plaintiff nonsuit.

* Rev. Stat., chap. 82, § 180 reads as follows:

"§ 180. Assignees of choses in action, not negotiable, assigned in writing, may bring and maintain actions in their own name, but the assignee shall hold the assignor harmless of costs, and shall file with his writ the assignment or a copy thereof; and all rights of set-off are preserved to the defendant."

POWERS v. MITCHELL.

June 4, 1885.

PRACTICE — EXCEPTIONS — EVIDENCE — PHYSICIAN'S.

It is the duty of counsel, if he thinks a client's rights are being prejudiced, by the opposing counsel exceeding the proper license of an advocate in his argument to the jury, to interpose objections at the time; he cannot elect to take the chance of a verdict in his favor, and if he fails, then raise the objection.*

A plaintiff cannot complain that she was required on cross-examination to testify that she commenced her action before notifying the defendant of her claim against him.

To lay the foundation for exceptions to the admission of testimony, the attention of the presiding justice should be called to the specific objection to it.†

An exception to the exclusion of a question to a physician relating to the health of a person cannot be sustained when it does not appear what personal knowledge he had of the health of such person.

An exception to the exclusion of admissible evidence will not be sustained when it appears that the excepting party is not aggrieved thereby.

The opinions of physicians are admissible to show that a greater injury to the person would result from a direct blow than from a glancing one.

C. W. Goddard and A. M. Spear, for plaintiff. Baker, Baker & Cornish (E. W. Whitehouse with them), for defendant.

LIBBEY, J. This case comes up on motion and exceptions.

The ground insisted on in support of the motion is the misconduct of the defendant's counsel in his closing argument, in asserting facts not in evidence, and not competent evidence, if offered, and arguing thereon. The motion cannot be sustained. If the defendant's counsel, as claimed by the plaintiff, exceeded the proper license of an advocate in his argument to the jury, it was the duty of the plaintiff's counsel, if he thought his client's rights were being prejudiced, to interpose objection; and then if the judge declined to interfere, the plaintiff might have exceptions. *Rolf v. Rumford*, 66 Me. 564. And if the judge stopped counsel and required him to desist and retract, and he refused to do so, the plaintiff might have his remedy by motion. But by electing to interpose no objection and rely upon the advantage he might have by counter assertion and argument in reply, he waived his right to exception or motion. *Learned v. Hall*, 133 Mass. 417. The case is similar in principle to a case of disqualification or misconduct of a juror. If known to a party during the trial, and he wishes to take advantage of it, he must interpose his objection. He cannot elect to take his chance of a verdict in his favor, and if he fails, then raise the objection.

Several exceptions were taken to the admission and exclusion of evidence. Those relied on will be examined in the order in which they are presented by the plaintiff's counsel. One and two relate to the conduct of the plaintiff in causing the action to be commenced before notifying the defendant of her claim for damages, and causing his property to be attached. The officer's return of the attachment was in the case. The questions were put to the plaintiff on cross-examination. She cannot explain that she was required to answer them. Three and six are similar in principle. The objection to the questions urged by the learned counsel is that they embrace hypothetically, facts not in evidence.

It is sufficient to say that the exceptions and the evidence reported do not show that there was no evidence in the case tending to prove those facts. Nor does it appear that the objections to the questions were for that cause. To lay the foundation for exceptions on that ground, the attention of the judge should have been called to the specific objection, so that he could determine, as he must in the first instance, whether there was sufficient evidence tending to prove the facts stated, to authorize the question.

Four. The question put to Dr. Dana and excluded was objectionable, because it does not appear he had heard all the testimony of the plaintiff; nor does it appear what personal knowledge he had, if any, of her health.

Five. We are inclined to the opinion that the question put to Mrs. Goddard and excluded, was competent on the questions of damages; but if so, the plaintiff

* 48 Am. Rep. 836, note.

† See *ante*, 182.

is not aggrieved, as the jury found the defendant not guilty, and the question of damages became of no importance.

Eight, nine, twelve and fourteen are alike in principle and may be considered together. They call for the opinion of the physicians as to the physical effects upon the person, of blows received in the manner specified. Their answers were in substance, that they should expect a greater injury from a direct blow than from a glancing one. We think the subject was within the range of the experience of medical experts, accustomed to observe the effect of blows upon the human body, and that the evidence was competent.

Ten and fifteen. The subject to which the questions put to Dr. Packard and Dr. Bricket relate is clearly a proper one for the opinion of medical experts. No question is made as to their qualifications as such. The questions and answers were competent.

The case has been four times tried to the jury with two disagreements and two verdicts for the defendant. The litigation should not be further prolonged without some substantial reason. Upon a careful examination of the whole case as presented, we see no good cause for disturbing the verdict.

Motion and exceptions overruled.

PETERS, C. J., DANFORTH, EMERY and FOSTER, JJ., concurred.

STATE v. ROLLINS.

June 4, 1885.

CRIMINAL LAW — INDICTMENT — PRACTICE.

An indictment alleging that the respondent at a certain time and place "unlawfully did keep a drinking-house and tippling-shop" is sufficient.

TRIAL — CROSS-EXAMINATION — COLLATERAL MATTERS.

The extent to which a cross-examination, relating to collateral matters, may be carried, is within the discretion of the presiding judge.

SAME — JURY UNABLE TO AGREE — FURTHER INSTRUCTIONS.

After the jury had taken the case and been in the jury room for two hours the court sent to them a message by the sheriff, inquiring if the jury desired further instructions. The sheriff reported that the jury were unable to agree whether they desired further instructions or not. Thereupon the presiding judge ordered the jury to be brought into court, and further instructed them upon the importance of agreement, and in relation to the manner of considering certain testimony and evidence in the case. *Held* no error.

W. T. Haines, county attorney, for State. Herbert M. Heath (with him Geo. W. Heselton), for defendant.

WALTON, J. We think the exceptions in this case must be overruled.

The indictment is sufficient. *State v. Collins*, 48 Me. 217; *State v. Casey*, 45 id. 435.

The exclusion of the question put to the government witness (Harrington) on cross-examination was not erroneous. The extent to which a cross-examination, relating to collateral matters, may be carried, is within the discretion of the presiding judge. By whom the witness was employed to act as a detective was entirely irrelevant to the issue being tried, and, upon principles of public policy, as well as in the exercise of the discretionary powers of a presiding judge, such a question may properly be excluded. The employment of detectives is not in all cases discreditable. In many cases it is the only way of bringing the offenders to justice. It is as important that laws should be enforced as it is that they should be enacted. If it is commendable in the legislature to enact laws prohibiting the sale of intoxicating liquors, or of diseased meat, or other unwholesome food, it is equally commendable on the part of the community to endeavor to enforce them, and persons who are willing to spend their time or money in efforts to enforce such laws should not be unnecessarily exposed to the ill-will of the persons whose crimes are thereby detected. We think the presiding judge committed no error in excluding the proposed question.

Nor was there any error on the part of the judge in calling the jury into court and endeavoring to impress upon them the importance of an agreement. Nor do we discover any thing in the remarks made by the judge to the jury which we

can say, as matter of law, it was illegal for him to say. A judge's style and manner are his own. We have no more right to dictate to the judge of the superior court what the style or manner of his address to a jury shall be, than he has to dictate to us what ours shall be. It is enough for us to say that we find nothing illegal in the course pursued by the presiding judge in this case.

Exceptions overruled.

PETERS, C. J., DANFORTH, EMERY and FOSTER, JJ., concurred.

SKOWHEGAN AND ATHENS RAILROAD COMPANY v. KINSMAN.

June 4, 1885.

RAILROAD — SUBSCRIPTION TO STOCK.

A subscriber to stock in a railroad company signed a subscription list in which he agreed to take a certain number of shares and promised unconditionally to pay the par value of the same. *Held*, that he was liable to an action on his express promise, though the amount of the capital stock was not fixed, and the minimum number of shares named in the charter were not subscribed for.

D. D. Stewart, for plaintiff. *H. & W. J. Knowlton* and *E. F. Webb*, for defendant.

EMERY, J. A person, by simply subscribing for shares in a corporation without words of promise to pay, assumes only the obligations imposed by law on such subscriber. He is understood to have agreed to assume a certain percentage of the responsibility of the enterprise, on condition that the amount of the responsibility be made certain, and the remaining percentage be assumed by responsible parties. He can require that the full amount of capital agreed upon, or established by the charter as necessary for success, shall be engaged before he pays in his part. He is only obliged to pay legal assessments, and where the capital has not been fixed, or when fixed, has not been subscribed for, there can be no legal assessment, unless the charter otherwise provide. *Som. & Ken. R. R. Co. v. Cushing*, 45 Me. 524; *Somerset R. R. Co. v. Clarke*, 61 id. 379.

But a person may, in his subscription, voluntarily assume any other obligations not forbidden by law. He may waive any and all of the conditions implied by law in a naked subscription. He may impose other conditions, or he may promise payment for his shares without any conditions. His promise once made, will be binding, there being in such cases sufficient consideration in the obligation of the company to deliver the shares. *Ken. & Port. R. R. Co. v. Jarvis*, 34 Me. 360; *Bucksport & Bangor R. R. Co. v. Buck*, 65 id. 536; *City Hotel v. Dickinson*, 6 Gray, 586; *Lexington & West Cambridge R. R. Co. v. Chandler*, 13 Metc. 811; *Pen. and Ken. R. R. Co. v. Bartlett*, 12 Gray, 244; *Boston, Burre & Gardner R. R. Co. v. Wellington*, 113 Mass. 79. In such cases the express promise is to be enforced by an action thereon, and not by an action on a promise implied by law only.

In this case, it was first proposed to organize the company under the general laws, and certain subscriptions were made to the stock of the proposed company. Subsequently the company was chartered by the legislature, the capital stock to be not less than seven hundred and fifty shares of \$50 each. The corporators met pursuant to the charter, accepted the charter, and chose officers under it. After this organization, and before the amount of the stock was fixed by the directors, the defendant with others made the following contract with the company:

"SKOWHEGAN AND ATHENS RAILROAD COMPANY.

Subscription List.

"We, the undersigned, hereby agree to take, and hereby subscribe for the number of shares of stock in said railroad company hereunto by each of us placed opposite our names in the following list: Said shares to be fifty dollars each. And we agree to pay the par value of the same. And all who shall subscribe for as many shares in the following subscription, as they have subscribed for in a former subscription list, are hereby released from all former subscriptions to said company.

"ATHENS, May 30, 1881."

The defendant claims he is not liable to pay for the shares he thus subscribed for, because the amount of the capital stock was not fixed and the minimum number of shares named in the charter were not subscribed for. He might not be liable to pay in such case, if he were a mere subscriber for stock, or if this action were for legal assessments, but he, in addition to his subscription for shares, expressly promised to pay \$50 each for them, and this action is on his express promise to pay, and not on any promise merely implied by law. His promise was unconditional and he cannot now invoke conditions. In *Ken. & Port. R. R. Co. v. Jarvis*, 34 Me. 360, above cited, the capital stock was fixed by the directors at twelve thousand shares with right of increase to twenty thousand shares. The shares subscribed for, were never so many as twelve thousand and the defendant invoked that omission in defense. The court expressly overruled that defense and held him liable, on the ground he had expressly promised to pay (not legal assessments, but) "at such times, to such persons and on such installments as shall be hereafter required by a vote of said company." That case is decisive of this. In the case cited by the defendant, it will be found there was no express promise to pay, or only a promise to pay legal assessments, or that the action was only an implied promise as for legal assessments. In such cases the conditions implied by law must be shown to have been fulfilled. In this case, those conditions were waived by the express promise to pay absolutely.

We think the organization of the company was sufficiently regular to enable it to maintain this action, the defendant having recognized it as an existing corporation by his subscription. *Chubb v. Upton*, 95 U. S. 667. The defendant did not stipulate for a demand, prior to suit, but we think it sufficiently appears he was requested to pay.

We find no averment nor evidence of a readiness to deliver the shares, but as the point was not made in argument, and the cases must be again heard, we do not notice it here.

Action to stand for trial.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and FOSTER, JJ., concurred.

WELCH v. PORTLAND.

June 4, 1885.

MUNICIPAL CORPORATION — STREETS — NOTICE OF DEFECT.

When it appears that the street commissioner had been informed of a defect in a way, the jury are authorized to find, from this information and the presumption that the commissioner did his duty by going to look up and remedy the defect, that the commissioner had actual notice of the particular defect.

B. Bradbury, for plaintiff. *William H. Looney*, for defendant.

EMERY, J. The defect complained of was a hole in Cotton street near the sidewalk in front of Newman's house, Cotton street being a short street less than forty rods in length connecting Fore and Free streets. The plaintiff's evidence of previous notice of the defect to the street commissioner was that one Mariner, employed by the city on the streets, informed one Heffron, another employee on the street, of this particular defect; that Heffron told the street commissioner there was a hole reported to him on Cotton street, near the sidewalk, that ought to be fixed; that the street commissioner asked him to report it to one of the men, if he should see him first; that Heffron himself went soon afterward and partially repaired this defect. The judge instructed the jury in effect, that the evidence did not amount to proof of knowledge in the street commissioner of the particular hole in front of Newman's house, and that such knowledge must be shown before the plaintiff could recover.

If to the evidence above stated, be added the presumption that the street commissioner did his duty by going or sending at once to Cotton street to find and repair the defect so reported to him, there would seem to be some reason to believe that from his information and subsequent inspection, he acquired actual notice of the defect — at least there was evidence enough to go to the jury. We think it was to be presumed that the officer did what was so plainly his duty, and that such pre-

sumption was proper evidence for the plaintiff, and in connection with the other evidence, and particularly the small length of the street, might warrant the jury in finding that the commissioner had actual notice of the particular defect.

It is urged that the notice did not specify the exact location of the defect. It was stated approximately enough to prevent any danger of the defect being overlooked by an officer acting in good faith upon the notice.

Exceptions sustained.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and FOSTER, J.J., concurred.

[See 33 Eng. Rep. 186; 39 Am. Rep. 79. — Ed.]

KNIGHT v. KIDDER.

June 4, 1885.

FRAUDULENT CONVEYANCE — BURDEN OF PROOF.

Where a judgment creditor seeks by proceedings in equity to recover real estate conveyed to the wife of the debtor in fraud of creditors, and the answer upon oath alleges that the conveyance was prior to the date of the debt and without fraud, the burden is upon the creditor to overcome the answer by proof of the fraud.

Frye, Cotton & White and *S. C. Andrews*, for plaintiff. *M. T. Ludden* and *S. C. Andrews*, for defendant.

PER CURIAM. A judgment creditor seeks to recover from his debtor and wife real estate conveyed to the latter, but paid for by the debtor, upon the ground that the conveyance was in fraud of creditors, both prior and subsequent to the conveyance.

The bill calls for answer upon oath.

The respondents upon oath answer that the conveyances were made prior to the time when the debt of the judgment creditor was contracted and without fraud.

The burden is upon the orator to overcome the answer by proof of the fraud charged. This he has failed to do. A decree should be entered at *nisi prius*.

Bill dismissed, with costs.

[See *Long v. West*, 81 Kans. 398; *Hogan v. Robinson*, 94 Ind. 188. — Ed.]

BUOK v. PIERCE.

June 5, 1885.

PRACTICE — PETITION FOR REVIEW — DISCRETION.

A petition for review will be granted in the discretion of the court to enable a party to introduce testimony which was, without his fault, omitted by him at the trial.

William H. Fogler, for petitioner. *Charles P. Stetson*, for defendant.

PER CURIAM. A petition for review, like a motion for a new trial, is addressed to the discretion of the court. It will not be granted to enable a party to introduce testimony which might with reasonable diligence have been within his knowledge and reach at such trial, and was negligently omitted; nor when the party complaining by reasonable diligence might have discovered such evidence and produced it at such trial. But in this case the evidence is such as to satisfy us that the prisoner was not in fault in omitting to produce evidence of the defects complained of in his petition. The issue before the jury was not in reference to concealed and latent defects in workmanship,—defects exclusively within the knowledge of the other party,—but whether the monument, for the price of which that suit was instituted, was made in accordance with the terms of the contract entered into between the parties.

The alleged defects which are now shown to have existed were not, at the time of the trial, observable or even discoverable except by persons of experience and skill in the art of stone-cutting. Nothing appears to have been then known or anticipated concerning these alleged defects, and if known, so far as the evidence before us shows, they were known only to the opposite party.

We cannot, therefore, say that the evidence of these facts was negligently omitted by the petitioner, or that by reasonable diligence it might have been discovered and produced at the trial.

Petition sustained. Review granted.

CHARLOTTE v. MARSHFIELD.

June 5, 1885.

PRACTICE.

When a majority of the justices of the supreme judicial court do not concur in granting a new trial judgment must be rendered on the verdict.

McNichol, for plaintiff. *Lynch*, for defendant.

PER CURIAM. In this case, there being a subsisting verdict, and a majority of the justices of the court, after mature consideration and consultation, not concurring in granting a new trial, the verdict will necessarily have to stand in accordance with the provisions of Rev. Stat., chap. 77, § 88. The entry must, therefore, be judgment on the verdict.

[See *Madlem's Appeal*, 108 Penn. St. 584; *Parsons v. Brown*, 78 N. Y. 613 — Ed.]

RICHARDSON v. NOBLE.

June 9, 1885.

SALE — FALSE REPRESENTATIONS OF VENDOR.

The rule that it is not an actionable fraud for a vendor to falsely represent to a vendee the price paid for property sold, affirmed; still the rule should be carefully construed and applied, and it may admit of exceptions.*

NEGOTIABLE INSTRUMENT — NOTE SECURED BY MORTGAGE — ESTOPPEL.

The holder of a note, secured by a mortgage upon land sold by the maker to a third person, is not estopped from enforcing the mortgage because he had previously promised the maker, without binding consideration, to surrender the note, though such third person had knowledge of and placed reliance upon such promise when he purchased the land.

EVIDENCE — DELIVERY — PRODUCTION OF ASSIGNMENT.

The production of the assignment of a mortgage, at the trial of a writ of entry in the name of the assignee for the benefit of the assignor, by the attorney of record for the plaintiff, is *prima facie* evidence of the delivery of the assignment from the assignor to the assignee.

Baker, Baker & Cornish and *C. A. Farwell*, for plaintiff. *D. D. Stewart*, for defendant.

PETERS, C. J. Defendant's counsel urgently asks our reconsideration of the rule acted upon in this State, that it is not an actionable fraud for a vendor to falsely represent to his vendee the price paid by himself for the property sold. *Holbrook v. Connor*, 60 Me. 578; *Bishop v. Small*, 63 id. 12; *State v. Paul*, 69 id. 215.

It is to be admitted that much may be said on either side of the question. No better evidence of that can exist than the fact that courts have differed among themselves about the expediency of the rule. In many cases the rule may operate harshly. But generally the effect of it is rather salutary. We do not feel that we should upset a rule so recently resolved upon after careful argument and consideration.

* 23 Eng. Rep. 895; *Moak's Underhill*, 519 *et seq.*; 11 Am. Rep. 212; 13 id. 379; 26 id. 198. A naked assertion by a vendor of the value of property offered for sale, even though untrue of itself, and known to be such by him, unless there is want of knowledge by the vendee, and the sale is made in entire reliance upon the representations made, or unless some artifice is employed to prevent inquiry or the obtaining of knowledge by the vendee, will not render the vendor responsible to the vendee for damages sustained by him. If, however, the vendee is, by the artifice or fraud of the vendor, induced to refrain from an examination of the property, and he relied upon the assurances made to him, an action to recover damages for the fraud will lie. *Chrysler v. Canaday*, 90 N. Y. 272; S. C., 43 Am. Rep. 166.

The very fact, however, that the rule is disagreed to by reputable courts is a reason why it should be strictly rather than liberally construed. Its application should be properly guarded. And there may be exceptions to the rule. The present case, however, seems to be one of the common instances where the principle is applicable.

The point that the note is invalid for failure of consideration is not good. The maker was to have a certain share represented by equitable ownership in real estate. The deed to the trustee provides for such ownership.

Nor can the point taken prevail that the owner of the note became estopped by a representation that he would give the note up. The purchaser of the land mortgaged should not rely upon a promise without consideration to do something in the future. The defendant contends that the proof amounts to an admission that the mortgage note was worthless, and that the real plaintiff is estopped from recovering the land against an after purchaser before whom the admission was made. But no such admission was made. On the contrary, what was said was a clear affirmation that the note was due, but that for personal reasons the holder would probably surrender it to the maker.

The action is a writ of entry in the name of an assignee of a mortgage, but prosecuted, it is admitted, wholly for the benefit of the assignor. There was no evidence of any delivery of the assignment to the assignee, except that the plaintiff's attorney of record produced the mortgage and the assignment thereon at the trial. It is the opinion of a majority of the court that the attorney's possession of the papers is *prima facie* evidence of delivery from the assignor to the assignee, notwithstanding the admission that the assignor is the real party in interest in the suit.

Exceptions overruled.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

GORHAM v. BILLINGS.

June 11, 1885.

WILL — LIFE ESTATE — INCOME.

A testator by apt and proper expression gave to his widow, by his will, a life estate in all the property of which he died seized, with power to sell and dispose of any of the same as may be most for her comfort and convenience.

Held, That the income and increase of the estate became absolutely the property of the widow, but the estate did not vest in her, and all that remained of it at her decease, whether in the same specific form or in a changed condition from exchange, sale and re-investment, should be distributed under the will. Those articles consumed by the widow, by her own fire, at her own table, or as food for stock were disposed of by her as she had a right to. She is not chargeable therefor, and like articles cannot be retained from her estate in their place and stead.*

George A. Wilson, for plaintiff. Enoch Foster and Addison E. Herrick, for defendant.

HASKELL, J. This cause is reported to the law court to be heard on bill, answer and proofs, wherein the true construction of the will of Timothy W. Gorham is sought.

The will provides, "It is my will that my debts and funeral charges be paid out of my estate."

"I give, bequeath and devise to my beloved wife, Emily C. Gorham, the rest and residue of my estate, real, personal and mixed; to have and to hold for and during her natural life, and to use and consume so much of the same as may be required for the comfort and convenience, giving her hereby full power and authority to sell and dispose of and convey any or all of my said estate, as may be most for her comfort and convenience."

"I give and bequeath out of my estate which may remain at the decease of my said wife to each of her brothers, J. D. and Simon S. Billings, the sum of two hundred dollars."

* See *ante*, 44.

"The residue and remainder of my estate . . . at the decease of my said wife, I give, bequeath and devise, after the above bequests shall be paid, to my brothers, David A. and Benjamin F., and to my sisters, Lois A. and Julia A., to be divided among them equally, share and share alike. To my other sisters I give nothing."

The testator and his wife at the time of his decease, lived upon a small farm furnished, stocked, and equipped as farms of its qualities usually are. The farm and its equipment and a small sum of money constituted his entire estate. At his decease the widow received and entered into possession and enjoyment of the same and held it for about five years until her death, when his executors entered and took possession of the farm and certain of the chattels thereon, including the harvested crops as a part of the testator's estate, and with others of like interest with themselves bring this bill against the administrator of the widow's estate and her heirs, asking a construction of the will, and that they be enjoined from disturbing the orator's possession, pending this suit.

The will of Timothy W. Gorham, by apt and proper expression, gave to his widow a life estate in all the property of which he died seized. It gave her full power to consume and dispose of so much thereof as her comfort and convenience might require. The income and increase of the estate became absolutely her own; but the estate did not vest in her beyond the uses and necessities mentioned in the will. All that remained of it at her decease, whether in the same specific form as she received it, or in any new or changed aspect, resulting from sale, exchange or reinvestment, remains a constituent part of the testator's estate, and should be distributed according to his will. Those articles suitable for consumption that the widow received and consumed, either by her own fire, or at her table, or as food for the stock, were disposed of by her as she had a right to do by the terms of the will. She is not chargeable therefor, and like articles cannot be retained from her estate in their place and stead. Such construction should be given to wills that the real intention of the testator may prevail. The will by express terms, creates a life estate, coupled with a power of disposal, and devises the remainder. That passes under the devise. *Hall v. Otis*, 71 Me. 830. Had the will, as in *Stuart v. Walker*, 72 id. 145; S. C., 39 Am. Rep. 311, shown an intention of the testator to limit the life estate to both the principal and income, then all that remained of either should go under the devise over, but such are not the terms of the will and the manifest intention of the testator. He was a farmer of small means, and meant to secure to his widow a support suited to her station in life. To this end he gave her the whole income of his estate so long as she should live, and fearful lest this should not be sufficient, as he could not foresee the number of her days, and the health and strength she might retain, he gave her authority to consume and dispose of so much of his estate as necessary to secure the fulfillment of his intentions. His wishes have been accomplished, and whatever remains of the estate that he left, whether in the same form that he left it, or in changed aspect, must be distributed under his will. But whatever income, increase or profit therefrom his widow may have saved belonged to her, a reward for her own toil and thrift, and has been wrongfully withheld from the administrator of her estate. Whatever debts of the testator, or charges of his funeral and burial, his widow paid from her own means should be allowed from his estate. Her own debts should be paid from her estate. All questions submitted germane to the will, have been answered.

Decree accordingly to be entered at *nisi prius*. Defendant to recover costs to be paid from testator's estate.

PETERS, C. J.. WALTON, VIRGIN, LIBBEY and EMERY, JJ., concurred.

PERRY v. CHESLEY.

June 15, 1885.

STATUTE OF LIMITATIONS — MUTUAL ACCOUNTS — AUDITORS — ACKNOWLEDGMENT.

An item in an account annexed which has been paid, and a receipt given and accepted therefor, cannot be considered an "unsettled item" within Rev. Stat. 1871, chap. 81, § 87.

An item in a mutual account which accrued within six years of the date of the writ cannot save from the operation of the statute of limitations any other items in the account, if there be none within six years of the date of the former.

An auditor has no authority to pass upon the account laid before him by the defendant unless it was filed in set-off in the court.

In a letter, before suit, the defendant wrote the plaintiff concerning the account sued "when we meet, we will talk it over."

Held, that this was not a sufficient promise or acknowledgment to bring the case within the provisions of Rev. Stat., chap. 81, § 97, which provides that no promise or acknowledgment takes a case out of the operations of the statute of limitations unless the promise or acknowledgment is express, in writing, and signed by the party chargeable thereby.

John J. Perry, for plaintiff. *S. C. Strout*, *H. W. Gage*, *F. S. Strout* and *David Dunn*, for defendant.

VIRGIN, J. By his writ dated in November, 1881, the plaintiff sued the defendant on an account annexed, the debit side of which comprised two hundred and thirty-one items, commencing in March, 1848, and ending in March, 1878. From the first item of March, 1848, the account run on from year to year to the item of March, 1865, when there was an interval of more than twelve years in the account, the next succeeding item being dated September, 1877.

All of the items on the credit side of the account annexed were dated in 1862 and prior thereto, with the exception of one dated September, 1877.

The case went to an auditor who disallowed all of the debit items of the plaintiff's account which were dated after March, 1862, except that of "September term 1877, to services in trying Yeaton's case, \$25," which he allowed. But it is admitted in the agreed statement that this last-mentioned item was paid at the time in cash by the defendant and a receipt given therefor. This payment of cash is the same as the one mentioned on the credit side of the account, and therefore neither the charge nor the credit should appear in the account; the item having been settled by the parties was no longer an "unsettled item." Rev. Stat. 1871, chap. 81, § 87; *Lancey v. M. C. R. R.*, 72 Me. 38; *Penniman v. Rotch*, 3 Metc. 216, 228.

Under this state of facts the action is barred by Rev. Stat. 1871, chap. 81, § 84.

The plaintiff strenuously contends, however, that the item of \$25 cash was in the defendant's account together with another cash payment of \$5, and both being dated in September, 1877, and both allowed by the auditor, they or either of them take the whole account, including those items which ante-date twelve years of non-dealing between the parties. But assuming these two items of credit to be properly allowed, and that in the language of the statute, "the cause of action shall be deemed to have accrued at the time of the last item proved," we do not understand that those items within six years next before the date of the writ can save from operation of the statute, any other items in the account if there be none within six years of their own date. This precise question was settled in *Lancey v. M. C. R. R.*, *supra*, and we see no occasion for disturbing that decision.

We are aware that statements may be found in the opinions of courts, several of which are quoted in the plaintiff's brief, which, if considered as abstract propositions, might seem to aid the plaintiff, but when they are applied to the facts then under consideration, they sustain no such view.

There is another answer to the \$5 cash item taken from the defendant's account. The defendant's account was never filed in set-off. It was only conditionally considered by the auditor. It is no part of the case, it never having "been ordered by the court" or "expressly embraced in the order." Rev. Stat., chap. 82, § 69.

The auditor does not find that the parties agreed that the defendant's account should be allowed in payment of the plaintiff's, but he makes an alternative report based upon the court's finding as to that fact; and no evidence is found in the case bearing upon that point.

It is urged that the defendant's letter of March 2, 1876, brings the case within

the provisions of Rev. Stat., chap. 81, § 97. But we find no "promise" therein save to talk it over when the parties meet; and no acknowledgment except that the plaintiff owes the defendant "more than \$100." *Lunt v. Stevens*, 24 Me. 538; *Weston v. Hodgkins*, 136 Mass. 326.

Judgment for the defendant.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

[As to when the statute commences to run against an attorney's claim for services, see 26 Eng. Rep. 52, 326. As to subsequent promise, etc., 30 Eng. Rep. 207; 49 Am. Rep. 344.—Ed.]

WHITE v. LEVANT.

June 16, 1885.

PENSION—TOWN OFFICER—FEES FOR SERVICE OF SUBPŒNAS.

While a person while holding the offices of selectman, overseer of the poor and town agent, obtained a United States pension for one of his town's paupers, and in pursuance of previous agreement with the pensioner, appropriated the back pay toward the pensioner's indebtedness to the town for past support, which sum the pensioner, by an action at law, subsequently recovered from the officer, — *Held*, that the officer cannot maintain an action against the town for services, expenses and disbursements in defending the action against him by the pensioner, nor in successfully defending an indictment in the United States court for the taking of such money in violation of U. S. Rev. Stat., § 5485. *

A party cannot charge fees for serving subpoenas.

A constable cannot charge fees for serving a subpoena on witnesses outside of his own town.

Barker, Voss & Barker, for plaintiff. *Jasper Hutchings and Charles Hamlin*, for defendant.

VIRGIN, J. While chairman of the boards of selectmen and overseers of the poor and agent of Levant, the plaintiff assisted one Mrs. Smart (for many years supported as a pauper by the defendants) in obtaining her pension, under an agreement with her that the back pay which might be recovered should be appropriated toward her indebtedness for support. When the pension check came, the pensioner at first repudiated the agreement; but finally accepted \$50 as an inducement to appropriate the balance of the back pay as originally agreed.

On July 5, 1880, the plaintiff paid the balance of the pension money (\$164.42) into the town treasury to the credit of the pauper fund, from which there were subsequently drawn, on town orders, \$10 by the attorney who prosecuted the pension claim, \$2 by the justice, and \$50 by this plaintiff.

On July 12, 1880, the pensioner sued the plaintiff for the recovery of her pension money, and at the April term, 1881, obtained a verdict therefor. The case went to the law court on motion and exceptions which were overruled. 73 Me. 332; S. C., 40 Am. Rep. 856. The execution which issued on the judgment (\$198.46) was paid on May 15, 1882, by a town order, but without any vote of the town.

The plaintiff now seeks *inter alia* to recover from the town payment for his personal services and expenses, summoning witnesses, and fees paid them and for fees paid to his counsel in the action of Mrs. Smart against him; and the jury, under the instructions of the presiding justice, rendered a verdict therefor, which the defendants now move may be set aside as being against law.

Our opinion is that so much of the verdict as includes fees for the plaintiff personally serving subpoenas on witnesses is without authority of law. There is no statute authority for a party personally to serve a subpoena on his own witness or to charge fees for such service.

Again, the action of *Smart v. White*, 73 Me. 332, S. C., 40 Am. Rep. 856, was for the recovery of money obtained from a United States pensioner in violation of a penal statute. This court has adjudged that the money was illegally in this plaintiff's hands; that the rule of *respondere superior* did not apply; that this plaintiff was the active and efficient party in perpetrating the wrong; and that the fact that before the action was brought he paid the money to the town would not screen him.

* See *ante*, 95.

We are of the opinion also that the plaintiff cannot recover for any services rendered or money paid in the defense of that action.

This case does not come within the rule of that class of cases which hold that a town may expressly indemnify its officers against liabilities incurred by them in the *bona fide* discharge of their official duties, as in the case of an assessor in the assessment of taxes—*Nelson v. Milford*, 7 Pick. 18—or of a surveyor in repairing a highway—*Bancroft v. Lynnfield*, in 18 id. 568—or of a committee against a judgment in favor of a pew-owner, for removing a meeting-house and out of its materials constructing a town-house—*Hadsell v. Hancock*, 8 Gray, 527—or of a school committee for expenses in successfully defending an action for libel alleged to be contained in an official report made by them in good faith—*Fuller v. Groton*, 11 Gray, 340—or of a school committee in defending an action for an alleged seizure and asportation of certain school registers—*Babbitt v. Savoy*, 3 Cush. 530—or of a collector of taxes for costs and expenses in defending actions against him for actions done in the *bona fide* performance of his official duties, *Pike v. Middleton*, 12 N. H. 278; for the defendants never voted any indemnity, and the services were rendered and expenses inturred in defending acts entirely foreign from any discharge of official duties.

This case comes rather within the class of cases which hold that a "town, in its corporate capacity, will not be bound, even by an express vote of a majority, to the performance of contracts or other legal duties not coming within the scope of the objects and purposes for which it is incorporated." *Anthony v. Adams*, 1 Metc. 284; *Vincent v. Nantucket*, 12 Cush. 103; *Minot v. W. Roxbury*, 112 Mass. 5; *Westbrook v. Deering*, 63 Me. 231. It is no part of the duty of towns or town officers to obtain pensions for its paupers. And if town officers see fit to indulge in such an avocation for the ultimate purpose of securing an appropriation of the pension money to the pauper's indebtedness to the town, and thereby involve themselves in lawsuits, the law will not allow them to involve the town and recover for the services and expenses of such an unsuccessful speculation.

We think, therefore, that the verdict is against law so far as it includes any thing charged for the Smart case, and also for any thing by way of fees for serving subpoenas out of the town of Levant in the Morey case.

The plaintiff's exception to the ruling of the presiding justice instructing the jury not to consider the items of the plaintiff's bills in connection with the criminal prosecution must be overruled. *Gove v. Epping*, 41 N. H. 539; *Merrill v. Plainfield*, 45 id. 126.

Therefore unless the plaintiff remit so much of the verdict as the parties agree comprise the illegal items mentioned in this opinion, the motion must be sustained and a new trial granted.

Otherwise motion and exceptions overruled.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

HOBART v. BENNETT.

June 22, 1885.

RECEIVERS—SERVICE OF WRITS—AMENDMENT OF OFFICER'S RETURNS—SALES ON EXECUTION.

Receivers of savings banks may maintain actions in their own name or in the name of the bank.

The failure to obtain an order of notice on the defendant at the return term of the writ does not defeat the attachment.

An officer's return on an execution, that he had given the notice of the intended sale required by law, is conclusive evidence of that fact, and he cannot be allowed to amend his return so as to show that no such notice was given.

If a receiver improperly purchases property sold on an execution in favor of the estate which he represents, the sale will be valid, but the receiver will be responsible for any injury which the estate thereby sustains.

A sale upon execution of the equity of redemption of real estate on which there are two or more mortgages at the same time, and for a gross sum, is not illegal or void.

Wilson & Woodward, for plaintiff. *D. D. Stewart*, for defendant.

WALTON, J. We will answer the questions presented for the determination of the law court in the order in which they are stated in the report.

1. Receivers of savings banks may commence suits in the name of the bank or in their own names as receivers. It is immaterial which. Suits may be so commenced by the receivers of banks of discount, and no reason is perceived why the same rule should not apply to the receivers of savings banks. Rev. Stat., chap. 47, § 62.

2. If a writ is entered in court without any other service than the attachment of property, as provided in Rev. Stat., chap. 81, § 23, the attachment will not be held to have been abandoned or invalidated, although the order of notice on the defendant is not obtained or served till a subsequent term. The statute authorizing notice in such cases contains no limitation as to the time within which the order shall be obtained or served, or that the attachment shall be lost if the order of notice is not obtained or served within a given time; and we do not think the court would be justified in fixing such a limitation. If such delays cause inconvenience, the legislature and not the court must provide the remedy.

3. Amendments of officers' returns, by which the title to property is to be affected, should be allowed with great caution. And in no case should such an amendment be allowed unless the court can see clearly that it will be in the furtherance of justice. The court does not see clearly that the amendment proposed in this case (the effect of which would be to defeat the title of the savings bank and vest it in one who purchased of a debtor pending a suit against him in which the property was attached), would be in the furtherance of justice. Consequently, the amendment is not allowed. The officer's return is conclusive evidence of the facts therein stated and cannot be contradicted. And in the application of this rule, it can make no difference whether the property sold by the officer on an execution is purchased by the judgment creditor or a stranger. Whoever the purchaser may be, in defense of his title he has a right to rely upon the officer's return as conclusive evidence of the facts therein stated. By "facts therein stated" we, of course, mean such facts only as relate to the doings of the officer, and are, therefore, properly stated in the return. The fact that he has given due notice of an intended sale is one proper to be stated in a return, and his statement that he has given such notice cannot be contradicted. If the statement is false, the remedy of one thereby injured is an action against the officer for a false return. The statement cannot be contradicted for the purpose of defeating the title of one who purchased the property at a sale made by the officer, although the purchaser was the judgment creditor in the execution on which the property was sold. In this particular we think he is entitled to the same protection as any other purchaser.

4. If a receiver improperly purchases property sold on an execution in favor of the estate which he represents, the proper remedy is to hold him responsible for the injury, if any, which the estate thereby sustains. It would be the poorest of all remedies to hold the purchase void, and thus, perhaps, lose to the estate both the property and the debt to secure which the purchase was made. In bidding off the equity of redemption which had been attached on the writ, the receiver probably did what he believed to be for the interest of the bank which he represented. But whether he acted wisely or unwisely is a question that will not be considered in this suit. It is sufficient to say that the court declines to declare the purchase void.

5. A sale upon an execution of a right in equity to redeem a parcel of real estate, on which there are two or more mortgages, at the same time, and for a gross sum is not illegal or void. So decided in *Bartlett v. Stearns*, 73 Me. 17. The sale in this case was not, therefore, void on that account.

We have now answered all the questions of law presented in the report, and the entry must be

Case to stand for trial on the questions of fact put to issue by the answer.

PETERS, C. J., DANFORTH, LIBBEY, EMERY and HASKELL, JJ., concurred.

STATE v. HIGGINS.

June 23, 1885.

CRIMINAL LAW — INDICTMENT — CONSPIRACY — DEMURRER.

An indictment not in the language of the statute, or words conveying the same meaning, nor charging a crime known to the common law, will be quashed on demurrer.

INDICTMENT.

"STATE OF MAINE, }
 "*Hancock,* } ss. :

"At the supreme judicial court begun and holden The jurors for said State upon their oath present that Bradford Higgins and John H. Higgins, of Ellsworth, in said county, at Ellsworth in said county of Hancock, on the tenth day of September, in the year of our Lord one thousand eight hundred and eighty-four, did then and there maliciously threaten to accuse one James L. Brown with committing the crime against nature, with intent thereby to extort money from him, the said James L. Brown.

"And the jurors aforesaid upon their oath aforesaid, still present that Bradford Higgins and John H. Higgins, both of Ellsworth, in the county of Hancock aforesaid, devising and intending unjustly and maliciously to deprive one James L. Brown of his good name and character, and to subject him, the said James L. Brown, without any just cause, to the punishment by law inflicted for the crime against nature, on the tenth day of September, in the year of our Lord one thousand eight hundred and eighty-four, at Ellsworth, in the county aforesaid, falsely, unlawfully, wickedly, and maliciously did combine, conspire, confederate and agree together, falsely to charge and accuse, and then and there in pursuance of said conspiracy, combination and agreement, did falsely charge and accuse him, the said James L. Brown, with having committed the crime against nature by having a venereal and carnal intercourse and copulation with a mare; with intent unjustly to obtain and acquire of and from him, the said James L. Brown, to them, the said Bradford Higgins and John H. Higgins, divers sums of money, for compounding the said pretended felony and crime against nature, so as aforesaid falsely, wickedly and maliciously charged upon him, the said James L. Brown."

George M. Warren, county attorney, for State. *Winwell & King*, for respondents.

PER CURIAM. The first count sets forth no crime under the Rev. Stat., chap. 118, § 23, because it uses neither the words of the statute nor their equivalent as decided in *State v. the same defendants*, this term.

Nor does it charge any crime known to the common law. The second count is insufficient for similar reasons. If founded upon statute relating to conspiracies — Rev. Stat., chap. 126, §§ 17, 18 — it fails entirely to describe the crime there defined. The purpose as alleged is not to subject the complainant to punishment but to obtain money from him. Nor is it to injure him in his person, character, or business or property, but another and different one, viz., to obtain money — or, if the first purpose is alleged, then the purpose is double, and void for that reason.

No sufficient charge of conspiracy at common law is found in this count. The purpose for which the alleged combination was made cannot be ascertained, except by referring to the act done, which is not admissible. *Comm. v. Hunt*, 4 Metc. 125.

Exceptions sustained. Indictment quashed.

FARRINGTON v. ANSON.

July 27, 1885.

PAUPER SUPPLIES.

An individual cannot maintain an action against a town for supplies furnished a pauper, resident therein, when there is no count in the writ, founded on statute liability, unless he proves that the supplies were furnished as pauper supplies, by virtue of a contract with the overseers of the poor.

Merrill & Coffin, for plaintiff. *J. J. Parlin*, for defendant.

DANFORTH, J. The plaintiff seeks to recover for aid rendered an alleged pauper. There is no count in the writ founded upon a statute liability — no pretense that any such exists. The supposed pauper has his settlement in the defendant town; the plaintiff lives and rendered the services for which she claims pay in another town. It is, therefore, evident that to succeed she must show that she furnished the support by virtue of some arrangement — some contract with the overseers of the poor — and that it was furnished as pauper supplies. This she fails to do.

The case shows that previous to October 1, 1879, the plaintiff had supported the child as a pauper under an express agreement with the overseers, for which she has been paid. At that date another and a different agreement was made by which she was to take the child as her own and save the town harmless from all expenses on his account until he had reached his majority — as a consideration for this the overseers were to pay her the sum of \$60, and by indentures bind the child to her during his minority. Subsequently the contract was reduced to writing and the \$60 were paid. Under this agreement, the plaintiff furnished the support for which she claims to recover in this action. But under this contract the child had ceased to be a pauper. The plaintiff so understood it and so did the overseers. The former agreement had ceased, the child was relieved from the disabilities of a pauper and the town from liability, until a new necessity occurred and a new notice given.

But it is said that this last agreement was void and therefore, did not interrupt the former. It is true that at the end of about four years, legal process was commenced in behalf of the child, and the court discharged him from his indentures. But this does not change the fact that for the time he was not a pauper, that the town was relieved of his support and entitled to the necessary statute proceedings before it could again become liable. *Oldtown v. Falmouth*, 40 Me. 108.

It is further claimed that the plaintiff is entitled to recover for services rendered in the partial performance of the contract by reason of having been prevented from its full performance by the fault of the other party. The same reply may be made here as before. These services were not rendered to a pauper, nor in fact to the town. The town was not a party to the latter contract, nor in any legal sense did it receive any benefit under it upon which an implied promise could rest.

It was only that benefit which accrues in all cases when the town is relieved from the support of one who has been a pauper. It is true that both contracts were made by the overseers of the poor. The former by them as the legal agents or servants of the town, in which they had the power and did bind the town to its performance. But the latter was made by them in their official capacity, in pursuance of a duty imposed upon them by statute, for which they alone are responsible and to the performance of which they could not bind the town. The town had no authority in the matter. It could not interfere to dictate the terms of the contract, or to prevent it. It was not therefore, responsible for an error or omission in the papers, and wherever the responsibility of such error or omission may rest, whether upon the plaintiff or the overseers, it certainly cannot upon the town, nor can it impose any liability upon the town for services rendered under the contract. *Mitchell v. Rockland*, 52 Me. 118; *Brown v. Vinhaven*, 65 id. 402; S. C., 20 Am. Rep. 709.

Judgment for the defendants.

PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

STATE v. GETCHELL.

July 27, 1885.

PRACTICE—CALLING THE JURY INTO COURT.

It is not error for the court to recall the jury, interrogate them as to the difficulties in the way of an agreement, and repeat a portion of the instructions given them when the case was submitted to them.*

W. T. Haines, county attorney, for State. *H. M. Heath*, for defendant.

PER CURIAM. The exceptions in this case are not to any ruling of law by the presiding justice, but to his acts in recalling the jury after they had retired, putting certain questions to the foreman and repeating a part of the instructions previously given. This is in accordance with precedent and sustained by authority. *Commonwealth v. Snelling*, 15 Pick. 338.

CARLTON v. NEWMAN.

August 8, 1885.

CONSTITUTIONAL LAW—ILLEGAL TAX—ENJOINING COLLECTION.

A bill to enjoin the collection of an entire school district tax, assessed without authority of law, brought by all the tax payers, or by any number thereof in behalf of themselves and all others, may be sustained on the ground of the inherent jurisdiction of equity to interpose for the purpose of preventing multiplicity of suits.

When municipal officers proceed to erect a school-house for a district under the provisions of Rev. Stat., chap. 11, § 58, they can legally expend therefor only so much money as the district may have voted for that purpose.

The legislature cannot constitutionally authorize the assessment upon the polls and estates of a school district any sum of money expended by the municipal officers in erecting a school-house in the district in excess of the sum voted therefor by the district.

Joseph C. Holman and Drummond & Drummond, for plaintiffs. *E. O. Greenleaf*, for defendants.

VIRGIN, J. While the defendant admits the facts, he denies that equity can enjoin the collection of the pretended tax, even on the assumption that it was assessed without the authority of law and, therefore void, and he contends that the only remedies open to the plaintiffs, and all the other tax payers on whose polls and estates the tax has been assessed are simply such as the law affords, viz.: Each to defend the action of debt against himself, provided the collector shall proceed to enforce the collection by such action, under the provisions of Rev. Stat., chap. 6, § 141; or, in case the collector shall resort to the more usual mode of seizing their individual property under the other statutory provisions for the collection of taxes, then for each tax-payer whose property shall be taken to bring an action for damages, or recover back the money when collected, and these remedies are said to be "plain, adequate and complete."

If a tax against an individual be illegal, simply by reason of some irregularity in its assessment, as for instance, on account of over-valuation, or if laid on property which the tax payer did not own at the time, he would then have ample remedy therefor by a seasonable application for an abatement. Rev. Stat., chap. 6, §§ 68, 69; *Gilpatrick v. Saco*, 57 Me. 277. Moreover, it is generally held that a bill to restrain the collection of a tax cannot be maintained on the sole ground of its illegality. *Greene v. Mumford*, 5 R. I. 472; *Sherman v. Leonard*, 10 id. 469; *Guest v. Brooklyn*, 69 N. Y. 506; *Loud v. Charlestown*, 99 Mass. 208; *Whiting v. Boston*, 106 id. 89, 93; *Hunnewell v. Charlestown*, id. 350. There must be some allegation presenting a case of equity jurisdiction. *Dows v. Chicago*, 11 Wall. 108; *Hannevinkle v. Georgetown*, 15 id. 547; *State Railroad Tax Cases*, 92 U. S. 575, 614; cases cited 2 Dest. Tax, 676, 677. In *Hunnewell v. Charlestown*, *supra*, brought by a single plaintiff, the court adds: "The question is not affected by the fact that there are others, whether few or many, who are subjected to a like assessment

* See 7 Am. Rep. 81; Bailey's Trial Prac. 242. But the court has no right to change the tenor of the charge already given. *Foster v. Turner*, 31 Kans. 58.

by the same proceedings of the city council and who propose to contest their liability."

But we are of opinion that when it appears that an entire school-district tax is illegal, because assessed without authority of law, a bill to enjoin its collection, brought by all of the tax payers of the district jointly on whose polls and estates the tax has been assessed, or by any number thereof on behalf of themselves and all the others similarly situated, may be sustained upon the ground of inherent jurisdiction of equity to interpose for the purpose of preventing a multiplicity of suits; that, although each tax payer has some legal remedy, it is grossly inadequate when compared with the comprehensive and complete relief afforded by a single decree.

The general doctrine, coeval with equity proceedings, asserted in a multitude of decisions, that, in certain cases, where parties have some remedy, equity may interpose and take cognizance for the purpose of preventing a multiplicity of suits, was declared by Chancellor KENT to be "a favorite object with a court of equity." *Brinkerhoff v. Brown*, 6 Johns. Ch. 151, and the number of parties and the multiplicity of actual or threatened suits, as stated by COMSTOCK, J., sometimes justify a resort to equity when the subject is not at all of an equitable character and there is no other element of equity jurisdiction. *N. Y. & N. H. R. R. v. Schuyler*, 17 N. Y. 608. And yet the precise extent and limitations of the doctrine are still unsettled, the decisions being quite inharmonious even as to its fundamental grounds. It is said that "bills of peace" were founded upon this ground — to quiet unnecessary litigation as to titles, and where one person claimed or defended a right against many or many against one. Sto. Eq., § 864. In these bills originally, whether brought by or in behalf of many against one, or by one against or on behalf of many, "chancery confined its jurisdiction to cases wherein there was common interest in the subject-matter of the controversy, or a common title from which all their separate claims and all the questions at issue arose, it not being enough that the claims of each individual being separate and distinct, there was a community of interest merely in the question of law or fact involved, or in the kind and form of remedy demanded and obtained by or against each individual." Pom. Eq., § 268. But, at an early day, the limitations began to yield and the jurisdiction to extend. Thus, in *York v. Pilkington*, 1 Atk. 282, Lord Chancellor HARDWICK at first intimated that the bill could not be maintained for want of any general right or privity among the parties and because the nature of the defendants' claims was different, and that, therefore, injunction would not quiet the possession, as other persons not parties might likewise claim a right. But after argument, he changed his opinion, saying bills might be maintained, although there were no privity between the plaintiffs and defendants, nor any general right on the part of the defendants, and when many more might be concerned than those before the court.

This jurisdiction has continued to extend until it comprises a great variety of cases, which do not come strictly within bills of peace, but which courts have declared to be analogous thereto and within the principles thereof, and in which there was no common title or community of interest in any thing, save the question at issue and the remedy sought. Thus, in a recent case, where the owner of lands on a river sought, by a bill against them jointly, to restrain several owners of mines from depositing the debris thereof in the river and its tributaries, where it floated down and was deposited on the plaintiff's lands, on demurrer, SAWYER, J., sustained the bill, saying: "The rights of all involve and depend upon identically the same question, both of law and fact. It is one of the class of cases, like bills of peace and bills founded on analogous principles, where a single individual may bring a suit against numerous defendants, where there is no joint interest or title, but where the questions at issue and the evidence to establish the rights of the parties and the relief demanded are identical." *Woodruff v. North B. G. M. Co.*, 8 Sawy. 628. This case has been cited and approved by this court in the very recent case of like nature. *Lockwood v. Lawrence*, ante, 403, to appear in 77 Me.

So in a late English case, the bursting of the plaintiffs' reservoir occasioned an inundation which damaged the property of many persons. The statute com-

missioners issued certificates to such as satisfactorily proved their damages and entitled them to costs and could be enforced by action at law. Fifteen hundred of these certificates were alleged to be invalid; and to avoid a multiplicity of suits against itself the bill was brought by the plaintiff against five holders of the certificates "on behalf of themselves and all other the persons named in any of certain pretended certificates. On demurrer, the bill was sustained first by Vice-Chancellor KINDERSLEY, and on appeal by Lord Chancellor CHELMSFORD, who said: "Perhaps, strictly speaking, this is not a bill of peace, as the rights of the claimants under the alleged certificates are not identical; but it appears to me to be within the principle of bills of this description. The rights of the numerous claimants all depend upon the same question." And after remarking that if the certificates had no validity, the executions could not be set aside until considerable expense had been incurred by many, he concluded: "It seems to me to be a very fit case by analogy, at least to a bill of peace, for a court of equity to interpose and prevent the unnecessary expense and litigation which would be thus occasioned and to decide once for all the validity or invalidity of the certificates upon which the claims of all the parties depend." *Sheffield Water-works v. Yeomans*, L. R., 2 Ch. App. 8, 12. See, also, *N. Y. & N. H. R. R. v. Schuyler*, *supra*; *Board Sup. v. Deyoe*, 77 N. Y. 219.

In *Brinkerhoff v. Brown*, *supra*, a bill by various distinct judgment creditors to render effectual their executions against their debtor was sustained in order to prevent a multiplicity of suits, although their only community of interest was in the relief demanded. See, also, *Cadigan v. Brown*, 120 Mass. 493, and *Ballou v. Hopkinton*, 4 Gray, 324, wherein one of the reasons assigned for holding jurisdiction in equity was, that at law each owner must bring a separate action to obtain a remedy for his particular injury, and equity prevents a multiplicity of suits.

After an exhaustive examination of the subject both upon principle and authority, an eminent legal author sums up his conclusions as follows: "Under the greatest diversity of circumstances and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of private property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party or on behalf of a single party against a numerous body, although there is no 'common title' nor 'community of right,' . . . or of 'interest in the subject-matter,' among these individuals; but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. The same overwhelming weight of authority effectually disposes of the rule laid down by some judges as a test, that equity will never exercise its jurisdiction to prevent a multiplicity of suits, unless the plaintiff, or each of the plaintiffs, is himself the person who would necessarily and contrary to his own will be exposed to numerous actions or vexatious litigation. This position is opposed to the whole course of decisions in suits of the third and fourth classes from the earliest period down to the present time." Pom. Eq., § 269.

These principles apply to the case at bar. They have been applied to a large number like this. Each of the plaintiffs has, of course, some remedy at law or else equity could not interpose on the ground mentioned. But at law he must wait and suffer the wrong before he can begin his action for redress, and when his legal remedy is exhausted it is not much else than nominal when viewed in the contrast with the full relief in equity which decides in advance of actual litigation once for all, the validity or invalidity of the tax.

The court in Rhode Island, although they in *Greene v. Mumford*, 5 R. I. 472, and in *Sherman v. Leonard*, 10 id. 469, referred the complainants therein to their remedies at law (the validity of the assessment in each case on the complainants only being involved), nevertheless declared the court would enjoin the collection of a tax where the question involves the validity of the whole tax. *Sherman v. Benford*, 10 R. I. 559.

So the United States supreme court, although they had denied jurisdiction in suits brought by a single plaintiff in the case already cited, they also disavow in the *State Railroad Tax Cases*, *supra*, any purpose of fixing any absolute limitation in restraining the collection of illegal taxes; and in *Cummings v. Nat'l Bank*, 101 U. S. 157, say: "We are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual but to a large class, that equity may interpose to restrain the operation of this unconstitutional exercise of power."

That our opinion is sustained by the weight of judicial authority to-day, see Dill Mun. Corp., §§ 731, 736; Bur. Tax., § 143 and cases; Pom. Eq., §§ 258-260, 1343, and cases in notes.

Was the tax assessed by authority of law? If any part is illegal the whole is; therefore the provisions of Rev. Stat., chap. 11, § 78, and chap. 6, § 142, do not apply.

Under the general statutory provisions, it is common knowledge that political subdivisions, such as towns, created for the more efficient administration of the affairs of the State, have only such power of taxation as is delegated to them by the State. In the provisions of Rev. Stat., chap. 11, defining the duties and obligations of towns and school districts in relation to education, we find no authority for assessing a tax on a school district for the purpose of building a school-house, unless: (1) The district, at a legal meeting thereof called for the purpose, vote to raise the money therefor — chap. 11, § 48 — or to borrow it — §§ 81, 83 — or (2), the town, on application of five voters of the district, under a proper article, deeming the sum voted by the district insufficient, vote a larger sum — § 51; *Powers v. Sanford*, 39 Me. 183 — or (3), the town, on the written opinion of the school committee that the district unreasonably neglects or refuses to raise money for a school-house, such as the wants of the district require, shall vote a sum. § 52. No action was ever taken under sections 51 or 52, but the district, under section 48, voted to raise by assessment \$500. There is no general statutory warrant for the tax, unless it is found in section 56.

The authority of the municipal officers to build a school-house for a school district is derived solely from section 56. When they had "decided where the school-house should be placed," and seasonably certified "their determination to the clerk of the district," their authority ceased *pro hac*. Then it became the duty of the district to "proceed to erect the house as if determined by a sufficient majority of" its voters. But when the district had neglected "for sixty days to carry such determination into effect," then it became the duty of the municipal officers, "at expense of the district, if need be, to purchase a lot for said house and cause it to be erected." § 56.

What house were the municipal officers directed by the statute to "cause to be erected?" — "said house" for which they might "purchase a lot;" "the house" which the statute directed the district to "proceed to erect" on the location fixed by the municipal officers; the house which it might build under its vote, viz., a \$500 house. The building committee of the district could not bind the district by expending more money than the district voted. *Wilson v. School District*, 32 N. H. 118, recognized in *Jenkins v. Union Sch. Dist.*, 39 Me. 220. The legislature could not have intended to confer on the municipal officers unlimited power as to the "expense" to which they might subject the district, for the decision of that question is rightfully vested in the discretion of the tax payers, except in the two instances coming under sections 51 and 52, when all the voters of the town take part in the decision. It is very evident, therefore, that the municipal officers transcended their authority and could not bind the district by thus virtually undertaking to hire money on the district's credit; nor could the payment by the treasurer of the orders drawn by them for the expenditure, in excess of the sum voted by the district, create any liability or debt of the district to the town. The relation of creditor and debtor the law does not allow to be created in that manner. *Brunswick v. Litchfield*, 2 Me. 32; *Hampshire v. Franklin*, 16 Mass. 84. We find no authority for the tax in the general statutes.

Did the special act of 1883, chap. 348, afford a legal foundation for it? We think not. Assuming that the legislature might constitutionally confer authority for assessing on the district the excess mentioned, did the act answer the object? Giving to it that strict construction which well-established rules of law require to be put upon statutes affecting the property of the citizen, and by which it may be taken from him, as by taxation—*Merritt v. Village of Port Chester*, 71 N. Y. 309; S. C., 27 Am. Rep. 47, and cases therein cited; Burr. Tax., § 128; 1 Dest. Tax. 257—the assessment was without legal authority, it having been made, not by the “municipal officers,” as provided in the act, but by the “assessors,” an entirely different and distinct board of officers. Rev. Stat., chap. 3, § 12. Moreover the act authorized the tax to be assessed for the purpose of reimbursing the town “for making repairs on the school-house,” and not for building a school-house, as the fact was. No money was paid by the town for “making repairs” on the district’s school-house. Districts may raise money for both purposes—§ 48—and the school agent may appropriate a certain per cent of the school money to repairs, but not to building. § 93. They are considered by statute distinct matters. Courts can give effect to legislative enactments only to the extent to which they may be made operative by legal construction of the language in which they are expressed, and cannot make defective enactments carry out fully the purposes which may have occasioned them. *Swift v. Luce*, 27 Me. 285.

Moreover, the last clause in the act satisfies us that the legislature must have supposed that the object of the act was the very common one of validating a former assessment, which was defective for some irregularity therein; for, as said by Mellen, C. J., “we cannot, without disrespect to the legislature, presume they intended, *ipso facto*, to create a debt from one man or corporation to another.” *Brunswick v. Litchfield*, *supra*. And in that of PARKER, C. J.: “It certainly must be admitted that, by the principles of every free government, and of our Constitution in particular, it is not in the power of the legislature to create a debt from one person to another, or from one corporation to another, without the consent, express or implied, of the party to be charged.” *Hampshire v. Franklin*, *supra*.

Bill sustained. Collection of the tax perpetually enjoined.

WALTON, DANFORTH, LIBBEY, FOSTER and HASKELL, JJ., concurred.

[See 49 Am. Rep. 288.—Ed.]

PARKER v. WILLIAMS.

August 6, 1885.

LIEN—ON LOGS—DECLARATION—ATTACHMENT, WHERE TO BE RECORDED.

In an action to enforce a lien on logs, it is necessary for the writ to show that it is brought for that purpose, but it is not necessary that it should state the name of the owner or supposed owner of the logs.

An officer attached a pile of logs containing three million feet, and in his return estimated them at six hundred thousand. *Held*, such an error will not invalidate the attachment.

Where the owner of logs, upon which there is a lien, so intermingles them with other logs upon which there is no lien that the former cannot be distinguished from the latter, it is the duty of the officer serving the writ brought to enforce the lien to attach the whole lot.

An attachment of personal property situated in an organized plantation having a clerk and other plantation officers, should be there recorded when the property is of that nature that the attachment may be preserved by recording in the town clerk’s office.

P. A. Sawyer, for plaintiff. *Savage & Oakes*, for the owners of the logs.

WALTON, J. This is an action to secure a laborer’s lien on logs. It is before the law court on a statement of facts found and reported by a referee. The Lewiston Steam Mill Company appears as claimant of the logs and objects to a judgment against them for several reasons.

1. It is claimed that the plaintiff has no lien, because it is not alleged in the writ that the logs were, or were supposed to be logs of the claimant, or that the owner was unknown. We think such an allegation is not necessary. The writ must show that the suit is brought to enforce the lien; but the statute giving a

lien on logs expressly declares that all the other forms and proceedings therein shall be the same as in ordinary actions of *assumpsit*. Rev. Stat., chap. 91, § 42.

2. It is insisted that the attachment was invalid because the officer went to a pile of logs containing three million feet and undertook to attach six hundred thousand feet without selecting or separating the portion attached from those which were not attached. It is a sufficient answer to this objection to say that there is no evidence that the officer undertook to attach a quantity less than the whole. The referee has found as a fact that all the logs were attached. True the officer in his return estimated the logs attached at six hundred thousand, but the fact is that he attached the whole pile, and the only error was one of judgment in estimating the amount in the pile. Such an error will not invalidate an attachment.

3. It is next insisted, if the whole pile was attached, that the attachment was invalid because it included logs on which the plaintiff had performed no labor. It is true that more logs were attached than those upon which the plaintiff had performed with labor. But this was because the Steam Mill Company had so intermingled the logs on which the plaintiff had labored, with other logs, all being marked alike, that the former could not be distinguished from the latter; and, in such a case, it is not only the right, but it is the duty of the officer to attach the whole. It is conceded that such is the law when the intermingling is carelessly or fraudulently done. And we think it is equally true that such is the law when, without the consent of the plaintiff, the intermingling has been designedly done. So held in *Spofford v. True*, 33 Me. 283, where the question was ably argued by counsel and fully considered by the court.

4. It is next claimed that if there was a valid attachment, it has been lost, because the officer did not take and retain possession of the logs nor legally record his attachment. It is not denied that the officer recorded his attachment, but it is denied that he recorded it in the right place. It is claimed that it should have been recorded in the oldest adjoining town instead of the plantation where the attachment was made. We think the attachment was properly recorded. Attachments made in towns are to be there recorded. Rev. Stat., chap. 81, § 26. But the word "town," when used in a public statute, includes cities and plantations, unless otherwise expressed or implied. Rev. Stat., chap. 1, § 6, rule 17. We do not think it is otherwise expressed or implied in the statute providing for the recording of attachments. On the contrary, it seems to us that the same reasons exist for having attachments made in plantations there recorded, when the plantation is organized and has a clerk's office in which they can be recorded, as exist for having them recorded in the towns in which they are made. True another provision in the same statute declares that when an attachment is made in an "unincorporated place" it shall be recorded in the oldest adjoining town in the county. But we do not think an organized plantation which has a clerk and other plantation officers is an "unincorporated place" within the meaning of this statute. We think it refers to places in which there is no clerk's office in which attachments can be filed or recorded. Rangely Plantation is not such a "place." It is an organized plantation, having a clerk and other plantation officers, and we think attachments there made should be there recorded. The attachment in this case was there made (the referee expressly so finds), and it was there recorded; and it is the opinion of the court that it was properly recorded. Consequently it is of no importance whether the officer took and retained possession of the logs attached or not; for the attachment, being legally recorded, would be valid without such possession. Still it is a fact that the officer did take possession of the logs (such possession as he could and the nature of the property would permit), and, through the agency of a keeper, retained it till he was wrongfully deprived of it by the Steam Mill Company. Such a dispossession of an officer does not dissolve an attachment. He may pursue the property and retake it by a writ of replevin, or he may maintain trespass or trover for its value. *Lovejoy v. Hutchins*, 23 Me. 272; *Brownell v. Manchester*, 1 Pick. 232.

It is the opinion of the court that, upon the whole case as reported by the referee, the plaintiff is entitled to recover of the defendants, Williams & Parker, the sum of \$63.31; and that he is entitled to a judgment against the logs attached on his writ, with costs, as awarded by the referee.

Judgment for plaintiff against Williams & Parker, and against the logs attached on his writ, \$68.81 with costs, as awarded by the referee.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

MITCHELL v. MORSE.

August 6, 1885.

WILL.—DEVISE.—ABSOLUTE FEE.

A testator devised a portion of his estate as follows: "I give and devise to my wife all the rest and residue of my real estate; but, on her decease, the remainder thereof I give and devise to my said children...." Held, that the wife took the fee, and that the devise over was void.

H. L. Whitcomb, for plaintiff. *S. Clifford Belcher*, for defendant.

WALTON, J. This is a real action, and the only question is whether John Mitchell, by his last will and testament, gave his wife a fee-simple estate in the demanded premises, or only an estate for life.

It is the opinion of the court that he gave her a fee-simple estate. A devise of real estate without words of limitation vests in the devisee an estate in fee-simple; and this result is not defeated by a devise over of the remainder. If a life estate only is given, a devise over of the remainder is good. But when by the terms of the devise an estate in fee-simple is given, the addition of a devise over of the remainder is void, because the whole estate having already been disposed of, there is nothing for it to act upon. The argument usually urged against this conclusion is that the devise over ought to be allowed to cut down or reduce the estate previously given to a life estate, upon the ground that such must have been the intention of the devisor. And in a few cases this argument has prevailed. But in a large majority of the cases, both in England and in this country, it is held that a mere devise over of a remainder will not cut down the estate given to the first taker. *Jones v. Bacon*, 68 Me. 34; S. C., 28 Am. Rep. 1; *Stuart v. Walker*, 72 Me. 145; S. C., 39 Am. Rep. 311.

In this case, the testator first gives a few small legacies to his children. He then gives the residue of his personal property to his wife. He then declares that if the personal property is not sufficient to pay the legacies and the expenses of the last sickness, enough of his real estate may be sold to supply the deficiency. He then adds this clause:

"I give and devise to my wife, Sarah F. T. Mitchell, all the rest and residue of my real estate. But, on her decease, the remainder thereof I give and devise to my said children, or their heirs respectively, to be divided in equal shares between them."

It will be noticed that in this devise there are no words of limitation. The gift is direct, positive and absolute. And but for the devise over of a remainder, no one would doubt that under our statute—Rev. Stat., chap. 74, § 16—the terms used are sufficient to convey an estate in fee-simple. The devise over is also direct and simple. It has no qualifying words or conditions whatever annexed to it. We thus have, first, a devise of a fee-simple estate, and then a devise over of the remainder. The two cannot co-exist. It is settled law in this State, as will be seen by the cases cited, that the latter must yield. The question is *res judicata* in this State, and will not be further discussed here.

The plaintiffs are the children mentioned in the secondary devise. The defendant has a warranty deed from the primary devisee. His is the better title.

Judgment for defendant.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

THOMPSON v. REED AND TRUSTEES.

August 6, 1885.

TRUSTEE PROCESS — CLAIMANT OF FUNDS.

When the claimant of funds in the hand of an alleged trustee is examined as a witness, and fails to make full, true and explicit answers to all questions touching the funds and the source of his claim to them, his claim will be adjudged invalid.

William L. Putnam, for plaintiffs. *Chas. W. Larrabee*, for trustees and claimant.

WALTON, J. This is a trustee suit. The fund attached is a legacy of \$1,000 given to the defendant by the will of his uncle. The executors disclose an assignment of the legacy, and the assignee has become a party to the suit for the purpose of sustaining his claim. Our conclusion is that the claim is not sustained. A just regard for the rights of creditors requires trustees to make full, true and explicit answers to all questions propounded to them touching their indebtedness to the principal defendant in the suit. And the same rule applies to assignees who claim the funds sought to be held by the attachment. If examined as a witness, it is the duty of an assignee to state fully and clearly the circumstances connected with the assignment, and the consideration for which it is made; and if he refuses to do so, and gives only vague, indefinite and sweeping answers, his claim may be justly viewed with suspicion, and declared invalid. *Barker v. Osborne*, 71 Me. 69.

In this case, the assignee has not complied with this rule. In fact it would be difficult to conceive of answers more indefinite and unsatisfactory. Being asked what the real consideration for the assignment to him was, he answered: "Security and gift; I was advised the seal was sufficient consideration at the time." Being asked if he actually paid any value for the assignment, and, if so, what and how much, he answered: "Extended favors before and after the assignment." Being asked how they were able to fix a value upon the defendant's interest in his uncle's estate before the will had been probated, he answered: "Security and gift." Being asked to state what part of the consideration had been restored to him, and to give the dates and amounts, and all other details, he answered: "Been returned and others advanced; it is a running security." Being asked what his then actual interest under the assignment was, and to explain it in full, he answered: "Security and gift of the whole."

The claimant was twice examined through a commissioner appointed by the court; but all his answers upon every material point were equally evasive, vague and indefinite. "Security and gift" was all the information that could be obtained in relation to the purpose and consideration of the assignment, except that in one of his answers he says that he was "advised" that the seal was sufficient consideration. Why he was so "advised" is not stated; but the inference which naturally suggests itself is not favorable to the honesty of the claim. A contract or promise under seal may be binding upon the parties to it without proof of any other consideration than that which the seal imports; but when an assignment or a conveyance is attacked upon the ground that it was made to defraud creditors, the fact that the instrument by which it was made has a seal upon it is of no significance. Such assignments or conveyances are quite as likely to be made by instruments under seal as by instruments not having a seal upon them. When the honesty of the transaction is in issue, the seal has no significance. "Security and gift!" The absurdity of this answer by which it is claimed that the assignment was in part at least a gift, will appear when it is contrasted with the letter of the defendant to the executors, which is made a part of their disclosure. The defendant there states that it had become necessary for him to realize the small benefit provided for him in his uncle's will, and had, therefore, transferred, not only the bequest of \$1,000, but also all his interest in said estate, to Harry D. Manson, "who had kindly aided him to anticipate the receipt of said bequest," and the writer expressed his hope that the executors would soon be able to reimburse his friend for his kind accommodation. Surely so far as the transfer was a gift, and so far as it was security for past "favors" (as stated in answer to interrogatory 8) the willingness of his friend to accept it was not of a very extra-

ordinary character. And for aught that appears in the answers of the assignee, the security may have been to the extent of only \$1, while the gift was of the remaining \$999, with the defendant's contingent interest in his uncle's estate thrown in.

This case strongly resembles the case of *Barker v. Osborne*, 71 Me. 69, already cited. In that case property, presumably worth \$12,000, had been assigned to the trustee, as he claimed, partly in payment of a debt owing to him, and partly as a gift; and he asserted over and over again that he was the absolute owner of the property; but the court held that such doubtful, indefinite and sweeping statements could not be allowed to supply the omission of details and particulars, and charged him. In this case, the answers of the assignee are more "doubtful, indefinite and sweeping" than the answers of the assignee in that case; and they are not such as a just regard for the rights of the plaintiff required him to make. They are such as would be likely to come from a fraudulent transferee of property; but they are not such as would be likely to come from an honest one.

Assignee's claim adjudged invalid. Trustees charged for \$1,000.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

BRAGDON v. HATCH.

August 6, 1885.

FORCIBLE ENTRY AND DETAINER — MORTGAGE — FORECLOSURE.

A mortgagee cannot maintain forcible entry and detainer against the mortgagor or those claiming under him unless the mortgage has been foreclosed.

Where the certificate of the publication of a notice of foreclosure states that it was published in a newspaper "published" in the county, it is not sufficient to comply with a statute requiring such notice to be published in a newspaper "printed" in the county.

Nathaniel Hobbs, for plaintiff. *Bourne & Son*, for defendant.

WALTON, J. A mortgagee's title will not support a complaint for forcible entry and detainer against the mortgagor, or those claiming under him, unless the mortgage has been foreclosed. *Jewett v. Mitchell*, 73 Me. 28, and cases there cited.

The evidence of foreclosure in this case is not sufficient. The only evidence of the facts necessary to constitute a foreclosure is a certificate of the mortgagee. He certifies that he published a notice of foreclosure in the *Sandford Weekly News*, published weekly in Sandford, in said county; but he does not say that the *Weekly News* was printed in Sandford, or within the county. In *Blake v. Dennett*, 49 Me. 102, such a certificate was held to be defective; for the statute requires the notice to be published in a newspaper printed in the county; and a newspaper may be published in a county, and yet not be printed there; and when the foreclosure of a mortgage is claimed, a strict compliance with the provisions of the statute must be shown.

Besides, we do not think a certificate of the mortgagee is competent evidence. The act of 1849, chap. 105 — Rev. Stat., chap. 90, § 5, clause 2 — makes the certificate of the register of deeds *prima facie* evidence of the publication of a notice of foreclosure; but there is no statute or rule of evidence that makes the certificate of the mortgagee evidence of the fact, and we think it is not competent evidence.

Judgment for defendants.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

HOWARD v. HOWARD.

August 6, 1885.

MARRIAGE — DIVORCE — PRACTICE.

Where, in a libel for divorce, the question is submitted to a jury who finds the libelee guilty, and he moves to set the verdict aside as against evidence, the question for the law court is, not whether the verdict is clearly right, but whether it is so clearly wrong as to require the court to set it aside.

L. T. Carlton, for plaintiff. *Potter & Lancaster*, for defendant.

PER CURIAM. This is a libel for divorce commenced by the wife against her husband. The libel charges, among other things, cruel and abusive treatment. The case has been tried by a jury and the defendant found guilty. He asks for a new trial on the ground that the verdict is against evidence. Consequently, the question for the law court is not whether the verdict of the jury is clearly right, but whether it is so clearly wrong as to require the court to set it aside. We think it is not.

Motion overruled.

Judgment on the verdict.

SNOW v. WEEKS.

August 6, 1885.

INTEREST—ON TAXES—WARRANT TO COLLECTOR.

Without a distinct vote definitely determining when taxes should be payable, the payment of interest on taxes cannot lawfully be enforced. A vote declaring that interest shall be collected after a time named is not sufficient.

If the warrant from the assessors contain such a recital of facts as would authorize a collection of interest, then the collector might justify his collection of interest under his warrant, although the recitals were not in fact true.

A. P. Gould, for plaintiff. *D. N. Mortland*, for defendant.

WALTON, J. The plaintiff having been arrested on a warrant issued by the defendant as treasurer and collector of taxes of the city of Rockland, claims that the arrest was illegal, and brings this action to recover the damages which he says he thereby sustained.

The city council of Rockland had voted that the collector be instructed to allow a discount of eight per cent on all taxes paid during the month of August, and four per cent on all taxes paid during the month of September, and that "on all taxes unpaid after the last day of December, interest must be collected." But there was no distinct vote by the city council determining when the taxes should be payable; and the question is whether, without such a vote, the payment of interest could lawfully be enforced. We think it could not. The statutes authorizing the collection of interest are explicit, and make it a condition precedent, that the town or city shall first fix the time when the taxes are payable.

The Revised Statutes of 1871, chap. 6, § 93, declare that "towns at their annual meetings may determine when their taxes shall be payable, and that interest shall be collected after that time," and the act of 1876, chap. 92, extending this power in terms to cities as well as towns, and limiting the amount of interest, declares that "whenever a city or town has fixed a time within which taxes assessed therein shall be paid, such city, by its city council, and such town, at the meeting when money is appropriated or raised, may vote that on all taxes remaining unpaid after a certain time, interest shall be paid at a specified rate, not exceeding one per centum per month; and the interest accruing under such vote or votes shall be added to and be a part of such taxes."

We think it is clear that under a fair interpretation of these statutes, a compulsory collection of interest cannot be justified, without a definite and distinct vote, fixing the time when the taxes are payable. A vote declaring that interest shall be collected after a time named is not sufficient. Interest may and generally does commence to run before the principal is payable; and a vote declaring when interest shall commence is by no means equivalent to a vote, fixing a time when the principal shall be payable.

Such being the law, we are forced to the conclusion that the warrant issued by the defendant for the arrest of the plaintiff was illegal. It directed the sheriff or his deputy to collect interest as well as the principal remaining due upon the plaintiff's taxes. We think an arrest upon such a warrant would be an actionable wrong. No justification is found in the defendant's warrant from the assessors, for that did not direct him to collect interest. It directed him to collect the taxes actually assessed, but it did not direct him to collect the interest. It made

no mention of interest. And no justification is found in the vote of the city council, for that is defective and insufficient upon its face. If the warrant from the assessors had contained such a recital of facts as would justify a collection of interest, and also a direction to the defendant to collect interest, then, being an instrument legal upon its face, and coming from competent authority, the defendant could justify under it, although the recitals were not in fact true. But the warrant from the assessors to the defendant contained no such recitals, and the principle invoked in his defense, and the authorities cited in support of it, do not apply.

When this case was before the law court, on a former occasion, the court held that inasmuch as the warrant which the defendant issued to the sheriff contained an averment of the vote by the city of Rockland, fixing a time when its taxes should be payable; this averment should be deemed to be true unless the contrary should be proved—in other words, that such a recital by a sworn officer is *prima facie* evidence of the fact. But the contrary is now proved. An inspection of the city records and the testimony of the clerk show that no such vote was passed. Consequently, the averment must be disregarded and the truth allowed to prevail.

The result is, that the defendant must be defaulted and the damages assessed by a jury, as agreed in the report.

Defendant to be defaulted. Damages to be assessed by a jury.

PETERS, C. J., DANFORTH, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

WOODS v. WOODS.

August 6, 1885.

MARRIAGE—DOWER.

A married woman received from her husband in his life-time \$1,000 and some specific articles of personal property, and agreed in writing, under seal, that she received it "in full discharge of all claim or interest upon [her husband], and upon his property for her support and maintenance by way of dower or otherwise." Held, that this agreement was a bar to her right of dower in the husband's estate.

S. & L. Titcomb, for plaintiff. *G. C. Vose*, for defendant.

WALTON, J. A married woman may be barred of dower in her husband's lands by a pecuniary provision made for her instead of dower with her consent, and without her consent, unless within six months after her husband's death she waives such provision and files the same in writing in the probate office. Rev. Stat., chap. 103, §§ 7, 8, 9.

In this case, while her husband was alive, the plaintiff received from him \$1,000 in money, and some other property, in consideration of which she agreed in writing, under her hand and seal, that the property so received should be in full discharge of all claim, right or interest upon him and upon his property, for her support and maintenance by way of dower or otherwise. Her husband is now dead, and the question is whether this agreement bars her right to dower. We think it does. That her husband intended that the provision so made for her should be in lieu of dower, and that she deliberately and advisedly accepted it as such there can be no doubt. The express wording of the agreement will admit of no other interpretation. We think she must abide by the agreement she then made.

Judgment for defendant.

PETERS, C. J., DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

WESTBROOK MANUFACTURING COMPANY v. WARREN.

August 6, 1885.

WATER AND WATERCOURSES — RIPARIAN OWNERS — INJUNCTION.

A bill in equity by one mill-owner to enjoin other mill-owners upon the opposite side of a stream, at the same power, for using more than one-half of the water, complained that the defendant, within ten days, commenced to use, and were continuing to use, and were threatening to use in the future more water than they were lawfully entitled to, thereby depriving the plaintiffs of sufficient water to run their mill, and obliging them to shut down portions of it, and thus throwing out of employment some two hundred persons. *Held*, that the injury claimed does not appear to be of that permanent or irreparable character necessary to justify or require the interposition of a court of equity by way of injunction.

William L. Putnam, for plaintiff. *S. C. Strout, H. W. Gage, and F. S. Strout*, for defendant.

WALTON, J. We do not think the injunction prayed for in this case can be rightfully granted.

The unlawful diversion of the water of a stream is a nuisance, for which one thereby injured may maintain an action at law. And in some cases such invasion of one's right may be restrained by an injunction issued by a court of equity. But, as a general rule, a remedy by injunction is obtainable only when the right is clear, and the invasion of it, actual or threatened, is such as will result in permanent or irreparable injury. In all other cases the injured party must be content with such redress as is afforded by an action at law.

The wrong complained of in this case is that the defendants had, within ten days, commenced to use, and were continuing to use, and threatening to use in the future, more water than they were lawfully entitled to; thereby depriving the plaintiffs of sufficient water to run their mill, and obliging them to shut down portions of it, and thus throwing out of employment some two hundred persons.

The injury claimed to have been thus received is considerable. But it does not appear to be of that permanent or irreparable character necessary to justify or require the interposition of a court of equity by way of injunction. It is not like the building of a dam or the digging of a ditch, by which the water would be permanently diverted from the plaintiffs' mill. It seems to be no more than a temporary invasion of the plaintiffs' right, and not likely to be continued, unless the defendants claim that they are entitled to the amount of water thus taken from the plaintiffs, in which case the right should be tried and determined in an action at law before application is made for an injunction. *Dennison Man. Co. v. Robinson Man. Co.*, 74 Me. 116; *Jordan v. Woodward*, 38 id. 423.

And there is another difficulty in this case. The defendants are not joint owners or occupants of the mills on the westerly side of the river; and, for aught that appears in the bill, the wrong complained of may have been committed wholly by the owners or occupants of only one of these mills, the owners or occupants of the other mills being entirely innocent of using or threatening to use more water than they are lawfully entitled to. And yet the court has no means of distinguishing between the innocent and the guilty. The bill charges that all the defendants, in the aggregate, are using more than half the water in the river. But it does not charge that each one of them is using more than he is entitled to. The effect of such an averment is to make it certain that some one of the defendants is guilty of using more than his share of the water, but not that each and every one of them is. Consequently, if the court should grant the injunction prayed for, it is by no means certain that innocent parties might not be enjoined, and be required to pay a portion of the costs of the suit. Surely the court ought not to be required to take such a risk as that. In this particular it is the opinion of the court that the bill is too indefinite or general in its averments to found a decree for an injunction upon.

Demurrer sustained. Bill dismissed with costs.

PETERS, C. J., VIRGIN, LIBBEY and EMERY, JJ., concurred; HASKELL, J., having been of counsel, did not sit.

TITCOMB v. McALLISTER.

June 8, 1885.

MORTGAGE — OF VESSEL.

A bill of sale of a vessel, absolute in form, given as security for the payment of a debt with a written agreement to reconvey upon payment of the debt, constitute a mortgage which should be foreclosed by the statute mode and not by proceedings in equity.

SURETY — CONTRIBUTION.

A surety may recover in *assumpsit* of a co-surety for contribution, and therefore is not entitled to relief by equity proceedings.

COSTS — EQUITABLE REMEDY DOUBTFUL.

In a bill in equity, which was brought in good faith, where the remedy was somewhat doubtful, and the court dismissed the bill because there was an adequate remedy at law,—*Held* no costs should be awarded.

Bill in equity to foreclose mortgage on vessel. The opinion states the facts.

C. E. Littlefield, for plaintiff. *Rice & Hull*, for defendant.

EMERY, J. From the bill, answer and proof, the following facts appear: The complainant, Titcomb, on the 20th day of April, 1877, was surety for Williams & Dean upon the two notes described in the instrument below recited, and upon the last-named note, that for \$1,600; the respondent, McAllister, was also surety for Williams & Dean. McAllister was not upon the first-named note. In this state of affairs, on that day Williams & Dean conveyed to the complainant, Titcomb, by absolute bill of sale, one-sixteenth of a barkentine and received back on the same day, and as a part of the same transaction, the following writing:

"In consideration of two notes signed by Williams & Dean and indorsed by me as follows — one note signed by Williams & Dean, payable to C. S. Smith, dated June 23, 1876, payable in one year from date, for \$1,000 and interest; also one note signed by Williams & Dean, payable to Alfred Sleeper, dated February 24, 1877, payable on demand, for \$1,600 and interest — I have this day received a bill of sale for one-sixteenth of the barkentine Addie E. Sleeper as collateral security for the payment of said two notes, and the said Williams & Dean hereby agree to pay the principal and interest of the said two notes and also keep the said one-sixteenth of said vessel insured for the protection of said Titcomb in case he shall be obliged to pay said notes, and when said Williams & Dean shall have paid said two notes and interest, I, the said W. H. Titcomb, hereby agree to re-transfer the said one-sixteenth of said barkentine to said Williams & Dean or their assigns.

"ROCKLAND, April 20, 1877.

"(Signed) W. H. TITCOMB.

"Witness: C. W. MAYO."

Williams & Dean did not pay either of said notes, and the complainant, Titcomb, was obliged to pay and did pay both of the notes. McAllister did not pay any thing. Williams & Dean are insolvent.

The first and preliminary prayer for relief in the bill is "that the said security (the one-sixteenth of the vessel) may be sold under the order of the court, and that Williams & Dean may be required to cancel and discharge said writing."

If the transaction of April 20, 1877, left Williams & Dean without any interest in the sixteenth of the vessel; if they had no right in the thing, but only a right of action on the contract, as was held in *Godard v. Coe*, 55 Me. 385, cited by complainant's counsel, then the complainant acquired an unembarrassed legal title, and could have sold the vessel at once, and given a good title, Williams & Dean could not have followed the vessel, nor troubled it, but must have been content with the right of action against Titcomb personally. In such case Titcomb would need no order of court to make a sale. Such an order would be superfluous, and should not be granted.

If, however, Titcomb's title was incumbered by some remaining right of Williams & Dean in the property itself, then the transaction evidently constituted a mortgage, and Williams & Dean have the rights of a mortgagor. It was not a pledge, for the legal title was transferred. Such a transaction has been often held to be a mortgage. *Jones Chat. Mort.*, § 19; *Bartel v. Harris*, 4 Me. 146; *Winslow v. Tarbox*, 18 id. 132; *Carpenter v. Snelling*, 97 Mass. 452. The rights of a mortgagor in a chattel mortgage after condition broken are created and defined by the statute. *Rev. Stat.*, chap. 91, § 3, provides that "when the con-

dition of a mortgage of personal property is broken, the mortgagor . . . may redeem it at any time . . . before the right of redemption is foreclosed, as hereinafter provided." The mode of foreclosure referred to in the third section is specified in detail in the fourth and fifth sections. In the sixth section it is provided that the right to redeem shall be forfeited, if the condition in the mortgage is not performed within sixty days after the specified notice of foreclosure is recorded. In effect, the statute gives the mortgagor for redemption, sixty days, after the mortgagee has performed a certain specific act of foreclosure. Can the court, even with full equity powers, take away from the mortgagor the statute right? Can the court substitute any other mode of foreclosure for that established by the statute?

It has been held in this State in *Chase v. Palmer*, 25 Me. 345, that the statute having provided specific modes for foreclosing mortgages of real estate, the jurisdiction of the court over bills to foreclose was thereby taken away. At that time the general statute specifying the powers of the court as a court of equity included the foreclosure of mortgages. It now only specifies the "redemption of estates mortgaged," dropping the other. See, also, *Shaw v. Gray*, 23 Me. 174; *K. & P. R. R. Co. v. P. & K. R. R. Co.*, 59 id. 35-37. The same reasoning would apply all the more conclusively to chattel mortgages. There was no right of redemption, nor the duty of foreclosure of chattel mortgages before the statute, as there was in the case of real estate mortgages. Courts of equity once had jurisdiction over bills to foreclose real estate mortgages, until it was taken away by the statute providing other modes.

In the case at bar of chattel mortgages, the statute mode was the first and only mode of foreclosure. It was said by VIRGIN, J., in *Ramsdell v. Tewksbury*, 73 Me. 199, that the only mode by which a mortgagee (in a chattel mortgage) can acquire an absolute title is by the statute foreclosure. The Massachusetts supreme court dismissed a bill to foreclose a chattel mortgage. *Boston Iron Works v. Montague*, 108 Mass. 248. We know of no case where with a statute like ours, a bill to foreclose a chattel mortgage has been sustained. This case, to be sure, is that of a mortgage of a vessel which need not be and we presume was not recorded in any town. *Wood v. Stockwell*, 55 Me. 76. But the United States statute only controls the place of record, all other rights of mortgagor and mortgagee are left to the State statute. The right of redemption and duty of foreclosure, and the mode of foreclosure remain the same. That the mortgage was not recorded in any town-clerk's office does not prevent a foreclosure in the statute mode. If there be no place to record the notice of foreclosure, it need not be recorded. This matter of the foreclosure of a mortgage of a vessel was fully considered in *Taber v. Hamlin*, 97 Mass. 489, with a similar statute, and we think the reasoning and conclusion of the court in that case satisfactory. The foreclosure according to statute without recording was held valid.

There may be instances of chattel mortgages where the statute mode of foreclosure would not be applicable, or would not provide a plain, adequate and complete remedy for the mortgagee. In such instances the court might afford relief in equity. In this case, however, we think the statute mode is applicable and sufficient and should be followed. The main prayer in the bill is for a valuation of the property, for a specified appropriation of it, and for a decree against the co-surety, McAllister, for contribution. The equity power of the court is ample for this purpose if this be the proper remedy, but the first inquiry in an equity proceeding must always be, whether there is a sufficient remedy at law. The legislature, in conferring equity powers on the court, enacted that these equity powers shall not be resorted to, nor exercised, in cases where there is a plain, adequate and complete remedy at law. If there be such a legal remedy, there is no occasion for invoking the equity powers of the court. Legal remedies are enlarged and multiplied from time to time by legislative enactments and judicial construction, and it was the evident intention of the legislature that these legal remedies should be sought, where sufficient. Legal and equitable remedies are not concurrent. As the legal remedies become more efficacious, there is less occasion for equitable remedies, and equity powers of the court become more limited. *Jones v. Newhall*, 115 Mass. 244; S. C., 15 Am. Rep. 97; *Hayden v. Whitmore*, 74 Me. 234; *True v. Loring*, 120 Mass. 507.

Sureties receiving contribution from co-sureties formerly were obliged to resort to equity courts, but it is now well settled that *assumpsit* may be maintained in such cases. *Bachelder v. Fiske*, 17 Mass. 484; *Davis v. Emerson*, 17 Me. 64. The case of *Bachelder v. Fiske* would seem to be a good precedent for this case. That was an action against a co-surety for contribution, by a surety who had taken security to himself from the principal. The principal was insolvent the same as in this case. It was held that the plaintiff could recover one-half of the balance after deducting the value of the proceeds of the security. In *Scribner v. Adams*, 73 Me. 541, cited by complainant, there were other interests and questions involved than those between the sureties. The respondent co-surety was insolvent, and the complainant sureties were endeavoring to reach the property given as indemnity by the principal to the defendant co-surety. Other parties claimed an interest in the property or fund. It was necessary to call them all before the court.

We do not see why all the questions in this case cannot be determined in an action of *assumpsit*.

Williams & Dean have no claim until they pay the debt, which payment will end all litigation. The accounts of the vessel, if necessary to be gone into, can be stated as well by an auditor as by a master. The value of the vessel, and its proper appropriations, can be made by a jury under proper instructions from the court. Cases of this kind, for contribution between co-sureties, may arise where, from the nature of the transactions, the situation of the parties, or other circumstances, as where more than an aliquot share is demanded, the remedy at law would not be plain, adequate and complete. Equitable remedies may then be successfully sought. In this case, however, we think a verdict and judgment at law could be maintained as readily, and would be as efficacious as a decree in equity, and hence the desired decree should be denied.

As our decision is only as to the remedy, and there was much doubt as to the proper remedy, and the respondent has not suffered thus far, we do not think costs should be awarded.

Bill dismissed, without costs.

PETERS, C. J., DANFORTH, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

[As to equitable actions to foreclose chattel mortgages, see 23 Eng. Rep. 504; 27 Alb. L. J. 178.—Ed.]

SUPREME COURT OF NEW HAMPSHIRE.

O'NEIL v. DUNN.

July 31, 1885.

ASSIGNMENT—WAGES OF EMPLOYEE—ACCEPTANCE.

An acceptance of an assignment of wages by an employee of a corporation made in writing by one who is not an officer of the corporation, but a confidential clerk in their office, apparently having authority to do the act, is not void.

Facts found by referee. November 27, 1883, Dunn was at work for the Nashua Lock Company, the trustee, and on that day made an assignment of his wages to Barry. Barry took the assignment to the counting-room of the company, and finding one R. P. Mosely there, asked him if he was the party to accept assignments of wages made by persons in the employment of the company. Mosely informed Barry that he was, and wrote across the back of the assignment the following words: "Accepted, November 27, 1883, Nashua Lock Company, by R. P. Mosely." Barry took the assignment, with this indorsement, and filed it with the city clerk of Nashua, where the parties reside. The lock company is a corporation having a treasurer in Nashua, where acceptance of such an assignment would be good against all parties.

Mosely was not an officer of the corporation, but a clerk holding confidential

relations to the company to such an extent that he was admitted to full knowledge of all business affairs, fixing the price upon goods for which he took orders, and employed by the treasurer with the assent of the directors.

At the pay-day following the date of the assignment, the treasurer paid Barry the wages due Dunn, and the same payment was repeated at each succeeding pay-day, until the service of the trustee process in this suit upon the company, May 3, 1884. Mosely had no authority to accept the assignment. The treasurer, for aught that he or the company had done, could have repudiated it upon the knowledge of its existence, but the treasurer and the company ratified it after it was filed with the city clerk, so far as paying the wages to Barry, the claimant, instead of Dunn, the workman, was a ratification.

The court ordered the trustee discharged, and the plaintiff excepted.

J. B. Parker, for plaintiff. *C. W. Hoitt*, for claimant.

CLARK, J. The only objection made to the validity of the assignment is that it was not duly accepted. The acceptance by Mosely was *prima facie* the acceptance of the lock company and sufficient to entitle the assignment to record. He was a clerk employed in the counting-room by the treasurer with the assent of the directors, holding confidential relations to the company and representing it at its place of business, and holding himself out as authorized to accept assignments of wages of persons in the employ of the company. In accepting the assignment he assumed to act for the company, the act was within the apparent scope of his duties, and the claimant was justified in relying upon his statement that he was authorized to act for the company. Under these circumstances the acceptance was not absolutely void. At most it was merely voidable, and until revoked by the company, it was sufficient as to third parties. Whether it could be revoked there is no occasion to consider, as it was treated by the company as a valid acceptance. The ratification by the company was before any objection had been made or question raised as to the validity of the acceptance, and prior to the plaintiff's attachment, and it was equivalent to a prior authority to the agents. *Haydock v. Duncan*, 40 N. H. 45.

Exceptions overruled.

BINGHAM, J., did not sit; the others concurred.

GILMAN BROS. v. STEVENS.

July 31, 1885.

CONFLICT OF LAWS—WHETHER NOTE IS PAYMENT—PLACE OF CONTRACT GOVERNS.

Whether a time note given in this State by a New Hampshire debtor to a Massachusetts creditor has the effect of payment *pro tanto* is to be determined by the law of New Hampshire.

Assumpsit upon an account. Facts found by the court. The defendant is defaulted and the defense is made by subsequent attaching creditors.

September 6, 1883, the defendant was indebted to the plaintiffs in the sum of \$822.37 upon account for goods sold to him in Boston. On that day, Burr, the plaintiffs' traveler, called upon the defendant for money on account; the defendant was unable to pay, but offered his notes amounting to \$500, payable to the plaintiffs, \$200 in fourteen, \$150 in thirty, and \$150 in forty-five days. Burr had no authority to accept notes, but received and forwarded them to the plaintiffs in Boston, who on September 12 procured them to be discounted. September 14, this suit was commenced. September 17, the defending creditors commenced their suits. After September 17, the plaintiffs paid to the bank the amount of the notes, took them up and at the trial produced and offered them to the defendant.

There was no agreement or mutual understanding that the notes were or were not given and received in payment of the account *pro tanto*. There was evidence tending to show and it is found that, by the law of Massachusetts, a promissory note constitutes payment of a pre-existing debt for which it is given, in the absence of any stipulation on the subject. The plaintiffs did not intend to extend

the time for the payment of the account, and did not do so, unless such extension results as the legal effect of receiving the notes and disposing of them in the manner stated.

C. C. Rogers, Barnard & Barnard, for plaintiffs. *Bingham & Mitchell, W. D. Hardy*, for defendant.

CLARK, J. The notes were made and payable in this State, and in determining their validity and effect they must be regarded as New Hampshire contracts. *Dow v. Rowell*, 12 N. H. 49; *Bank v. Colby*, id. 520; *Dyer v. Hunt*, 5 id. 401; *Thayer v. Elliott*, 16 id. 102; *Little v. Riley*, 43 id. 109; *Chase v. Dow*, 47 id. 405. The contract of the maker with the payees and with any indorser of the notes was to be performed in this State and is governed by the law of New Hampshire. Story Conf. Laws, § 332; *Woodruff v. Hill*, 116 Mass. 310. In this State a note is not payment of a pre-existing debt, unless specially agreed to be received as payment. *Moore v. Fitz*, 59 N. H. 572. The defendant, being unable to pay when called upon by the plaintiffs' agent, offered his notes and delivered them to the agent. That the agent had no authority to accept them does not alter the case. It does not appear whether he assumed to accept them, or whether he informed the defendant that he was not authorized to receive them, and whether he did or not is immaterial. The agent's lack of authority did not change the nature and effect of the contract between the maker and the payees of the notes. Under the law of New Hampshire, the notes, executed and payable in New Hampshire, did not operate as payment of the indebtedness for which they were given, and no additional force or effect was acquired by the acceptance in Massachusetts. In the absence of any agreement of the parties, the acceptance was an acceptance of the notes as New Hampshire notes—contracts to be performed in New Hampshire—and, by the law of New Hampshire, the notes were not a payment of the plaintiffs' account. The defendant cannot set up the defense that the notes were payment of the plaintiffs' claim, and subsequent attaching creditors can make no defense which the defendant cannot make.

Judgment for the plaintiffs.

CARPENTER, J., did not sit; the others concurred.

NOTE—(1) A note dated in one State, and signed by one maker there, but signed by other makers and delivered in another State, is a contract of the latter State. *Hart v. Wills*, 52 Iowa, 56; S. C., 85 Am. Rep. 255; *Fresse v. Brownell*, 85 N. J. L. 285; S. C., 10 Am. Rep. 289. See, also, *Howard v. Fletcher*, 59 N. H. 151.

(2) In Massachusetts a negotiable note given for a pre-existing debt, is presumed to be in payment, whether it be the note of the debtor or of a third person, but the presumption may be rebutted. *Mellidge v. Boston Iron Co.*, 5 Cush. 158; S. C., 51 Am. Dec. 59.

So in Maine: *Newall v. Hussey*, 18 Me. 249; S. C., 36 Am. Dec. 717. *Contra*, see *Estate of Davis*, 34 Am. Dec. 574; *Larrabee v. Talbot*, 46 id. 687.

Where, upon a sale of hogs for cash on delivery, the agent of the purchaser, after weighing them, stated that he should have to go to a bank at some distance for the funds, and asked the vendor which he preferred, the currency or a draft, and the latter replied "a draft," whereupon the agent stated that he would get one payable to the vendor's order, and did so, after obtaining permission to ship the hogs at once on condition of obtaining the draft as soon as possible, which draft was accepted by the vendor, — *Held*, that whether the delivery of the hogs was to be deemed conditional until receipt of the draft, or a credit was given and the draft received upon a precedent debt, in either case the presumption was that it was received in payment and satisfaction. *Gibson v. Tobey*, 46 N. Y. 687; rev'g 53 Barb. 191.

In the absence of any agreement to take it as payment, the receipt of a note for the interest due on a bond and mortgage and the indorsement thereof on the bond, does not amount to a payment of the interest, but if the note is not paid the holder of the bond and mortgage can enforce them for such interest against a purchaser of the mortgaged premises, who took them with knowledge that back interest was not paid. *Feldman v. Beier*, 78 N. Y. 298.

A renewal note given by a debtor to take up a preceding one is not a payment, but is a mere extension of such preceding one; and it makes no difference that the first of the series was indorsed and procured to be discounted by the creditor, and the succeeding ones were each discounted to take up the preceding one. The new note is not a payment, unless the creditor is thereby discharged from liability as indorser, or obtains a claim against another party. *Jagger Iron Co. v. Walker*, 76 N. Y. 521; aff'g 48 N. Y. Supr. 276.

The acceptance of a new security for an existing debt, does not operate as a payment unless so intended by the parties. *Kemmerer's Appeal*, 102 Penn. St. 558.

See, also, 7 Wait's A. & Def. 409.—Ed.

ALDRICH v. BENNETT.

July 31, 1885.

PARENT AND CHILD — CUSTODY CHANGES ON MARRIAGE.

The legal marriage of a female infant terminates the father's right to her custody and services.

Case, for unlawfully enticing away the plaintiff's minor daughter on the 29th day of March, 1879, and depriving him of her services from that time until the 8th day of September, 1882, when she became twenty-one years of age. The defendant pleaded that on said 29th day of March he was lawfully married to the daughter, and that the plaintiff was not thereafter entitled to her services. To this plea the plaintiff demurred, and the question thereupon raised was reserved for the opinion of the court.

Lane & Dole, for plaintiff. *Batchelder & Faulkner*, for defendant.

CLARK, J. The right of a parent to the earnings of his minor child, upon whatever principle it is founded — *Hammond v. Corbett*, 50 N. H. 501 — is commensurate with the right of custody; and so long as the right to the services of the child remains, the right to control those services must exist. Whatever, therefore, operates as a release from parental control necessarily terminates parental right of service, and the emancipation of the minor from legal parental authority, either by the voluntary act of the parent or by operation of law, puts an end to the legal claims of the parent to the minor's earnings.

The marriage of a female infant, if above the age of legal consent, is valid, although contracted and entered into in defiance of parental wishes and authority. Gen. Laws, chap. 180, § 14; *Parton v. Hervey*, 1 Gray, 119. Being valid, the same legal consequences must follow from it, whether contracted in obedience to parental preference or in opposition to them. In either case the parent is no longer entitled to the services and earnings of the infant married daughter. The new relations created by the marriage, being inconsistent with the enforcement of parental rights, operate as an emancipation from them. The plaintiff's daughter, being above the statutory age of consent, had the legal capacity to form the relation of marriage, and although in strictness of law it should not be formed without parental consent, it is nevertheless sustained on grounds of public policy, and parental rights are made to yield to it. *Cooley Torts*, 237. The legality of the marriage is admitted by the demurrer, and the plea is a sufficient answer to the plaintiff's action. *Harvey v. Moseley*, 7 Gray, 479.

Demurrer overruled.

CARPENTER, J., did not sit; the others concurred.

CHADBURN v. GILMAN.

July 31, 1885.

TRUSTEE PROCESS — NOTE PAYABLE IN ANOTHER STATE — MAKER NOT TRUSTEE.

The maker of a negotiable sight draft, not payable in this State, cannot be held as trustee of the payee of the draft.

Trustee process. Facts found by the court. July 15, 1884, the Commercial Union Ins. Co., of London, adjusted a fire loss with the defendant, and gave him, in payment therefor, a negotiable sight draft on their office in New York, July 19, and before the draft reached New York, this writ was served on the insurance company as trustee of the defendant, and payment of the draft was for that reason refused when it was afterward in the usual course of business presented for payment in New York.

J. H. Hobbs, for plaintiff. *Worcester & Gafney*, for claimant.

CLARK, J. At the time of the service of the plaintiff's writ upon the trustee, July 19, 1884, the trustee was indebted to the defendant upon a sight draft, payable to the order of the defendant at the office of the trustee in the city of New

York. The draft being a negotiable instrument not payable in this State, and one of the parties to it not residing in this State, was not subject to the trustee process; and the plaintiffs took nothing by the attempted attachment. Gen. Laws, chap. 249, § 15.

Prior to 1842 negotiable paper was not liable to trustee process in this State. *Stone v. Dean*, 5 N. H. 502. By the Revised Statutes negotiable promissory notes "made or payable in this State, or the parties to which at the time of making the same resided in this State," were subjected to this process. Rev. Stat., chap. 208, § 18. In *Kibling v. Burley*, 20 N. H. 359, 362, Woods, J., in speaking of the statute, says: "It has subjected negotiable paper, made under such circumstances as to derive its effect and construction from the laws of this State as the *lex loci*, to the control of the process of foreign attachment to a certain extent." In *Horn v. Thompson*, 31 N. H., 562, 572, BELL, J., says of the same statute: "There is no general power conferred in relation to negotiable paper; promissory notes alone are specified. All promissory notes are not embraced in the act, but such only as are made and payable in the State, or the parties to which, at the time of making the same, resided in this State." And in *Thompson v. Carroll*, 36 N. H. 21, 25, FOWLER, J., speaks of the statute as applying to notes "payable in this State." It may be doubtful whether a note made in this State, payable at a place outside the State, the parties to which at the time of making the same did not reside in the State, would be liable to trustee process under the Revised Statutes, as such a note would be construed and interpreted by the law of the place of payment and not by the law of this State. But, however that may be, the statute was materially changed in 1867, and put in its present form. It was extended so as to include negotiable paper generally, and the phrase "made or payable in this State," was changed to "made and payable in this State;" so that the statute now reads: "If the trustee is sought to be charged for any negotiable promissory note, or other instrument on which he is liable, made and payable in this State, or the parties to which at the time of making the same, resided in this State, . . ." Gen. Stat., chap. 230, § 21; Gen. Laws, chap. 249, § 15.

The process of foreign attachment being unknown to the common law, does not extend beyond the express provisions of the statute; and under the present statute, negotiable paper if subject to the trustee process, when made and payable in this State, or when the parties reside in the State at the time of making the same, and not otherwise. In *Orcutt v. Hough*, 54 N. H. 472, the question was raised and considered, whether a note made in this State and payable generally, no particular place of payment being specified, "was made and payable in this State," within the meaning of the statute, and it was held that it was within the statute. SARGENT, C. J., says: "If a note is made payable at a particular place, the law of the place where it is there made payable will govern its construction; but a note made and dated in a particular place will be deemed to be a note of that place and governed by the law of that country whether it is expressly made payable there or is payable generally without naming any particular place." In this case the draft being payable at New York, is not "made and payable in this State," within the meaning of the statute, and the trustee is not chargeable for the draft.

The case finds that the draft was given by the special agent of the trustee who adjusted the defendant's loss, in settlement and payment of the loss, and that the defendant has surrendered his policy and all claims under it. This is an express finding that the draft was given in payment of the loss and in discharge of the claims under the policy. The plaintiffs suggest that it does not appear that the agent was authorized to give the draft. This objection should have been made at the trial. The plaintiffs claimed to hold the fund in the hands of the trustee by force of an attachment, and it was incumbent on them to show that the fund was liable to attachment by trustee process. Consequently, the burden was on them to show that the draft was unauthorized, if such was the fact. The case does not show that any question was raised at the trial as to the agent's authority, the trustee does not dispute it, and it is to be assumed that he acted within the scope of his authority.

Trustee discharged.

BLODGETT, J., did not sit; the others concurred.

SUPREME COURT OF RHODE ISLAND.

KENT v. BONGARTZ.

June 26, 1885.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — STATEMENTS IN PETITION FOR REMOVAL OF OFFICER — MALICE.

Certain citizens presented to the town council of their town, a request that K. might be removed from his office of constable because: "*firstly*, said K. is a man utterly devoid of principle, and uses his office more for the purpose of wreaking his personal spite than for the peace and harmony of the community; *secondly*, said K. is wholly ignorant of the duties of his office; *thirdly*, said K. has at various times heretofore maliciously and wickedly assaulted and arrested sundry persons who were entirely innocent of the charges charged by him against them;" whereupon K. brought an action for libel against the citizens, and at the trial introduced evidence to show that the statements of the request were false. *Held*, that the action could not be maintained without affirmative proof of express malice; that proof of the mere falsity of the statements would not support the action, and that the statements were not such as, if proved untrue, to imply actual malice.

Exceptions to the court of common pleas. The opinion states the case.

Page & Owen, for plaintiff. *Edward C. Dubois, John H. Bongartz, William B. W. Hallett, Charles F. Baldwin and George N. Bliss*, for different defendants.

DURFEE, C. J. This is an action on the case for libel. The plaintiff is a citizen of the town of East Providence, and was, when the alleged libel was published, a police officer or constable of the town. The alleged libel is a petition which purports to be signed by the defendants as citizens of East Providence, and which is addressed to the town council, the body having power to appoint and remove the town constables. It asks the town council to remove the plaintiff from his office for the following reasons, which are set forth in the petition, and which the plaintiff complains of as false and defamatory, to-wit: "Reasons. *Firstly*, that said Kent is a man utterly devoid of principle and uses his office more for the purpose of wreaking his personal spite than for the peace and harmony of the community; *Secondly*, that Kent aforesaid is wholly ignorant of the duties of his office; *Thirdly*, that said Kent has at various times heretofore maliciously and wickedly assaulted and arrested sundry persons who were entirely innocent of the charges charged by him against them."

At the trial the plaintiff introduced testimony tending to prove that the petition was signed by some of the defendants, that it was published by presentation to the town council, and that the "reasons" were false. It is not claimed that there was any testimony other than that afforded by the charges contained in the "reasons" and the proof of their falsity, to show any actual or express malice toward the plaintiff on the part of the defendants. At the conclusion of the plaintiff's testimony, the defendants moved for a nonsuit on the ground that the petition was a privileged communication, and that the plaintiff could not maintain his action thereon without proof of express malice. The court granted the motion and the plaintiff excepted.

The plaintiff admits that the petition is of the class of communications which are conditionally, not absolutely, privileged, and consequently, that the burden was on him to show by affirmative evidence that it was malicious. He contends, however, that the question of malice is a question of fact for the jury, and that, if the case had been left to the jury, there was evidence from which they might have found express malice, namely, the grossness of the charges and the testimony to their falsity. The question then is, whether the charges themselves are of such a character that actual malice can be inferred from them simply on proof of their falsity. It is well settled that falsity alone is not enough. The author or authors of the communication may make it and press it upon the attention of others, honestly believing it to be true and acting from the purest and highest motives, when in fact it is false, and, therefore, actual malice is not to be inferred from mere falsity. *Somerville v. Hawkins*, 10 C. B. 583; *Harris v. Thompson*, 13 id. 383; *Hart v. Gumpach*, L. R., 4 P. C. 489; S. C., 4 Moak's Eng. Rep. 188; *Laughton*

v. *Bishop of Sodor and Man*, L. R., 4 P. C., 495; S. C., 4 Moak's Eng. Rep. 162; *Lewis v. Chapman*, 16 N. Y. 369; *Fowles v. Bowen*, 80 id. 20; *Ormsby v. Douglass*, 37 id. 477; *Shurtleff v. Stevens*, 51 Vt. 501; S. C., 31 Am. Rep. 698; *Brow v. Hathaway*, 13 Allen, 239. The question then is, do the charges in the petition bear upon their face the *indicia* of actual malice. In *Laugh-ton v. Bishop of Sodor and Man*, *supra*, the court say that "undoubtedly a privileged communication may be couched in language so much too violent for the occasion as to afford in itself evidence of malice, whereby the privilege is forfeited." The court added, however, that it will not do to hold that "all excess beyond the exigency of the occasion is evidence of malice," and held that though there were some expressions used beyond what was necessary, they did not warrant any inference of express malice. In *Hart v. Gumpach*, *supra*, the same court used the following language: "It is no doubt true that malice may, in some cases, be inferred from the defamatory statements themselves; but where representations, if *bona fide*, are privileged by the occasion, the mere circumstance that they are defamatory does not furnish that proof; it must be shown either from the nature of the language employed, or by extrinsic evidence, that they were prompted by bad feeling or wrong motives, and it is not sufficient in such cases that the representations are consistent with the existence of malice, they must be inconsistent with *bona fides* and honesty of purpose." The language accords with the decision in *Somerville v. Hawkins*, *supra*, that actual malice cannot be inferred from conduct which is as consistent with *bona fides* as with malice. The maintenance of the privilege is regarded as important not only to the parties immediately protected by it, but also the public at large. In *Brow v. Hathaway*, 13 Allen, 239, 242, the court say that the mere fact that the statements made are intemperate or excessive from over excitement will not defeat it. See, also, *Wright v. Woodgate*, 2 C., M. & R. 573.

We do not think the charges here complained of are of such a character that a jury without other proof could be justified in finding them malicious. They are severe in substance but concise in expression. They employ no language which has the appearance of being used only by way of spiteful invective or malignant vituperation. Their chief fault is that they are vague and inexplicit, but this is a fault which is as likely to have arisen from unskillfulness as from malice. Indeed the petition is just such a petition as we might expect from persons, honest and earnest in purpose, but ignorant of the proper mode of making charges which are to be judicially investigated. It is as consistent, on the face of it, with good faith as with malice, and therefore, under the rule laid down in the cases above referred to, it was for the plaintiff to show by extrinsic evidence not only that the charges were false, but also that the defendants had no probable cause for believing them to be true, or that they acted without sincerity, using the occasion as a mask for personal spite and ill will.

Exceptions overruled.

NOTE.—On the general subject of privileged communications, see 4 Wait's A. & D. 304 *et seq.*; 32 Eng. Rep. 164; 31 Am. Rep. 708, note; Moak's Van Sant. Pl. 695-6; 34 Am. Dec. 249; Moak's Underhill on Torts, 180, 146.

A communication, made *bona fide*, and without malice, upon any subject-matter in reference to which the party communicating has a duty, is privileged, if made to a party having a corresponding duty, although it contain criminating matter which, without this privilege, would be slanderous and actionable. *Halstead v. Nelson*, 24 Hun, 395.

In *Decker v. Gaylord*, 35 Hun, 584; 30 Alb. L. J. 462, it was held that communications made in good faith and in a proper manner to a school commissioner by a resident of the district, charging the woman then teaching in the district with unchastity and the use of profane and obscene language are privileged; that the presumption is, that the communication is made in good faith, and the burden of proving actual malice is on the opposite party; and that the falsity of the charge is not of itself sufficient to raise an inference of malice. See, also, *Harwood v. Keech*, 4 Hun, 889.

Where one makes a charge affecting the character of another, who is a candidate for office, to an elector shortly before the election, in good faith and without malice, he is not liable therefor, his statement being in the nature of a privileged communication. *Mott v. Dawson*, 46 Iowa, 538.

In *Bays v. Hunt*, 60 Iowa, 251, it was held that words spoken without malice of a candidate for office, in the belief of their truth, and for the sole purpose of advising electors of what was believed to be the true character of the candidate, were privileged. To same effect, *State v. Batch*, 31 Kans. 465.

Certain merchants who had lost goods by false representations, having probable cause to suspect another as a party to the fraud, drew up and signed a paper reciting that they had been "robbed and swindled" by such party and others named, and agreeing to share the expenses of their prosecution. *Held*, that the communication was privileged; that the terms used, though strong and plain, were not irrelevant or inappropriate; and that no action would lie therefor without proof of express malice. The exhibition of such paper to an agent of one of the merchants having sole charge of his business there, for the purpose of obtaining the signature of the latter, is also a privileged communication. *Klinck v. Colby*, 46 N. Y. 427.

Words spoken by one who has been robbed, to an officer employed to detect the criminal, charging another person with the offense, if spoken in good faith, under a belief of their truth, and with probable cause, are privileged and not actionable. *Smith v. Kerr*, 1 Bdm. Sel. Cas. 190.

A written communication by a banker in the country to a mercantile house in New York, in respect to the pecuniary responsibility of a customer of such house whose note has been sent to him for collection, is privileged. *Lewis v. Chapman*, 16 N. Y. 889, cited in principal case.

An advertisement in a newspaper, "warning the public against the negotiation of notes, etc., alleged to have been obtained by fraud, or stolen," is a privileged communication, and express malice must be shown to make it a libel. *Con. v. Featherston*, 9 Phila. Rep. 594.

A landlord has such an interest in knowing the character and reputation of his tenants, that words spoken to him by a third person, in answer to inquiries made respecting the character of a tenant, are in their nature privileged, and if the words are spoken without malice, such third person is fully protected. *Liddle v. Hodges*, 2 Bosw. 587.

To a declaration in an action for slander, imputing bribery and corruption to plaintiff in his office of mayor, the defendant pleaded that the words were spoken at a public meeting of the rate-payers and inhabitants convened for the purpose of considering municipal business. The plaintiff replied that the meeting had not been convened or held under statutory or other authority, and that, to the knowledge of defendant, it was opened to and attended by persons who were not either rate-payers or inhabitants, in whose hearing the words had been spoken. *Held*, that the occasion was privileged, and that the casual presence of strangers at the meeting, to the knowledge of defendant, did not take away the privilege. *Hodges v. Glass*, 1 Olivier, Bell & Fitzgerald's (New Zealand Sup. Ct.) 66.—Ed.

HILL v. BAIN.

June 26, 1885.

ESTOPPEL — SUIT AGAINST TOWN FOR NEGLIGENCE — FORMER JUDGMENT.

A. brought an action against B. to recover damages for injuries received by collision with certain teams left in a highway by B. B. obtained judgment. A. then brought an action against the town in which the highway was situated, to recover damages for his injuries, charging the town with negligence in permitting the highway to be unsafe. The town pleaded in bar the judgment recovered by B. against A., alleging that B. caused the defect complained of. To this plea A. demurred. *Held*, that the plea was good and that the demurrer should be overruled, and that A., by the judgment which B. recovered against him, was estopped from suing the town.

Trespass on the case. On demurrer to plea. The opinion states the case.

Page & Owen, for plaintiff. *Nicholas Van Slyck & Ziba O. Slocum*, for defendant.

DURFEE, C. J. The case made by the pleadings is this: September 28, 1882, the plaintiff, while driving on the Pontiac road, so called, in the town of Cranston, in the night-time, in the exercise of reasonable care, came into collision with certain teams or carts placed in the road and left there by James A. Budlong and Frank L. Budlong, copartners, and was badly injured in his person. He sued the Budlongs at the March term of this court, 1883, in a plea of trespass on the case, laying his damages at \$20,000 for injuries received from said obstruction, but after trial the jury found a verdict for the Budlongs as not guilty of causing the injuries, on which verdict the court gave a final judgment for the Budlongs, which judgment still remains in force. At the December term of the court of common pleas, 1883, the plaintiff brought this action against the town of Cranston, which is an action on the case to recover damages for the injuries aforesaid, on the ground that the town neglected to keep said road, the same being a public highway, safe and convenient for travel. The defendant pleads the judgment for the Budlongs in bar by way of estoppel, alleging that the Budlongs were the authors of the obstruction or defect complained of. The plaintiff demurs to the plea. The case is here on appeal. The question is, whether the plea is a good plea by way of estoppel. The defendant contends that it is, because, in the first place, the plaintiff, in order to recover in this action, would have to prove all which it was

necessary for him to prove in order to recover in the former action, except the fact that the said teams and carts were placed in said road and left there by the Budlongs, which fact is admitted by the demurrer; and something else besides, namely, that the town after notice of the alleged nuisance, actual or constructive, neglected to remove or guard against it; and because, in the second place, the town has only to notify the Budlongs of this action, thus giving them an opportunity to defend it, in order in case of a judgment against the town to make the Budlongs liable over for the damages recovered; so that, if the plea is not sustained, the Budlongs, after judgment in their favor proving that the plaintiff has no case, may be compelled, in this roundabout way, to compensate the plaintiff for his injuries. The plaintiff, on the other hand, contends that the plea is bad because the defendants in the two actions are different and there is no privity between them.

Undoubtedly the rule as generally laid down is, that judgments avail as estoppels only for or against parties and privies, but nevertheless the courts allow themselves a good deal of latitude in applying the rule, observing the spirit of it rather than the letter. Thus it has been held that a judgment in favor of a deputy sheriff, in an action against him for official misfeasance or default, is available by way of estoppel in an action against the sheriff for the same misfeasance or default. *King v. Chase*, 15 N. H. 9; S. C., 41 Am. Dec. 675. So it has been held that a judgment in favor of a master in an action against him for the act of his servant, rendered in a trial of the case on its merits, is a bar to a suit against the servant for the same act. *Emery v. Fowler*, 39 Me. 326; S. C., 63 Am. Dec. 627. So it has been held that a judgment on the ground of payment against one of two joint and several makers of a promissory note is a bar to recovery against the other, whether as between the makers the other signed as principal or surety. *Spencer v. Dearth*, 43 Vt. 98. In *Bates v. Stanton*, 1 Duer, 79, 88, the plaintiff, claiming to be the owner of certain goods, delivered them to the defendant by way of bailment; the defendant afterward surrendered them to the true owner, taking from him an indemnity bond. Thereupon the plaintiff sued him in trover for their conversion, and it was held that a judgment recovered by the true owner, in an action against the plaintiff involving the right to the goods, was conclusive against the plaintiff in his action against the defendant, inasmuch as the parties, though nominally different, were virtually the same on account of the interest which the true owner had in the defense of the later action by reason of the indemnity bond which he had given to the defendant of record. In *Atkinson v. White*, 60 Me. 396, the owner of a lot of logs mortgaged them to A. and then sold them to B. A. afterward sold a portion of them to C. warranting their title. B. sued C. in trover for a conversion of the logs bought by him, and recovered judgment; C. setting up his title under A. In a later suit by C. against A. involving the same title, it was held that the judgment recovered by B. was a bar to recovery. See, also, *Durham v. Giles*, 52 Me. 206, and *Freer v. Stotenbur*, 2 Abb. Ct. App. Dec. 189.

In these cases the defendants were permitted to avail themselves by way of estoppel of judgments to which they were neither parties nor privies. The ground on which this was permitted seems to have been that the defendants, though not parties to the judgments, were so connected in interest or liability with the parties, that the judgments when recovered could be regarded as virtually recovered for them, for the purposes of estoppel, as well as by and for the parties of record. The supreme court of Maine in *Atkinson v. White*, *supra*, express an inclination to go even further and to hold broadly that "when a party has once tried a question in one suit, he shall not, without regard to mutual estoppel, again try the same question involving the same testimony in another suit." We think, on the authority of these cases, it is competent for the defendant town to set up by way of estoppel in the case at bar the judgment recovered by the Budlongs. Certainly if the town had notified the Budlongs of the pendency of this action and the Budlongs had, in consequence of the notice, assumed the defense, it would be competent for them, on the authority of these cases, to plead the former judgment in bar, for they would then be the real defendants, though defending in the name of the town, and ought not to be required to try

over a question which they have already tried with the result of a final judgment against the plaintiff in their favor. But the Budlongs, if they assumed the defense, would have to make it in the name of the town, and we see no good reason why the town should not be permitted to make, without calling upon them, any defense which they could make, if called upon, in the name of the town.

Demurrer overruled.

BARNEY v. ARNOLD.

June 27, 1885.

WILL—FEE, SUBJECT TO EXECUTORY DEVISE—"CHILD OR CHILDREN"—"ISSUE."

A clause in testator's will provided as follows: "I give, devise and bequeath to my daughter, M. A. W., during her natural life, and at her decease to her children, one-half of a lot and half of all the buildings and improvements thereon, situated One-quarter of said house and lot I devise to S. L., her heirs and assigns, and the remaining quarter of said house and lot I give and devise to J. B., her heirs and assigns, for and during the natural life of each of them, but if any of them or all may die, leaving no child or children, then my will is that each respective right shall be divided equally amongst my daughters, A. A., S. L. and J. B., their heirs and assigns forever." M. A. W. died childless. *Held*, that on her decease her one-half, not the whole estate, became divisible among her sisters; and that S. L. took under the will an estate in fee-simple, subject to a gift over by executory devise.

Distinction traced between the words "child or children" and the word "issue" in case of a testamentary gift with limitations over.

Bill in equity for partition. The opinion states the case.

James C. Collins, for complainant. *W. W. & S. T. Douglas* and *James Harris*, for respondents.

DURFEE, C. J. Two questions have been submitted to us under the following clause of the will of Thomas Whipple, deceased, to-wit: "I give, devise and bequeath to my daughter, Martha Ann Whipple, during her natural life, and at her decease to her children, one-half of a lot and half of all the buildings and improvements thereon, situated in the city of Providence, at a place called Constitution Hill, and is the same house formerly owned by George Carpenter and myself. One-quarter of said house and lot I devise to Sarah Loring, her heirs and assigns, and the remaining quarter of said house and lot I give and devise to Julia Barney, her heirs and assigns, for and during the natural life of each of them, but if any of them or all may die, leaving no child or children, then my will is that each respective right shall be divided equally amongst my daughters, Amey Arnold, Sarah Loring and Julia Barney, their heirs and assigns forever." Martha Ann Whipple died before her three sisters, leaving no child. The first question is whether, on her decease, the whole estate or only her half became divisible among the three sisters. We think her half only became divisible; for otherwise, instead of using the distributive phrase, "each *respective* right," the testator would have said "the whole estate" shall be divided equally, etc. The second question is, whether Sarah Loring took under the will, an estate tail or an estate in fee-simple, subject to a gift over by way of executory devise to Amey Arnold and Julia Barney on the event of her dying without leaving any child. We think she took a fee-simple estate subject to such gift over. In *Morgan v. Morgan*, 5 Day, 517, the devise was to the testator's four sons in fee-simple, with the clause following added, to-wit: "And also my will is, that if my sons should either of them die, without children, that his brothers shall have his part in equal proportion." The court held that the words "die without leaving children" meant *dying without children living at the death of the first devisee*, and consequently that the limitation over was good as an executory devise. The case is exactly like the case at bar. In *Smith v. Hunter*, 23 Ind. 580, the estate given to the first devisee in fee was given over "if he die childless," and the gift over was sustained. In *Doe v. Webber*, 1 B. & A. 718, the devise was to A. in fee, "and in case A. shall happen to die and leave no child or children," then to B. in fee, and the gift over was held to be good by way of executory devise. The court, however, was of opinion that the words "child or children" were equivalent to "issue," and sustained the gift over on other indi-

cations in the will going to show that the testator intended to have the gift over take effect, not on an indefinite failure of issue, but upon a failure happening at the death of the first devisee. We think there is good reason for giving the words "child or children" an extended meaning, for the first devisee might die without leaving any child and yet have a grandchild or some other remoter descendant, in which case the gift over cannot have been intended to take effect. But we do not think it is necessary to give the words the same effect as to the gift over as if the word "issue" had been used by the testator in the place of them. For, as has been well remarked, the words "child or children" have not the technical force of the word "issue" in a limitation over; and generally refer to the time of the death of the devisee.' *Sherman v. Sherman*, 3 Barb. 385, 387. It is in the natural order for the parent to die before the children and for the children to succeed the estate, and it is to be presumed that the testator made his will in view of the natural order, and therefore, though the meaning of the word "children" be extended by construction, it is entirely unnecessary to extend it beyond the grandchildren or other descendants who take the place of the children in the succession. The construction that the words, "dying without issue" or "dying without having issue," imports an indefinite failure of issue, is highly artificial, and probably defeats oftener than it furthers the testamentary intent, and it is therefore not to be carried unnecessarily beyond the line of existing precedents. If, however, any other indication of the intent be required, such indication is afforded by the phrase, "for and during the natural life of each of them," which follows the devises to Sarah Loring and Julia Barney. That phrase is inconsistent with said devises, and as to them, must be rejected for repugnancy, but nevertheless it indicates pretty clearly that the times which the testator intended as the times for the gift over to take effect in case they should take effect, were at the deaths of the first devisees.

Sarah Loring died leaving a son living at her death. After the death of Martha Ann Whipple, Sarah Loring made a deed purporting to convey all her interest in the estate to Hannah Loring in trust. We think that, under that deed, Hannah Loring took all her interest subject to said trust, and that, therefore, no part of the estate descended to the son.

CARROLL v. RIGNEY.

July 6, 1885.

LANDLORD AND TENANT—TRESPASS BY TENANT—PLEADING—JUSTICE COURT—UNDER GENERAL ISSUE CANNOT QUESTION TITLE.

A landlord cannot maintain trespass for injury to the premises let, done by the tenant during the tenancy. His remedy is trespass on the case.

Pub. Stat. R. I., chap. 196, § 80, provides: "Whenever an action of trespass shall be brought before any justice court and the defendant shall plead the general issue, he shall not be allowed to offer any evidence that may bring the title to real estate in question." *Held*, that the word "title" meant the right of possession not the fact of possession. In trespass, before a justice court, evidence may be given to disprove the fact of the plaintiff's possession, if it can be given without bringing the right of possession into dispute.

When, without objection, a defendant introduced evidence affecting both the fact and right of the plaintiff's possession,—*Held*, that in the circumstances, the evidence was good to the extent and for the purposes allowed by the statute.

Exceptions to the court of common pleas. The opinion states the case.

Edward D. Bassett & Frederick Hayes, for plaintiff. *George J. West*, for defendant.

DURFEE, C. J. This is a trespass for injuries to the plaintiff's barn. The case was begun in the justice court of the city of Providence. The only plea pleaded was the general issue. The case was carried by appeal to the court of common pleas, where, on trial to the jury, a verdict was rendered for the plaintiff for \$55. It comes before us on exceptions. The bill of exceptions makes the following statement, to-wit: "The action was trespass *vi et armis* and was brought to recover damages done by a tenant by the month, in possession, to a barn and the earth thereunder. The plaintiff offered testimony tending to prove that manure was thrown upon the barn floor to the depth of two or three feet and left there a long

time; that the defendant's horse was cast one night and kicked down a stall, and that the mangers, feed-boxes, etc., were destroyed and the barn otherwise seriously damaged and torn during the tenancy. The barn belonged to the plaintiff and she leased the land on which it stood. The defendant was a tenant by the month. The defendant offered testimony to show that he was a tenant by the month, that he did not injure the premises, but that one night his horse, being seized by the colic, rolled about while in great pain and kicked down the stall." The bill of exceptions further states in effect that, at the conclusion of the testimony, the court instructed the jury that the plaintiff was entitled to recover if the barn was injured by the defendant, or by his horses, or servants acting under his direction, in the manner testified to by the plaintiff and her witnesses. The court also refused to charge, as requested by the defendant, in several requests.

The defendant contends that the court erred because as a rule, a landlord cannot maintain trespass for injuries to the premises let, done by the tenant during the tenancy and because the possession was in the defendant. Without doubt these positions are generally correct. 2 Greenl. Ev., § 616. The plaintiff contends that where the general issue alone is pleaded, the plaintiff's possession need not be shown, citing Addison Torts, §§ 424, 425. The statement in Addison, however, rests not upon the common-law rule of pleading, but upon the new rules adopted at Hilary Term. 4 Wm. IV. The new rules do not govern here. But we have a statute which provides as follows, to-wit:

"Whenever an action of trespass shall be brought before any justice court and the defendant shall plead the general issue, he shall not be allowed to offer any evidence that may bring the title to real estate in question." Pub. Stat. R. I., chap. 196, § 30. It has been held in Massachusetts under a similar provision that when the defendant pleads only the general issue, he cannot give evidence that the plaintiff was not in possession. *Lynch v. Rosseter*, 6 Pick. 419; *Stone v. Hubbard*, 17 id. 217. But in New York under similar provisions, it has been decided that the question of actual possession is not one of title under the statute, and accordingly that when the plaintiff adduced evidence to show his possession, the defendant was entitled to give counter evidence to prove possession in himself. *Ehle v. Quackenboss*, 6 Hill, 537; *Fredonia, etc., Plankroad Co. v. Wait*, 27 Barb. 214. We think the New York decisions rest on the better reason and are more accordant with the view which has been generally taken of our statute. The word "title," as used in our statute, signifies not the *fact* of possession, but the *right* of possession which may exist without the fact, and accordingly evidence may be given to controvert the fact, whenever it can be given without bringing the right in question. The purpose of the statute was not to exonerate the plaintiff from the burden of making out a *prima facie* case by proving his possession as well as the acts complained of as trespasses, or to preclude the defendant from controverting such case by disproving the fact of possession, but only to require that questions of disputed right, if any there are, shall be raised on the record and carried to a higher court for adjudication. In the case at bar, it is true, the defendant did more than controvert the fact of possession, he proved that he was himself in possession as tenant of the plaintiff; but the evidence on this point went in without objection, and indeed, so far as appears, the tenancy was not disputed. We do not see, under these circumstances, that the fact that the evidence went further than the statute allows, would render it any less effectual to the extent and for the purposes which the statute allows.

Exceptions sustained.

HAMPSON v. TAYLOR, Treasurer of Town of Bristol.

July 9, 1885.

NEGLIGENCE—PROXIMATE CAUSE—COMBINATION OF CAUSES—DEFECTIVE HIGHWAY AND ACCIDENT.

When a traveler on a highway is injured and the injury results from a combination of two causes, both proximate, one a defect in the highway and the other a natural cause or a pure accident, the town is liable in damages to the injured traveler, provided his injury would not have been sustained but for the defect in the highway.*

* See *ante*, 398.

A. injured by falling on a highway which had been washed away in gullies and was slippery with frozen sleet, brought an action for damages against the town. At the trial the presiding judge charged the jury: "If the sidewalk where the accident happened was so defective as to render the town liable in case an accident had happened by reason of the defect in the absence of the obstruction caused by the ice, and this accident happened by reason of such defect and would not have happened but for it, then the town is liable even though the ice was one of the proximate causes of the accident." *Held* no error.

Exceptions to the court of common pleas. The opinion states the case.

Henry W. Hayes, for plaintiff. *Samuel P. Colt*, for defendant.

DURFEE, C. J. This is an action on the case to recover damages from the town of Bristol for injuries to the plaintiff alleged to have been received by him while walking in one of the streets of said town, in consequence of the neglect of the town to keep said street safe and convenient for travel. The case was tried to a jury in the court of common pleas, when the plaintiff recovered a verdict for \$3,500 damages. The case comes here on exceptions to the rulings of the court taken by the defendant. The accident occurred February 5, 1884. The plaintiff left his house between eight and nine o'clock, A. M., to carry some tea to his wife, who worked in a mill. The street was covered by a thin film of ice, caused by rain falling and freezing the previous night. The plaintiff's route was through Thames street, along the west side, which the plaintiff selected as the safer side. Testimony was adduced by the plaintiff tending to show that Thames street, on its west side, where it corners on State street, was washed and gullied, with cobble stones left exposed in the gully, some part of which was nearly a foot deep. The plaintiff made his visit to the mill, and was returning when, stepping on one of the stones so exposed, he slipped and fell, dislocating his right hip and injuring his foot. He adduced testimony to show that the fall would not have occurred but for the gully; or, if it had occurred, would not have seriously injured him. The defendant moved for a nonsuit, which was refused. The defendant alleged exceptions, but upon our intimation that exceptions do not lie for a refusal to nonsuit, they are not pressed. *Wentworth v. Leonard*, 4 Cush. 414; *Priest v. Wheeler*, 101 Mass. 479; *Cutler v. Currier*, 54 Me. 81, 90; *Girard v. Gettig*, 2 Binn. 284; *Providence County Savings Bank v. Phalen*, 12 R. I. 495. The court below, among other instructions to the jury, gave the following, to-wit: "If the sidewalk where the accident happened was so defective as to render the town liable in case an accident had happened by reason of the defect in the absence of the obstruction caused by the ice, and this accident happened by reason of such defect and would not have happened but for it, then the town is liable, even though the ice was one of the proximate causes of the accident." The defendant excepted to this ruling. In support of the exception he cites numerous cases, chiefly from Massachusetts and Maine, which hold that the action will not lie where the injury is not the result solely of the defect, but of the defect and another cause, for which the town is not liable, concurring with it. There is, however, a line of cases that maintain a different doctrine, which has been tersely stated thus: "Where two causes combine to produce the injury, both in their nature proximate, the one being the defect in the highway and the other some occurrence for which neither party is responsible, the corporation is liable, provided the injury would not have been sustained but for the defect in the highway." *Dill Mun. Corp.* (ed. of 1881), § 1007. It seems to us that this doctrine, at least where the concurring cause is a natural cause or a pure accident for which no person is responsible, is the more reasonable doctrine. Indeed we think it is the duty of the town, in making and mending its highways, to consider the natural effects of rain and snow and ice as affecting the safety and convenience of travel thereon, except so far as the statute exonerates them from duty in that regard. *Houfe v. Town of Fulton*, 29 Wis. 296; S. C., 9 Am. Rep. 568; *City of Atchison v. King*, 9 Kans. 550; *Kelsey v. Glover*, 15 Vt. 708; *Winship v. Enfield*, 42 N. H. 197; *Bassett v. City of St. Joseph*, 53 Mo. 290; S. C., 14 Am. Rep. 446; *Hull v. City of Kansas*, 54 Mo. 598; S. C., 14 Am. Rep. 487; *City of Joliet v. Verley*, 35 Ill. 58; *City of Lacon v. Page*, 48 id. 499; *Baldwin v. Greenwood's Turnpike Co.*, 40 Conn. 288; S. C., 16 Am. Rep. 33; *Ring v. City of Cohoes*, 77 N. Y. 83; S. C., 33 Am. Rep. 574; *City of Crawfordsville v. Smith*, 79 Ind. 308; S. C., 41 Am.

Rep. 612; *Palmer v. Inhabitants of Andover*, 2 Cush. 600; *Sherwood v. Corporation of Hamilton*, 37 Upper Can. Q. B. 410; S. C., 1 East. Rep'r, 400. We do not find any error in the instruction complained of.

Exceptions overruled.

WHITTIER v. COLLINS.

July 9, 1885.

PLEADING — FORMER SUIT — INCONSISTENT ACTION — POOR DEBTOR'S OATH — NEW TRIAL.

A. recovered judgment in *assumpsit* against B. for money loaned. A. afterward brought case against B. for alleged fraudulent and false statements made to obtain the loan. B. pleaded in bar the judgment against him in *assumpsit*. *Held*, that the plea was not good, and that the value of the judgment in *assumpsit* was to be considered as *pro tanto* reducing the damages recoverable in the action on the case.

To the action on the case B. also pleaded in bar that he had, after the judgment in *assumpsit*, taken the poor debtor's oath, which was administered notwithstanding A.'s objection of the alleged fraudulent and false statements. At the trial the presiding justice excluded the evidence offered to sustain this plea. On petition for a new trial, — *Held*, that as the evidence was not set out on the record, the court, not knowing what the evidence was, must assume it to have been rightly excluded.

Defendant's petition for a new trial. The opinion states the point.

Warren R. Perce, for plaintiff. *Colwell & Barney*, for defendant.

DURFEE, C. J. Two questions are raised by the petition. The first is this: The plaintiff lends the defendant money on the faith of the defendant's representation that he has property. The defendant failing to repay the money when due, the plaintiff sues him for it in *assumpsit* and recovers judgment which remains unsatisfied. The plaintiff afterward sues the defendant in case for deceit on account of the representation, alleging it to have been false and fraudulent. The defendant pleads the judgment in *assumpsit* in bar of the action. Is the plea good? We think it is not. The two actions are neither identical nor consistent. The plaintiff, when he sues in *assumpsit*, affirms the contract, and sues to recover for a breach of it. The plaintiff, when he sues in case for deceit, also affirms the contract and sues for damages for the fraud by which he was led to enter into it. The case is clearly distinguishable from the case when A. sells goods to B., being induced to sell them by B.'s false and fraudulent representation that he has property, and, suing B. for the price, recovers judgment therefor, and then sues B. in trover for the conversion of the goods. Here the two actions are inconsistent; for A. when he sues B. in *assumpsit* affirms the contract and treats B. as the purchaser; whereas, when he sues B. in trover, he is obliged to disaffirm the contract, claiming that the goods were not sold but fraudulently obtained, the sale being void and that he is still the owner; and this, after he has prosecuted the contract to judgment, the law will not permit him to do, because the judgment in *assumpsit* conclusively affirms the title of B. In the case at bar, if the false representation instead of having been made by the defendant had been made by a third person, the unsatisfied judgment against the defendant would evidently not bar an action on the case for deceit against such third person. But we can see no difference in principle between such a case and a case in which the false representation is made by the defendant himself. *Wanzer v. De Baun*, 1 E. D. Smith, 261. The plaintiff in such case, of course, would not necessarily be entitled to recover the full value of the goods sold or money lent, but it would be the duty of the jury in assessing the damages to consider the value of the judgment in *assumpsit*, and if the judgment were thought to have any value, to reduce the assessment accordingly.

The second question arises under a special plea in bar pleaded by the defendant, which sets up that the defendant, after the judgment in *assumpsit*, applied to take the poor debtor's oath; that the plaintiff, being cited, appeared and opposed the application, alleging among other objections the making of the representation as aforesaid; that issue was joined on said allegation; that the magistrate, after full hearing, decided said allegation in favor of the defendant and allowed him to take the oath, etc., "as by the record, etc., more fully appears." The plaintiff

replied *nul tiel record*. The defendant in his petition asks for a new trial because the court erred in excluding the evidence offered by the defendant under said plea. The petition is accompanied by an agreed statement of facts which sets forth that the defendant offered evidence in support of the allegations of said plea and of the decision of the magistrate which was excluded; but neither the petition nor the statement shows what the evidence was which was offered. We doubt whether an allowance or a refusal to allow the taking of the poor debtor's oath is a judgment entitled to effect as such by way of estoppel beyond the effect which the statute gives; but, if so, we still think the defendant does not show that he is entitled to a new trial, for we cannot, without knowing what the evidence was which was offered, decide that it was improperly rejected. We must presume that the court decided correctly until the contrary appears.

We do not think the defendant is entitled to a new trial on the other grounds assigned.

Petition dismissed.

SUPREME COURT OF VERMONT.

ADAMS v. RAILROAD CO.

October, 1884.

EMINENT DOMAIN—DAMAGES—OWNER'S LIEN.

When land is taken for public use, the owner has a lien upon it for its "equivalent in money," which a court of equity will enforce, unless the owner has done that which in law precludes him from asking its enforcement.

MORTGAGE—MORTGAGOR'S RIGHTS AFTER CONDITION BROKEN.

In reference to mortgaged premises, after condition broken the interest of the mortgagor becomes at law absolutely vested in the mortgagee.

A mortgagee who has come into possession by foreclosure and who is entitled to damages from a railroad company for having taken a part of the mortgage premises, is not bound by an agreement made between the mortgagor and the company as to the amount of the damages; and not being bound by such an agreement he cannot take advantage of it. The damages which he is entitled to receive are the actual damages to the land.

EMINENT DOMAIN—EVIDENCE THAT VALUE OF LAND INCREASED—INTEREST.

Evidence is not admissible to prove that woodland was enhanced in value by the building of the railroad over meadow land attached to the same farm. Interest is recoverable from the present company only from the date of its possession.

Bill in chancery. Heard on bill, answer, traverse, master's report, and exceptions thereto. Decreed that the defendants be perpetually enjoined from operating their railroads and running trains over the lands owned by the orators mentioned in the bill, unless they pay to the clerk of the court for the benefit of the orators the sum of \$1,463.65, with interest from August 10, 1883, and the sum of \$200 with interest from the date of the decree, and costs, on or before June 1, 1884.

The bill was brought at the April term, 1882, to recover damages for lands taken by the defendant, the L. V. R. R. Co., for railroad purposes, and prayed that the orators might have a special lien on the land, etc., and that the defendants be enjoined from running their cars over said land unless they paid said damages. The orators were Orange Adams, J. H. Cotterell and Fannie F. Cotterell, wife of said J. H., Mahala Wells and H. M. Wells. The land taken by the railroad was meadow land, and part of a farm situated in Bakersfield, and owned by James H. Malavin, as a mortgagor. Malavin executed March 10, 1866, a mortgage on said farm to Gardner A. Paige to secure certain promissory notes. On or about January 1, 1870, said Paige sold two of said notes to said Fannie F. Cotterell, and at the same time sold three of said notes to A. C. Wells, and also transferred a proportional part of the mortgage security to them. The other nine of said notes were transferred October 31, 1871, by said Paige to said Adams. One note fell due each year. The owners of the mortgages foreclosed, and the

decree became absolute March 1, 1879. On January 1, 1880, the executor of A. C. Wells' estate deeded the interest of that estate to the said H. M. Wells and Mahala Wells.

[Omitting master's report.]

The following question was asked a witness by the defendants' solicitor: "What would be the worth of that wood standing (referring to the wood on the Malavin farm) if the railroad was not there?" Mr. R. H. Start, solicitor for the orators, said: "The defendants offer to prove by this witness that the value of the standing timber on this Malavin farm has been increased from \$2,000 to \$4,000 on account of the market created by the railroad." The question was excluded.

The mortgage debt on the Malavin farm at the date of the decrees of foreclosure—September 20, 1878—was \$8,631.86, and the farm rented for \$360 per year. The bond executed by said Malavin was subsequently superseded by the agreement fixing the land damages at \$1,100. The masters found that, if they were not bound by the agreement, the damages were \$900, with interest from August 1, 1877; that if the \$1,100 agreement, made January 10, 1876, was the correct measure of damages, the orators were entitled to recover \$1,600.50; but if the interest was to be computed only from the time the Lamoille Valley Railroad Company began to operate the railroad—August 1, 1877—then they should recover \$1,468.65; that if interest should be computed on the \$1,100 only from July 1, 1880, then they were entitled to recover, on August 10, 1888, \$1,305.15; or, if interest was computed on the \$900 from July 1, 1880, then they should recover \$1,067.85. No part of the land damages had been paid by the defendants.

Burt, Hall & Burt, for defendant. *Cross & Start*, for orators.

VEAZEY, J. This case has been twice argued. The right of the orators to a decree, upon the facts reported, is established by recent cases in this court. *Kendall v. M. & C. R. R. Co.*, 55 Vt. 488; *Kittell v. Missisquoi R. R. Co.*, 56 id. 96. Those cases stand on the principle that when land is taken for public use the owner has a lien upon it for its "equivalent in money"—art. 3, chap. 1, Constitution of Vermont—which a court of equity will enforce, unless the owner has done that which in law precludes him from asking its enforcement.

We hold that the land-owner is not estopped by an agreement as to the amount of damages, where he does not consent to the taking of the land before payment, but objects and forbids and threatens to interrupt and prevent, and is thereupon enjoined from so doing, which was this case. But it is claimed the case at bar differs from those cited in that it is brought not by the land-owner but by persons who held the interest of the mortgagee at the time of the entry and construction of the railway.

The foreclosure of the mortgage was not obtained until after the land was taken, and the defendants claim that the orators acquired title only as purchasers at the date of the foreclosure. This is not sound; because the mortgage debt, or a portion of it, was overdue long before the land was taken; and it is settled that after condition broken the interest of the mortgagor becomes at law absolutely vested in the mortgagee. *Kimball v. Sattley*, 55 Vt. 285; S. C., 45 Am. Rep. 614; *Hagar v. Brainerd*, 44 Vt. 294. See, also, *Wade v. Hennessy*, 55 id. 207.

The orators claim that the agreement as to damages which the land-owner and mortgagor made with the company that took the land is the true basis of recovery in this case. They agreed that the damages were \$1,100. The masters find the damages were \$900. We are unable to see how the mortgagor, who had no right except to redeem, could bind the mortgagees on the question of value of the mortgage premises, or a portion thereof, any more than in the matter of title. The title and the right of each party to the mortgage were defined by well-settled rules of law; and neither could be affected by agreements of the other with third parties. The mortgagees' title was perfect, subject to the right of redemption, which has since been foreclosed; and they will be made whole, when they receive the actual damages to the farm, which the taking of the land and the building thereon of a railroad has caused it. They will then have received an "equivalent in money" for land "taken for public use." This amount the masters have found. They would not have been bound by an agreement of the mortgagor for a less amount. The agreement was not made by authority in their behalf. Not being bound by it, it

was not such an agreement that they can take advantage of it. No claim is made that the damages were different when the present company took possession from what they were when the former company first took the land.

Another question arises on the report in respect to the damages. The defendants offered to prove that the value of the standing timber on this farm has been increased from \$2,000 to \$4,000 on account of the market created by the railroad, which evidence was excluded by the masters, to which exception was taken.

The orators urge two answers to this claim; first, that under our Constitution the benefits to the land through which a railroad is built cannot be deducted in determining the compensation; second, that if this was allowable the offer was not specific and broad enough in this case. Without passing upon the first objection, we think the second is well taken. The deduction for benefits must be limited to the particular tract which is in part taken, and the benefits be confined to such as are direct and peculiar to the owner, excluding those which he shares with others whose property is not taken. If the benefit is only personal and does not affect the land, it cannot be considered. *Pierce R. R. 221 et seq.* and cases there cited. The railroad could not have increased the value of Malavin's wood and timber without increasing that of his neighbors. To allow deductions on account of his benefit would, therefore, be exacting contribution from him and relieving others benefited in like manner. The offer was not to show the benefit specified was peculiar to him; nor was it an offer to show a fact that was necessarily a peculiar benefit, and not common. The offer was to show a fact in substance like the rise of real estate resulting from the building of a railroad, which is held to be a general advantage, common to all in the vicinity not peculiar to any one. *Pierce R. R. 223; Childs v. New Haven and Northampton Co.*, 133 Mass. 253.

Another question is as to when interest shall begin to run on the damages found by the masters. The orators claim it should be from the time the Lamont Valley Railroad Company entered upon the land. This would be so as against that company; but the St. Johnsbury and Lake Champlain Railroad Company denies that it is liable for interest prior to its possession of the road. The question as here raised has not been passed upon in previous cases in this State. This railroad was mortgaged to a trustee for bondholders to secure a large bonded indebtedness. This mortgage was foreclosed in December, 1879, and the decree expired without redemption and became absolute. The bondholders then proceeded under the statute and organized into a corporation called The St. Johnsbury and Lake Champlain Railroad Company, and took possession of the road July 1, 1880, and have retained possession ever since. This company included in its possession and use the land in question. It never had any right to this land or to the use of it, because the railroad mortgage, which was prior to the possession of the land by the former company, conveyed no interest in it. This company simply took and used the land for railroad purposes, without right, and became liable therefor. It was not bound to take the land, or it might have taken it under the right of eminent domain, as provided by statute. It neither assumed nor succeeded to any of the debts of the former company. The liability of that company for its taking and use still exists. The mortgage of the railroad and foreclosure thereof, without redemption, did not work a dissolution of that company. Its corporate existence and general corporate powers continued as before. *Eldridge v. Smith*, 34 Vt. 484. This is a suit in equity, and the orators are seeking to enforce an equitable remedy. They rested on their claim, for which they had remedies in law as well as in equity, for many years and until the old company became insolvent and a new one was organized by its creditors and took the road. They now seek to enforce a lien upon this land, for the damages in taking it, by foreclosure or injunction against both companies. If the new company had not entered upon this land it would have incurred no liability. Having taken it a liability was thereby created. No judgment had been obtained by the land-owner on account of the previous taking as in the case of *Pfeifer v. S. & F. R. R. Co.*, 18 Wis. 155. The new company being organized under the statute independent of the former company, did not directly become the owner of the road by contract of purchase; nor indirectly of this land through the mortgage or otherwise. In the absence of any right or liability established by con-

tract or by judicial proceeding as between the original parties, and of any contract succession to the present company, and of any obligation of this company as to this land prior to entering upon it, but having the right to take it *de novo* in exercise of the right of eminent domain, we think the fact that the act of this company was a continuance of the wrongful use of the former company, is not sufficient to make this company responsible anterior to its own possession. Such a holding would in effect be to make this company liable for the other company's use of this land. Interest should be reckoned as against each company from the date of its possession.

The decree is reversed and the cause remanded with a mandate pursuant to these views.

Taft, J., dissents.

BAILEY v. TROY AND BOSTON RAILROAD CO.

October, 1884.

MASTER AND SERVANT—NEGLIGENCE OF INDEPENDENT CONTRACTOR—ERROR IN CHARGE TO JURY.

The plaintiff's horse was frightened at a steam shovel, and ran, throwing the plaintiff out of his carriage, who thereby received the injury complained of. The shovel was located on the defendant's land, used to obtain gravel to ballast its road-bed, near the highway in which the plaintiff was traveling. The defendant's evidence tended to show that the shovel was operated and wholly controlled by one M., an independent contractor, and his servants, although its use was contemplated when the contract was made; and the question being whether the defendant or M. was liable, the court charged in effect, that the defendant's liability was co-extensive with that of M., if it was part of the agreement that the shovel should be used in doing the work. *Held* error; that the work being lawful, and the shovel not a nuisance, until it became such by negligent use, the defendant was not liable, unless the relation of master and servant existed between it and those operating the shovel; unless it not only prescribed the end, but directed the means and methods; and that the inquiry was, whether the defendant or M. was the principal or master in operating the shovel; if M., and it became a nuisance through his negligence, he alone was liable, although it was understood by the defendant, in making the contract, that the shovel was to be used.

Case to recover for injuries. Trial by jury. Verdict for plaintiff. The head-note states the case.

T. Sibley and *J. K. Batchelder*, for defendant. *J. L. Martin* and *A. F. Walker*, for plaintiff.

POWERS, J. The defendant's evidence tended to show that the steam shovel in use when and by which the plaintiff's injuries were occasioned was operated by Munson, without any control or right of control over it, or the manner of its use by the defendant; that Munson was an independent contractor, who supplied the shovel and operated it by his own servants, although it was contemplated by the defendant that it should be used when the contract was made by the defendant with Munson.

Upon this phase of the evidence, the defendant insisted and requested the court to charge that Munson, if anybody, was solely liable for the plaintiff's damages.

In answer to this request the court charged the jury as follows: "If you find that the defendant made the contract with Munson, that he, Munson, should do this work of loading the gravel, and I do not understand that there is any controversy between the parties as to the facts with reference to the contract in this respect,—that such a contract did exist, or the terms of it with relation to the amount to be paid him for doing the work under this contract; and if you also find that this contract was made between Munson and the defendant with the agreement or understanding between them that a steam shovel should be used in doing this work—that this gravel should be loaded with a steam shovel—then the court will tell you that the defendant would be liable in the same manner and to the same extent that Munson, who did the work, and who put the shovel there and used it, would be liable; that the liability of the defendant in that respect would be the same as the liability of the contractor who put the shovel there and

did the work, if you find that there is any liability that attaches to them under the rule that I shall give you." The rule given the jury was this: If the shovel, while lying still or in operation, by its appearance or its noise, or the noise of the engine used in operating it, was calculated to frighten horses of ordinary gentleness, the plaintiff should recover.

In other words, the jury was told that the defendant's liability was co-extensive with Munson's, if it was part of the agreement or understanding of the parties for doing the work that Munson should use a steam shovel.

If the work contracted to be done was in itself unlawful, or the shovel a nuisance *per se*, the instruction given the jury would be unobjectionable. But the work was lawful, and the shovel was an appliance customarily employed by railroads in work of this kind. It could work injurious results to third persons only by its negligent use. The injury done in this case was not by its frightful appearance. The plaintiff's horse passed by it without difficulty; but after passing it in safety its operation commenced, and in this the plaintiff avers negligence. Was this the negligence of Munson's servants, or the servants of the defendant? The defendant cannot be made liable unless the legal relation of master and servant subsisted between it and the men operating the shovel. The fact that Munson was a contractor and employed these men does not of itself preclude the relationship of master and servant between the defendant and these men. The inquiry in the case is, who was the principal or master in this work, Munson or the defendant? A master is one who not only prescribes the end, but directs, or at any time may direct, the means and methods of doing the work. If he merely prescribes the end and contracts with another to accomplish the end by such means or methods as such other may in his discretion employ, the latter is as to such means and methods not a servant, but a master; and for negligence therein is alone answerable. This rule of law is forcibly illustrated by the case of *Rourke v. White Moss Colliery Co.*, 2 C. P. Div. 205; S. C., 20 Eng. Rep. 469. There the defendants, after partly sinking a shaft into their colliery, agreed with W. to finish the work for them on terms, among others, that defendants should provide engine power and engineers to work the engine. The engine that had been used by the defendants in excavating the shaft was thereupon handed over to W. The same engineer remained in charge of it, and continued in the pay of the defendants as before, but was subject to the orders of W. It was held that the engineer was the servant of W., and not of the defendants; and that W. alone was answerable for his negligence in operating the engine.

Murray v. Currie, L. R., 6 C. P. 24, is another recent English case in point. The defendant, a ship-owner, employed a stevedore to unload his vessel. The stevedore employed his own laborers, among whom was Davis, one of defendant's crew, whom the stevedore paid, and over whom he had entire control. The plaintiff was injured by the negligence of Davis, and it was held that the defendant was not liable. See, also, *Wood Mast. and Serv.*, § 313; *Callahan v. R. R. Co.*, 23 Iowa, 562. The conflict in the cases upon this subject doubtless arises from inattention to the character of the work to be done. If the work to be done is committed to a contractor to be done in his own way, and is one from which, if properly done, no injurious consequences to third persons can arise, then the contractor is liable for the negligent performance of the work. If, however, the work is one that will result in injury to others unless preventive measures be adopted, the employer cannot relieve himself from liability by employing a contractor to do what it was his duty to do to prevent such injurious consequences. In the latter case the duty to so conduct one's own business as not to injure another continuously remains with the employer. *Bower v. Peate*, 1 Q. B. Div. 821; S. C., 16 Eng. Rep. 374. In this case, if the shovel became a nuisance merely because it was negligently operated, and such operation was controlled by Munson, he is the author of the nuisance, and answerable for the consequences; and the understanding between the parties that the shovel should be used in the work does not change the liability to the defendant. This understanding calls for the proper, not negligent, use of the shovel.

Judgment reversed, and case remanded.

SHELDON v. PREVA*.

October, 1884.

STATUTE OF FRAUDS—PART PERFORMANCE—SALE OF GROWING TREES—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—INJUNCTION—PAROL EVIDENCE TO PROVE LICENSE.

The bill charged the defendant with entering upon and cutting and removing standing wood, etc., from the timbered lands owned by the orator's intestate, and prayed for damages and a perpetual injunction. The defendant admitted the charge and justified under a parol contract. The master found such contract; and that by it the defendant was to clear eighty acres of said land, — ten acres the first year, and then five each year, — and was to have the wood in payment; that he had performed for three years, and claimed the right to continue; that he had expended somewhat in teams, etc., in preparation; and, at the intestate's request, that he had cleared that part culled of timber, and so less remunerative. *Held*, (1) that parol evidence was admissible, at least to prove a license, which would be a defense to the trespass; (2) that the contract was within the statute of frauds, *as it was not to be performed within a year*, and that the defendant had not so far performed that he had any enforceable rights under the unexecuted portion of the contract; (3) but before the injunction is granted, the orator should do equity in respect to the executed portion, *i. e.*, make the defendant whole.

Bills in chancery. Heard on bill, answer and master's report. Bill dismissed. The opinion states the facts.

J. L. Lewis and *C. A. Prouty*, for orator. *Crane & Alfred* and *H. C. Wilson*, for defendant.

VEAZKY, J. The orator, as administrator of L. P. Gallup's estate, charges that the defendant entered upon the timbered lands of the orator's intestate in May, 1883, and began cutting and removing the standing wood and timber thereon, without leave or license from any source, and against prohibition, and refused to desist when commanded, but threatened to continue. The bill charged and prayed for damages, and an accounting and injunction. The ground of invoking equity jurisdiction, as stated, was that the future injury could not be fully compensated in damages, that the right of the orator could not be fully determined by a court of law, and that future damages could not be determined without multiplicity of suits. The defendant answered, admitting the act charged, but justifying under an alleged contract with Gallup in his life-time to clear the wood and timber from eighty acres and prepare the land for cultivation. The cause was referred to a special master, who found and reported such contract, but it rested in parol; also that the contract was entered into in 1878; that defendant was to clear and prepare ten acres the first year, and at least five acres each year thereafter until completed; that he was to have the wood and timber in payment; that he had gone on for three years and performed according to the agreement and was ready and claimed the right to complete the contract; that he had expended somewhat in teams, etc., in preparation, and had cleared that part at Gallup's request which had been culled of timber and therefore afforded less remuneration to the defendant than the balance would afford, in proportion to the work done and to be done. On the filing of the bill a temporary injunction was granted, and the orator now only seeks to have that made perpetual.

The first position taken by the orator's solicitor is, that the evidence, upon which the master found and reported the contract, was inadmissible; because, as the solicitor insists, it proved a contract which is void under the statute of frauds, as it was not to be performed within one year, even if not regarded as a contract for an interest in land. This evidence, being in parol, was all seasonably objected to. The master has reported a contract not void, but simply not enforceable by action, unless it can be enforced by reason of part performance.

We think the evidence was admissible, if not to establish an agreement that would be enforceable when established, yet because a parol license is a good defense as against a charge of trespass, as this was in substance. The bill goes upon the ground of a wrongful possession by a stranger, and prays for both damages and injunction. It has often been held that possession is evidence that there was some contract; and is such cogent evidence as to compel the court to

* See *ante*, 64.

admit evidence of the terms of the contract in order that justice may be done between the parties. *Ungley v. Ungley*, L. R., 5 Ch. D. 887; S. C., 22 Eng. Rep. 535; *Frame v. Dawson*, 14 Ves. 385; *Crocker v. Higgins*, 7 Conn. 348.

Treating the contract as having been legally proven, and as being within the operation of the statute, which the defendant has not controverted in argument, has there been such part performance as to entitle the defendant to the right to complete the performance? The primary subject-matter of the contract was labor. The contract was purely executory. Under it the defendant had no right to the exclusive possession of the land upon which the timber was standing. As far as the defendant cleared the land, so far the wood and timber vested in him; but as far as the land was not cleared, the contract remained executory. He had no possession of the land except as he entered upon portions from year to year for the purpose of clearing. There could be no performance by the defendant except from time to time. Payment constantly attended the performance. The improvements resulting from the labor were on the orator's land and for his benefit. The defendant's possession was not that of a purchaser, nor were the improvements for his benefit; neither did he lack in compensation for making them. If the land already cleared and worked at orator's special request has not yielded a due proportion of the whole timber to the work done as compared with what remains to be done under the contract, the loss thereby to the defendant can be ascertained.

The case, therefore, lacks the features essential to bring it within the rule, that, where possession has been taken under a parol contract for the sale of an interest in land, and there has been such part performance that the purchaser cannot reasonably be compensated in damages, the case is taken out of the statute in equity, so that the contract will be specifically enforced. As the contract was not to be performed within a year, we think the same result follows whether or not it is regarded as a contract for an interest in land. No other ground of defense is suggested, except the general ground that an injunction would aid the orator in a fraud. This suggestion can have reference to a moral aspect only, as it can hardly be said, in legal point of view, that a party has suffered a wrong whose legal rights have in no respect been invaded. As the defendant had no enforceable right as to the unexecuted portion of this contract when the implied license to the defendant to enter upon the land to continue performance was revoked, the orator only exercised his legal right in making revocation. But as he now seeks to enforce that right in equity, he should do equity in respect to the executed portion of the contract. If the defendant has made expenditures in preparation to perform the contract, and has failed to receive just compensation for what he has done under the contract by reason of clearing portions of land at the orator's request that were culled of timber, the defendant should be made whole in these respects before the orator should receive the relief prayed for.

The *pro forma* decree of the court of chancery is therefore reversed, and the cause remanded with a mandate in accordance with the above views.

GREENE v. SMITH.

October, 1884.

ESTOPPEL — GROSS NEGLIGENCE — GROSS FRAUD — INNOCENT MISTAKE.

In 1870 A. built a house on land which he supposed was his, but in fact was owned by B., who was present and made no objection. In 1872 A. mortgaged the premises to C., and B. witnessed the deed; and subsequently A. conveyed to C. by warranty deed to extinguish the mortgage. On the death of C. in 1881, and the appointment of appraisers, B. pointed the house out to them, saying that it belonged to C.'s estate; and it was appraised as such, and assigned by the probate court to C.'s daughter, as her distributive share. The referee found that B. first knew in 1875 that the house stood on his land; and that there was no evidence which showed that the oratrix was influenced by what B. said or did, in accepting the house. Held, that B.'s conduct amounted to gross negligence or gross fraud, and in either case he should be estopped from claiming the house, and should be compelled to deed the land to C.'s daughter.

Bill in chancery. Heard on bill, answer, and the report of a special master. Decree that the bill be dismissed.

The oratrix is a married woman; and petitioned the court by William G. Greene, her husband, as her next friend. The bill prayed that the defendant Smith be decreed to deed the house and lot to the oratrix and to give up possession. It appeared from the report that when the mortgage deed was executed by Silas Smith to Evarts, that it was read over in the presence of the defendant; that when the appraisers were shown over the house and lot by the defendant, he knew that they were there for the purpose of appraising it; that the premises were situated in Georgia; and that the defendant had been in possession for several years, but how, or on what terms, it did not appear. The other facts are sufficiently stated in the opinion.

Farrington & Post, for orators. *Wilson & Hall*, for defendant.

REDFIELD, J. In the fall of 1870, Silas Smith, father of the defendant, built a house on land, the legal title of which was in the defendant; the defendant was present when the house was being built and made no objection. In May, 1872, the said Silas mortgaged said house and lot to Joseph Evarts for \$1,000 borrowed money; and defendant knew of the fact, and signed the mortgage, as a witness; at the same time Silas assigned the insurance policy on said premises, in which he had represented that he owned the premises free of incumbrance; and defendant guaranteed the premium note, which had become necessary by reason of the mortgage. Said Evarts died intestate on the 2d day of April, 1881; the orator, W. G. Greene, was appointed administrator on his estate; appraisers were duly appointed by the probate court, who appraised this house and land, as being a part of the estate of said Evarts; the defendant was present and went over the premises with the appraisers, and told them that the house and the land on which it stood, and a chance to go around the house, were the property of said Evarts' estate.

The oratrix is the daughter of said Evarts, and these premises were assigned to her by the probate court as her distributive share of her father's estate, and the administrator, under license of the probate court, conveyed the same to the oratrix, on the 8d of February, 1882.

The referee states, that defendant did not know that the house stood on his land until 1875, and that he then told said Silas that fact, which Silas denied; and that in 1880, defendant told said Evarts that he owned the land on which the house stood. And the referee reports that there was no evidence to show that the oratrix in taking a deed of said premises was influenced thereto by what the defendant had said and done in regard to said property. The defendant was present when his father dug his cellar, and laid the foundation walls of the house, and saw him from time to time building the house; which is the most unequivocal consent to its being built, where, and as it was built. Defendant knew of the mortgage to Evarts for its full value; and witnessed the deed. These facts alone will estop the defendant from drawing in question the father's title to said premises, unless his ignorance of his own title is an excuse. It is generally true that an innocent mistake as to the facts stated and relied upon will not be permitted to estop one from averring the truths.

The land on which this house was built was purchased by defendant of one Webster, and conveyed to him in January 7, 1867. The description in the deed "begins at the south-east corner of defendant's farm in the highway, thence easterly on the highway fourteen rods and twenty-two links," and the house was built near the terminus of this line, as we infer from the papers in the case. The value of the small piece of land on which the house stood was trifling, as the whole consideration in the deed from Webster of several acres is but \$75; the exact boundaries of the defendant's land are obvious, or could easily be made so. The defendant knew at the time his father was building his house, if not placed upon his land, it was very near to it; and if the defendant then intended, if the building should chance to be on his land, to thereafter appropriate it to himself, it is such gross carelessness and indifference to the rights of others that should estop him from setting up title in himself. But the charitable and probable view, as we think, is, that the defendant did know or suppose that the house was built on his land, and was willing; else, why did he tell the appraisers, when he showed

them the house, "that his father owned the house, and the land on which it stood and a right of way around it," when, as he now claims, he *then falsified*. It is better, as we think, that he should be kept honest and truthful, than that he should voluntarily make himself a liar. When Evarts loaned the father \$1,000 and took a mortgage of the house, and little patch of land on which the house stood, with full covenants of title, it is obvious that Evarts *relied* upon the mortgage as his security for the loan; and when the defendant witnessed the mortgage deed, it was an assurance to Evarts that the defendant had no adverse claims upon the premises thus conveyed; and it was gross negligence, and heedlessness, if he did not know, and gross fraud, if he *did* know, that the premises, thus pledged as security, for a loan to its full value, were a part of his own farm. In either case the defendant would be estopped from asserting title in himself. *Loucks v. Kenniton*, 50 Vt. 116. In the last case Kennison showed to the plaintiff the line fence, as the true boundary of his farm; and verily believed it to be the true dividing line between the two lots of land; and, relying upon the statement, a purchaser bought the adjoining farm. There was no intended fraud or bad faith, but a careless negligence, which misled a purchaser of an adjoining farm. The party was presumed to know the boundaries of his own farm; and if he pointed out the wrong one to the detriment of a purchaser, he must stand by his statement, as the *truth*, rather than by averring its falsehood, defraud an innocent purchaser.

The report states that the defendant was present when the appraisers examined and appraised the premises; that he showed them about the same, said that the house and the land on which it stood, and a way around it, belonged to his father, which he had conveyed to Evarts. The defendant will be supposed to know that such proceedings were the machinery of the law, put in motion by the orators to ascertain and appropriate the assets of Evarts' estate to pay all legal debts, and then distributed in due course. If the defendant had protested against the proceeding, and asserted title in himself, it is not probable that the oratrix would have consented to have set out to her these premises as her full share in the inheritance. Indeed, there is a very strong probability the other way. Although the report says there was no proof that the orators were influenced in what they did, by what the defendant said and did as to the appraisal, it seems a salutary rule of law, that if the owner of land stands by and sees another erect a house on his land, even if not aware at the time that it stands on his land, yet after he is aware of his ownership the builder dies, and the owner aids and assists in the inventory and appraisal and administration of the house and land as part of the assets of the estate, and says that the house and land on which it stands and right of way around it belong to the estate, such owner ought to be estopped from thereafter asserting ownership in himself. It is clear that the oratrix believed that the house and land belonged to her father's estate; and that the defendant has so conducted himself in regard to the building of the house by Silas Smith and the mortgage to the intestate, and aiding and assisting in administering and appropriating the property as a part of the assets of the estate, that he should be estopped from asserting title in himself, as against a beneficiary of the estate. And this salutary rule, we think, in this case sound law.

The decree of the court of chancery is reversed and cause remanded, and a decree directed for the oratrix, according to the prayer of the bill.

SOMERS v. JOHNSON.

October, 1884.

SURETY — JOINT — WHEN ENTITLED TO SHARE IN COLLATERALS.

The rule that if one of two joint sureties for an insolvent principal holds collateral the other is entitled to share in it, does not apply where the sureties are on separate bonds to secure a faithful discharge of duty on the part of the principal acting in different capacities, first as guardian of an insane ward, and then on the ward's death, as administrator of her estate, when the collateral was not given as security for signing the bond, but for signing as surety certain bank notes; and this is so, although, after it was claimed that the principal was in default, the sureties entered into a written agreement to join in defense and share equally in the liability; and the defendant realized more out of the collateral than he was compelled to pay on said notes.

Heard by the court on a referee's report. Judgment for the defendant.

It appeared that some time prior to 1877 the plaintiff had signed the bond of one Abbott to the probate court as guardian of Phebe Gregg, an insane person; that subsequently said Phebe deceased, said Abbott was appointed administrator of her estate, and the defendant signed his probate bond; that the defendant had also signed certain paper for said Abbott as surety to the Merchants' National Bank of St. Johnsbury, and had received as security notes signed by Avery George, and a draft on Hill, Jewell & Co. of Boston. The heir of Phebe Gregg's estate made a claim against said Abbott for \$1,000, coming from said estate; and claimed that the plaintiff and defendant were each liable therefor, or for some part of it as sureties on said Abbott's bonds. Because of this claim, on January 14, 1878, the plaintiff and defendant entered into the following agreement:

"Whereas Claud Somers signed J. D. Abbott's guardian bond as surety for him to the judge of probate of Mrs. Phebe Gregg as an insane person, and whereas Moses Johnson signed as surety for said Abbott his administration bond on the estate of said Phebe Gregg, and a question being made by the heir of said Phebe, to-wit: Mrs. Caroline Holmes, she claiming that said Abbott is in arrears on both said bonds and claims, that the said bondsmen are liable to her for any balance on either or both said bonds: Now we, the said Claud Somers and Moses Johnson hereby agree with each other to jointly defend any and all suits on said bonds charging us with liability thereon, and to be at equal charges in such defense, and share equally in any and all liability or liabilities which may be adjudged against us, whether the liability is on either of said bonds, to-wit: the guardian bond or the administration bond."

The defendant realized a larger sum out of the collateral than was necessary to indemnify him for signing as surety for Abbott said bank notes, and this suit was brought to recover one-half of such excess. The plaintiff and defendant settled the claim of the Gregg heir by each paying \$250. It also appeared that the plaintiff had brought a suit against said Abbott, and said George as trustee, and the defendant as claimant, which suit was tried on a commissioner's report, June term, 1880, Caledonia county, and decided in favor of the defendant. The report in that suit was made a part of the report in this, so far as it is applicable. It was there found: "December 27, 1877, at the time the assignment was made, and the draft on Hill, Jewell & Co. was given, nothing was said about the liability on which the draft was to be applied as collateral. Johnson was not then aware that he was on Abbott's bond at the probate office, or had forgotten the fact. But it turned out that he had signed a bond in the sum of \$500, with Abbott, in the matter of Mrs. Gregg's estate, and on April 27, 1878, he had to pay the sum of \$250 on this liability, to avoid a suit on said bond. There is no direct evidence to show whether Abbott was aware of Johnson's liability on said bond when he gave the draft or not. From all the circumstances I incline to the belief that Abbott intended to secure Johnson for all his liability for him. But I do not think it was in his mind at the time he gave the draft and assigned the notes that there was likely to be any liability other than that at the bank."

At the time the George notes and mortgage were given to the defendant, he signed a receipt for them in which it was stated: "This is given to secure me for indorsing two notes, each for the sum of \$500 at the Merchants' National Bank of St. Johnsbury, and when said notes are paid the said notes and mortgage are to be returned to said Abbott." The receipt was given in May, 1877; but the notes and mortgage were not assigned till December 27, 1877, when it became apparent that the defendant had got one of the bank notes to pay.

Bates & May, for plaintiff. *Poland*, for defendant.

VEAZEY, J. The plaintiff stands on a sound, legal proposition, viz.: that if one or two joint sureties for an insolvent principal holds collateral from the principal, the other surety is in equity entitled to share in it. But we think the referee has failed to find the relation of co-suretyship between the plaintiff and defendant to its full legal import, or a state of facts which warrants such inference. There was no such relation before they entered into the written agreement. The language of that writing does not necessarily import an agreement to share in collaterals. They did not understand when they made the agreement that the

defendant had any security for his obligation on the bond, which he had signed as surety. The draft from which the fund in question was realized was not given to the defendant as security for signing the bond. There is nothing in the report to show that the defendant was in greater peril on his bond than the plaintiff was on his; nor to show why the defendant should give the plaintiff the benefit of the defendant's security if he had any. The agreement was to join in the defense and share the expense and liability. They settled before trial by paying equally as agreed. In the light of the facts reported we do not think we should construe this as an agreement to become co-sureties except to the extent expressed in the writing; not an agreement to share in the fund in question.

Judgment affirmed.

SUPREME COURT OF PENNSYLVANIA.

MILLER'S APPEAL. .

March 16, 1885.

PRACTICE — APPEAL FROM ORPHANS' COURT DECREE — SUPERSEDEAS.

In order to operate as a *supersedeas*, an appeal from a definitive decree of an orphans' court in Pennsylvania must be brought up and filed in the supreme court on the first day of the term next following the day upon which said appeal is perfected.

This was an appeal by Henry H. Miller, executor, from a definitive decree of the orphans' court of Berks county.

The said orphans' court entered a decree in February, 1884, ordering a certain distribution of the funds in Miller's hands as executor. From this decree Miller took an appeal March 1, 1884, but did not bring up the same and file it in the supreme court until after the first day of the term next following. Meantime, on May 16, 1884, counsel for the residuary legatees applied to the orphans' court for a rule on the executor to show cause why writs of *fi. fa.* should not issue to collect the amounts due the legatees under the decree of the court. The rule was made absolute, and a decree entered directing the writs to issue. Whereupon Miller took this appeal, alleging that the appeal taken May 16, 1884, was pending when the *fi. fa.*'s issued, and was a *supersedeas*.

Richmond L. Jones, for appellant. A. G. Green, for appellees.

PER CURIAM. A careful examination of the record fails to disclose the pendency of a valid appeal from the decree at the time the executions issued. The appeal appears to have been taken on the 1st of March, 1884. It should, therefore, have been brought up and filed in this court on the first day of the term next following, which was a few days after the appeal was perfected. This not having been done, and no reason being shown for the omission, it did not operate as a *supersedeas*. Hence the facts do not admit the application of the fifty-ninth section of the act of 29th of March, 1832. This conclusion makes it unnecessary to consider the effect of the acts of 1874 and 1883 in regard to certain separate orphans' courts.

Decree affirmed and appeal dismissed at the costs of the appellant.

MERKEL'S ADMINISTRATORS v. MARX.

March 23, 1885.

REVENUE LAW — STAMPED INSTRUMENTS — WHO MAY AFFIX STAMP — BURDEN OF PROOF OF WHOM, TO SHOW STAMP, WHEN INSTRUMENT LOST.

Where an instrument requiring a stamp has been lost, but is made the basis of a suit, the onus of proving the absence of a stamp is upon the party who raises the objection. The principles upon which secondary evidence of the contents of a written instrument is refused, have no application to an objection which arises only under the policy of the revenue laws.

The maker of an instrument requiring a stamp is not obliged literally to affix and cancel a stamp with his own hand. Under a reasonable construction of the act of congress any party interested in such instrument may affix and cancel the stamp at and immediately before the execution thereof.

Error to the common pleas of Berks county. Debt by the Kutztown Savings Bank against George Merkel's administrators to recover on a promissory note for \$100 made by Nicholas Hunter and indorsed by Merkel.

The testimony showed that the note was brought to the bank unstamped and the stamps affixed and canceled by the cashier before surrendering the old notes for which it was a renewal.

The note was lost before suit brought, and the declaration was on a copy upon which no irregularity in regard to stamping appeared, there being in the upper left-hand corner of said copy the following inscription: "U. S. Stamp."

The bank having become insolvent, the assignee, Marx, was substituted on the record.

Verdict for the plaintiff and judgment thereon; whereupon the defendants, who claimed that the note had not been properly stamped so as to justify a recovery against the indorser, took this writ.

G. F. Baer, for plaintiffs in error. *Edward Harvey* and *Frank K. Schell*, for defendant in error.

TRUNKY, J. Upon the cross-examination of Hottenstein, the cashier, the defendants elicited that Hunter brought the note unstamped to the bank, and that the witness received it and affixed and canceled the stamps, before discounting and placing the proceeds of the note to Hunter's credit, or before surrendering the old notes for which the one in suit was a renewal. The learned judge of the common pleas charged, that according to Hottenstein's testimony, the note was sufficiently stamped at the proper time. This must be taken in connection with his previous remark that where the suit is upon a lost instrument requiring stamps, and the lost instrument is proved to the satisfaction of the jury, the law presumes that it was duly stamped. There was no testimony that the requisite stamp was not affixed to the note, the proof was, that the stamps were affixed and canceled by the cashier before the close of the transaction of which the giving of a note was a part.

When the instrument has been lost "the onus of proving the want of a stamp lies upon the party who raises the objection. The principles upon which courts of law refuse to admit secondary evidence of the contents of written instruments have no application to an objection which arises only under the policy of the revenue laws." *Hart v. Hart*, 1 Hare, 1; *Cloomadene v. Carrel*, 18 C. B. 44; 86 Eng. Com. Law. 43. The ruling in these cases is so consonant with reason, that it should be followed without hesitancy.

There is no testimony to overcome the presumption that the note was duly stamped. The witness does not say that the affixing and cancellation of the stamps was of date different from the date of the note, or that said act was done without the direction or assent of the maker of the note. No authority is cited to show that the maker of the instrument was required literally to affix and cancel the stamp with his own hand. A reasonable construction of the act of congress would admit any interested party to an instrument to affix and cancel the stamp at and immediately before execution or delivery. The act required "that in any and all cases where an adhesive stamp shall be used for denoting any duty

imposed, . . . the person using or affixing the same shall write thereupon the initials of his name and the date upon which the same shall be attached or used, so that the same may not again be used." It was also provided that any person who should make and issue a promissory note, or accept or negotiate such note "without the same being duly stamped or having thereon an adhesive stamp for denoting the duty chargeable thereon with intent to evade the provisions of this act, shall for every such offense forfeit the sum of fifty dollars." Each party was bound to see that the stamp was affixed before delivery and receipt of the note. If that was duly done by one party in presence of the other, it was well done. It was immaterial who paid the duty or which party canceled the stamp, the evidence of payment, so that it could not be used again.

Judgment affirmed.

ELTON v. PERKENPINE.

April 6, 1885.

PARTNERSHIP — ASSUMPTION OF FIRM DEBTS BY PURCHASER — ACTION BY FIRM CREDITOR AGAINST SUCH PURCHASER — EVIDENCE.

Where one buys the business and assets of a firm, and the bills payable by the firm are deducted in computing such assets, and their payment assumed by the purchaser, a creditor of the firm can maintain an action for his claim against the purchaser.

In such an action, the testimony of other creditors of the firm, that the purchaser has paid their claims without objection, is admissible.

Error to common pleas No. 2, of Phila county.

This was an action of *assumpsit* upon an alleged promise to pay the debt of another. Perkenpine was a creditor of Steck & Paschall, morocco manufacturers. On August 19, 1881, said firm sold their business, stock and fixtures to Elton, who was also a creditor to a large amount. The assets of the firm, as appraised, did not equal Elton's claim against them. As a basis of settlement a trial balance was struck showing the amount of the firm's assets, and the latter were to give Elton their judgment note for the difference between their assets and his claim. Perkenpine alleged that in making up this balance, bills payable by Steck & Paschall were deducted from the amount of their assets, and the payment thereof assumed by Elton, and the trial balance in evidence showed Perkenpine's claim thus deducted. On the basis of this trial balance, Steck & Paschall gave Elton their judgment note for the difference between their assets and his claim, but the sum due Perkenpine was not specified in this note.

On the trial, several creditors of Steck & Paschall were allowed, under objection, to testify that Elton had paid their bills without demurrer.

Elton's counsel submitted several points, in which he asked the court to charge that, unless the jury found that the consideration moved from Perkenpine himself to Elton, that is, unless Steck & Paschall were released and Elton substituted as debtor, upon his alleged promise, there could be no recovery against the latter. The court charged that the transfer of the assets of the firm to Elton was a sufficient consideration for assuming the debts thereof, and that this consideration inured to the benefit of Perkenpine.

Verdict for plaintiff (Perkenpine) and judgment thereon; whereupon Elton took this writ, assigning for error the admission of evidence, as above, and the answers to his points.

W. H. Browne, for plaintiff in error. Arthur M. Burton, for defendant in error.

PER CURIAM. The jury have found, and on sufficient evidence, that the promise of the plaintiff in error to pay the debt in question was clear, explicit and unequivocal. In fact the debt due to the defendant in error is one of those mentioned in the trial balance containing the statement of debts which the plaintiff in error assumed to pay, although it was not specified in the judgment note given. The court made the proper distinction, substantially recognizing the rule laid down in *Wynn's Admr. v. Wood*, Penn. St. 216, that if any one deliver money or personal property to another, under promise of the latter to deliver it or the proceeds, to a third person who has a beneficial interest therein, the latter can main-

tain an action therefor against the promisor. We see no error in the admission of evidence, nor in the answers to the points.

Judgment affirmed.

[See 20 Eng. Rep. 756; 22 id. 69; 27 Am. Rep. 378 — Ed.]

MERKEL'S APPEAL.

April 13, 1885.

WILL — CONSTRUCTION OF — BEQUEST OF PERSONALTY WHEN ABSOLUTE.

A testator, by the first clause of his will, provided as follows: "I give and bequeath to my beloved wife, Susanna, my remaining personal property, it may be money or whatever kind it will, to her full ownership, so long as she doth live. Further, I recommend that my hereinafter-named executor shall see that her money does not become lost." The widow used but part of the income of the personal property and, at her death, left the principal and surplus interest still in the hands of the testator's executor. *Held*, that the clause of the will, quoted, vested the personalty therein-mentioned in the widow, absolutely.

The recommendation to the executor to see that the widow's money did "not become lost," was not sufficient to convert the devise into a trust; and the fact that she allowed the corpus of the personalty to remain in the executor's hands was immaterial.

The bequest of the widow was the residue of the testator's personal property remaining after provision had been made for the other bequests contained in the will; and this, although the widow's bequest preceded the others in the instrument.

Appeal from the orphans' court of Berks county. The opinion states the case.

D. N. Schaeffer, Horace A. Yundt, Daniel and James M. Ermentrout, for appellants. *Warner & Zeiber, Jeff. Snyder and George F. Boer*, for appellees.

PAXSON, J. This contention arises out of the following clause of the will of Philip Leibelsperger, deceased: "I give and bequeath to my beloved wife, Susanna, my remaining personal property, it may be money or whatever kind it will, to her full ownership, so long as she doth live. Further, I recommend that my hereinafter-named executor shall see that her money does not become lost."

Mrs. Leibelsperger survived her husband over four years. At her death the personal estate still remained in the hands of her husband's executor, she having drawn a portion only of the interest. The corpus, thereof was claimed by her administrators, who are the appellants, and by the next of kin of her husband, who are the appellees. The auditor awarded the fund to the appellants; the court below, upon exceptions filed, reversed the auditor and gave the fund to the appellees.

The language of the will, above quoted, is ample to vest the personal estate of the testator absolutely in his widow. It is a gift for life, without any limitation over, and without the intervention of a trustee. There is a line of decisions in this State which hold that such a bequest is absolute. *Smith's Appeal*, 23 Penn. St. 9; *Brownfield's Estate*, 8 Watts, 465; *Diehl's Estate*, 36 Penn. St. 120; *Silkmittler's Appeal*, 45 id. 365; *Groves' Estate*, 58 id. 420. Authorities might be multiplied were it necessary.

We must give effect to the language above cited unless from the whole context of the will it clearly appears that the testator intended to limit his widow to a life interest in the personal estate. We say clearly appears, for it is not our purpose to grope for, or guess at the testator's intention.

It is obvious that his wife was the first object of the testator's bounty. They were childless and left no lineal descendants in any degree. It was the more natural, therefore, that he should provide liberally for his wife. The bequest to her is first in the order of time in the will. Next follows a devise to his wife of a small tract of woodland, "as her property, as long as she doth live, to have the right to dig thereon for ore and to retain the revenues; she also dare take wood therefrom as much as she needs for her use, it may be of which kind it will, nevertheless she can sell it if she wishes."

The question is raised as to whether she took a life estate or a fee in this woodland, and it will not be discussed here, further than to remark that it furnishes no ground to say that the testator intended an intestacy as to the personal estate.

Next follows a bequest to his niece Marietta Leibelsperger of \$8,000, to be paid upon the death of his wife, but in case of the death of said niece, then to her children, and in default of children, to her brothers and sisters then living.

Then follows a devise to Jacob Leibelsperger (a nephew) of a valuable farm, he paying thereout the sum of \$7,000 to certain nephews and nieces; after which there are several unimportant provisions intended for the comfort of his widow.

It is difficult to see in this, and there is nothing else, an intention to limit his widow to a life estate in his personal property.

The recommendation to his executor to see that the widow's money "does not become lost" are precatory words, and since *Pennock's Estate*, 20 Penn. St. 268; S. C., 59 Am. Dec. 718, has never been held sufficient to convert a devise or bequest into a trust. It does not take from the widow her control of the corpus, and the fact that she allowed it to remain in the hands of the executor, who appears to have been a prudent person, has no significance.

Much stress was laid upon the circumstance of the legacy to Marietta Leibelsperger. This legacy, as before stated, was not to be paid until after the death of the widow, and it was argued that if the widow was to have all the personal estate, free from any trust, how was the legacy to be provided for? The answer to this is not difficult. The widow was to have all the personal estate left after the payment of debts and other bequests contained in the will. The personal estate was the natural and proper fund for their payment. There would have been no question about this had the bequest to the widow, which is practically of the residue, been inserted at the end of the will instead of the commencement. As was said by Chief Justice SHARSWOOD in *Fox's Appeal*, 11 Week. Notes, 236: "The order in which devises are made in a will is rarely of much importance. The legacy to the testator's wife's niece of the interest of \$1,000, . . . as well as the specific bequest of the old family clock to my oldest nephew or niece living, though subsequent in order to the devise of all his real and personal estate to his wife, were clearly gifts preceding it. The will ought to be read as if they were actually written before it. Then the gift to the wife is only that which remains."

So we say here. The bequest to the widow should be read as if actually written at the end of the will. She then takes the "remaining personal property;" that is to say, remaining after the bequests which were properly payable out of the personal estate. Of such was the legacy to Marietta Leibelsperger. As that was not payable until after the death of the widow, the interest of it would belong to the latter, and the executor would have been justified in retaining that sum out of the personal estate to meet this legacy, paying the interest to the widow in the mean time. To this extent there was an implied trust in the will, but no further. The executor was not in any legal sense a trustee for the widow as to the residue of the personal estate.

The fact that the personal estate was much larger than the widow, with her simple tastes and habits of economy, required for her support, and that in point of fact she used but a small portion of the income, is not important.

There is nothing upon the face of this will to indicate that the testator intended to die intestate as to the residue of the personal estate, and such an intent is never to be presumed.

We find nothing in the will to control the legal effect of the language used in the bequest to the widow. Under the intestate laws she would have been entitled to one-half of the personal estate absolutely, and one-half of the income of the real estate. In the absence of any expressed contrary intent we must assume he intended to give her a fair equivalent for this. The collateral heirs say she brought him nothing in the way of estate. We do not know how this is, but we do know that the collateral heirs brought him nothing, and we have a right to presume that his wife by her care and thrift aided him in accumulating his estate and nursed and cared for him in his sickness. He speaks of her in his will as his "beloved wife." She was evidently the principal object of his bounty, as well as of his affection. We are of opinion that she was entitled to the remaining personal estate absolutely.

The decree is reversed at the costs of appellees, and it is ordered that distribution be made in accordance with this opinion.

[As to what included in "money" see *ante*, p. 323. When precatory words create a trust and when not, see 25 Eng. Rep. 462; 81 id. 820; 85 id. 258; 48 Am. Rep. 487.]

SUPREME COURT OF VERMONT.

JUDEVINE v. WEAKS.

October, 1884.

EVIDENCE—DECLARATIONS TO VENDOR SUBSEQUENT TO PURCHASE.

When both plaintiff and defendant claim to have derived title to the property in question from the same party—the one by sheriff's sale, and the other by private sale—what the defendant said to his vendor, subsequently to his contract of purchase, in the absence of the plaintiff, is not admissible in behalf of the defendant.

SAME—PRESUMPTION—IMPEACHING SHERIFF'S SALE—BURDEN OF PROOF.

It is presumed that a sheriff's sale, regular in form, was made in good faith and the burden of proof is on the party attempting to impeach a sheriff's sale, to prove that it was fraudulent, and not on the purchaser, that it was *bona fide*.

SAME—DEPOSITION—PARTY CANNOT SWEAR AS TO CONTENTS—SUPPRESSING—PRESUMPTION.

It is proper to inquire of a party whether he has taken the deposition of a witness supposed to be familiar with the matter in contention, but not as to the contents of the deposition; and it is presumed to contain evidence against the party suppressing it.

Trover for 400 sap buckets. Plea, not guilty and notice. Trial by jury. Judgment for the defendant.

The plaintiff's evidence tended to show that he obtained a judgment against one Williams by confession, and that the buckets were sold to him by an officer at public auction on his execution against Williams. The defendant claimed that the sale of the buckets on the execution was collusive between plaintiff and Williams, and not intended to pass the property, or at most, only a sale by Judevine for the benefit of Williams, and so that Judevine could hold additional security upon Williams' property; that Judevine on the day of the sale, in the hearing and presence of defendant, authorized Williams to sell the property that he, Judevine, had bid off at said sale, it being the property sued for, and received pay for it; and that he, defendant, afterward, sometime in the spring of the year, purchased said property of Williams and paid him for the same. As to the deposition the plaintiff was compelled to testify: "I have taken deposition of Frank Williams. Saw it last about one year ago in possession of Mr. Carter; think he testified in deposition in regard to his relation to property, and his right to sell it." The jury returned a special verdict, and found: (1) that the sale from Williams to the plaintiff was *bona fide*; (2) but that the sale was "a mere device to give the plaintiff further security for his debt against Williams;" (3) that the plaintiff authorized Williams to sell the buckets and receive the pay.

Harry Blodgett, for plaintiff. Belden, Ide & Stafford, for defendant.

REDFIELD, J. The plaintiff claims title to the property in question by virtue of a sheriff's sale on his execution against one Williams. The action is trover; the plea is general issue, with notice of special matter, that defendant would prove on trial that the sale of the property to the plaintiff was collusive and fraudulent, etc.

I. "The defendant introduced as a witness in his behalf one Chas. O. Davidson, who testified that he worked for defendant in the summer of 1878, and that he heard a conversation between defendant and said Williams, at which plaintiff was not present;" and against plaintiff's objection and exception the witness testified: "I heard defendant say to Williams, 'If you pay me I shall fulfill on my part.'" The exceptions state, in explanation of the ground and reason of admitting the evidence: "The defendant had testified that, at the time he paid Williams for the property, he had told him if he paid him back he might have the property back. There was in issue, whether defendant had paid Williams for the property; this evidence was received as bearing on that issue, and corroborative of the defendant." This was not a part of a conversation in which defendant claims he made a contract with Williams for the purchase of the property; but a subsequent, naked declaration of the defendant in his own favor; and its admission as testimony, under objection and exception, was error. If the defendant's

declaration in his own favor is legally admissible for any, it must be for all purposes; and the reasons given in the exceptions, that it intended to *corroborate* the testimony of the defendant, that he had before that bought the property of Williams, does not make it any more *legal* testimony.

II. The court charged the jury, "that the burden of proof was on the plaintiff not only to show that he purchased the buckets at said sheriff's sale, but that said sale was a *bona fide* sale, made in good faith, with the intention and purpose on the part of plaintiff and Williams of passing the title of the property to the purchaser, and applying the avails of the same on the plaintiff's execution." The sale of the property was in regular form on the plaintiff's execution; and the return of the officer vested the apparent title in the plaintiff; if that apparent title is to be impeached, the defendant takes the burden of impeachment, under his plea and notice. The sheriff's sale of the property on the execution vested the title of the property sold in the purchaser; and the proceedings are supposed to be *bona fide*. In the charge of the court, therefore, there was error.

III. The inquiry of the plaintiff while on the stand whether he had taken the deposition of Williams we think proper. Williams would be supposed to know all about the sale of the property to the defendant, if any was had; and if the deposition was taken and not used, it would be presumed to contain evidence against the party suppressing the testimony. Such inquiries should be largely within the discretion of the court. But we think the inquiry of the plaintiff as to the contents and subject-matter of the deposition was in excess of the true legal rule of practice. A party has a right to take the deposition of an adverse or suspected witness, and is without fault, if he does not interfere with the freedom and right of his adversary to obtain his testimony; and is at perfect liberty to use, or decline to use, such testimony; and should not be subjected against his will to disclose the contents of such deposition; besides, the deposition itself, if its contents are made testimony, is the best evidence.

Reversed and remanded.

PROBATE COURT v. WINCH.

October, 1884.

PROBATE COURT — DECREE OF, WHEN VOID — HOMESTEAD OF WIDOW.

A decree of the probate court distributing the estate of a deceased husband is void so far as it includes money derived from the sale of the homestead right, or personal property, owned by his widow, whose death was subsequent to that of her husband, and whose estate was unadministered; and an action cannot be sustained against the administrator and his surety on the probate bond by an heir to recover his portion of his mother's estate so included in the decree distributing his father's estate.

ADMINISTRATOR — WHEN CHARGEABLE WITH INTEREST.

The administrator should be charged with interest received by him on interest-bearing notes.

Debt on bond. Heard on the report of referees. Judgment, *pro forma*, by consent of parties without hearing, for the plaintiff to recover the largest sum named in the report — \$80.01.

It appeared from the report, that the prosecutor, Jeremiah Hall, and the administrator, subsequent to the decree and taking the decree as a basis, had settled, and the amount found due the former was \$80.01; that the administrator offered to give his note for that sum, but that the prosecutor refused it; and that afterward a disagreement arose in relation to interest.

Frank Plumley, for defendant. James N. Johnson, for plaintiff.

VEAZEY, J. The question is whether the defendants are liable on the administrator's bond, given in the administration of the estate of Benj. Hall, deceased, for an amount due Jeremiah Hall as his portion of the money derived from the sale of the homestead right of his mother in the estate of his father.

In the decree of distribution of the estate of Benj. Hall, a distribution of the homestead money was ordered, and such distribution was doubtless acquiesced in by the parties thereto as a matter of convenience; but it appears that administra-

tion of the widow's estate had never been taken out; and that though such homestead money was in the hands of Winch, the administrator, it was there simply as a trust for the legal owners and not as a fund subject to the orders of the probate court. That court, in administering upon the estate of Benj. Hall, never having acquired jurisdiction over the estate of the widow of Benj. Hall beyond ordering that part of it which consisted of her homestead right and her right to at least one-third of the residue of the personal estate of her deceased husband to set out — Rev. Laws, § 2108 — erred in ordering a distribution of her estate; and so much of its decree as relates to such distribution is void. And any right of action against this administrator for an amount due to an heir of the widow of Benj. Hall must be pursued in some other way than upon his administration bond.

The probate court does not proceed according to the course of the common law; but has a special and limited jurisdiction given by statute; and if it appear on the face of the proceedings that it has proceeded in a manner prohibited, or not authorized by law, its orders and decrees are absolutely void, and may be treated as a nullity. *Hendrick v. Cleveland*, 2 Vt. 329; *Smith v. Rice*, 11 Mass. 507; *Hunt v. Hapgood*, 4 id. 117; *Sumner v. Parker*, 7 id. 79.

As to the item of interest: It appears that at the date of the decree of distribution, a part of the assets in the administrator's hands consisted of unmatured interest notes given by Jeremiah Hall to the administrator in payment for the farm of his father, which he and other heirs bought in. The administrator thus receiving interest on these notes should be charged with the same on settlement.

The report shows that, upon this basis of interest and regarding the decree as void only as to the homestead money, the administrator has paid the plaintiff all that is due him under said decree except \$3.30. But the defendant claims that the decree not only ordered a distribution of the homestead money, but also the widow's thirds of the personal estate which she derived from her deceased husband, and that this clearly appears from the probate records which were before the referee. If this is true, the decree was void in this respect the same as in respect to the homestead money. In *Johnson v. Johnson*, 41 Vt. 467, it was decided that the portion of the personal estate of an intestate husband to be distributed under our statute to the widow, vests in her immediately upon his decease; and in case of the decease of the widow before assignment by the probate court, the same passes to her legal representative.

The claim is that the plaintiff has been overpaid under the decree more than said \$3.30, by reason of the error in it last referred to. Whether this is true or not does not fully appear from the report, the records of the probate court being only in part before us. We think the case shows the point was made before the referee and county court; and that the defendants are entitled to have the case recommitment to the referees to report on this point. Then judgment should be rendered in accordance with the above views.

Judgment reversed and cause remanded.

WILLARD v. BENTON.

October, 1884.

LANDLORD AND TENANT — PERPETUAL LEASE — FORFEITURE — DEMAND OF RENT.

The failure of a tenant under a perpetual lease from the selectmen of a town to pay rent according to the terms of the lease, or a neglect by the tenant to pay when the rent was called for, does not work a forfeiture, no legal demand having been made for the rent on the very day it became due and at the very place where payable.*

Trespass *quare clausum* and for cutting and carrying away timber. Plea, not guilty. Trial by court. Judgment for the defendant.

The lot in question is a glebe lot — No. 63 — in the town of Maidstone. Both parties claim title under leases from the selectmen of said town — the plaintiff under a lease dated September 24, 1879; and the defendant under a lease dated

August 9, 1850. The lease of 1850 was perpetual. The forfeiture clause was as follows:

"And, if it shall so happen that the said yearly rent or any part thereof shall be behind or unpaid for the space of twenty-eight days next after the day or time on which the same should or ought to be paid as aforesaid, on being lawfully demanded, then and therefor it shall and may be lawful for the selectmen of Maidstone aforesaid, into the said demised premises to enter, and to have and repossess, hold, and enjoy the same as in their first form, estate, title, and degree, and the said March Norris, his executors, administrators, heirs and assigns throw out, and from them expel and put out, any thing herein anywise to the contrary notwithstanding."

The defendant Benton took possession under a mortgage which he had on the premises, in November, 1877. The defendant Goodwin, as the agent of said Benton, in the winter of 1879-80, cut and removed from the lot \$75 worth of timber. The rent had been paid to 1877. It appeared that the plaintiff paid the back rent when he received his lease, and that said Benton, December 27, 1879, sent the money by an agent, to the town treasurer to pay the rent, and the treasurer, after stating that it had been paid, received it under an agreement that it should not affect any litigation. The exceptions stated, in part:

"In May, 1878, S. W. Allen, the first selectman for Maidstone, met defendant Baker on the street of Lancaster, in front of the court house. Allen handed him a slip of paper, and said he had a bill against him. Benton read the heading aloud, 'Benton & Brown,' and said he didn't know any thing about Benton & Brown. Allen said it was for taxes, or rent taxes, on lands formerly belonging to Brown. Benton said he had a mortgage on some lands that once belonged to Brown, but he could not tell whether it was these lands or not, without going to his office and examining his papers. Allen said they must be paid, or they should sell the land. Benton replied, 'sell the land, then, if you want to.' Benton understood it was a call for taxes. He was in his wagon in the street, and did not give much attention to the matter."

The lot had never been used except for a timber lot.

Geo. N. Dale and Bates & May, for plaintiff. *Poland*, for defendants.

REDFIELD, J. In 1850 the selectmen of Maidstone gave a perpetual lease of lot No. 63 to March Norris. The title of Norris came down to Benton, and he is in possession. The lease stipulated for rent \$2 per year, payable on the first of March, and if unpaid for twenty-eight days, *on being lawfully demanded*, the town might re-enter. The rent was not demanded at the time it became due, nor on the land. But Allen, one of the selectmen, had several conversations with Benton at Lancaster, N. H., in which the rent on this lot of land was called for; and Benton not paying the rent, the selectmen treated the lease of 1850 as forfeited, and leased the land to the plaintiff. Did all this work a forfeiture of the freehold estate of Benton, and give a legal title to the plaintiff?

It is well settled at common law "to entitle a landlord to re-entry for breach of covenant to pay rent, he must make demand of the actual rent due, on the very day it becomes due, at a convenient time before sunset, at the very place where payable, or at the most *notorious place* on the premises demised." 3 Kent Com. (11th ed.) 611; Taylor L. & T., §§ 493, 494; *Van Rensselaer v. Jewett*, 2 N. Y. 141; S. C. 51 Am. Dec. 275; *Maidstone v. Stevens*, 7 Vt. 487. The provisions in leases in regard to rent are regarded as additional securities to the landlord for the payment of his rent; when strictly followed so as to work a *forfeiture*, they were always relieved against by courts of equity. 2 Story Eq., §§ 1315 to 1325. But it has long been well settled both in England and in this country, that where the landlord brings ejectment, or writ of entry for non-payment of rent, a court of law, without the aid of any statute, will allow the tenant to bring his rent into court, and thus relieve himself from forfeiture. That right in this State is secured by statute. Rev. Laws, § 1259. In this case, after the rent had fallen due, and after some street talk, and perhaps wrangle, between one of the selectmen and the defendant Benton, the selectmen undertake to divest Benton of a freehold estate, and cut off all remedy either at law or equity, by conveying the title to the plaintiff.

This, we think, cannot be lawfully done. The law does not favor forfeitures; nor would declare one by implication, but would require strict proof. We think Benton has not been divested of his freehold estate; consequently, the town failed to convey title to the plaintiff.

Judgment affirmed.

GARFIELD v. FOSKETT.

October, 1884.

INSOLVENT LAW — ASSIGNEE — SURETIES — CONTRIBUTION.

A. and B. gave their note to the bank for \$1,000, and each received one-half of the money. Soon after, B. was adjudged an insolvent, and the bank procured the whole note to be allowed against his estate, which paid a dividend of forty-two per cent. After the allowance the bank sold its interest in the note and claim to A.'s agent, who purchased for A. The assignee paid the forty-two per cent on the entire note to A., and now seeks to recover back one-half of it. *Held*, that A. was surety, that the estate had not yet paid what belonged to it to pay, and that the action could not be sustained.

Assumpsit. Plea, general issue. Trial by court. Judgment for the plaintiff. The opinion states the facts.

H. F. Wolcott, for defendant. *E. L. Waterman*, for plaintiff.

VRAZET, J. Livermore and Foskett borrowed \$1,000 of the savings bank, giving their joint and several note therefor, and divided the money equally between them. Before any part of the note was paid Livermore was adjudged insolvent, and the bank proved the whole note, including interest, against his estate, and a dividend of forty-two cents on a dollar of the whole has been paid to Foskett, amounting to \$428.06. Livermore's assignee in insolvency now seeks to recover of Foskett one-half of this sum as money paid on his debt, or for his benefit.

The claim is that, although as between Livermore and the bank the whole note was a debt against Livermore, yet, as between Livermore and Foskett one-half only was Livermore's debt, therefore, his estate may recover of Foskett the money which it has paid in dividends on the half of the debt that belonged to Foskett to pay as between Livermore and Foskett. No provision of the Insolvency Act affords any solution of the question; nor do the authorities cited shed much light upon it.

If the estate had paid in dividends on the whole note more than one-half of it, clearly, the assignee could recover as contribution the excess above the half Livermore was bound to pay. *Aldrich v. Aldrich*, 56 Vt. 324; *Morgan v. Smith*, 70 N. Y. 537; 6 M. & W. 153. This excess would have been a payment on Foskett's half of the debt as between him and Livermore. But the estate has not yet paid the half which belonged to Livermore to pay. It owed the whole note to the bank, which gave the bank the right to prove, and to receive dividends on, the whole. Until the estate pays more in dividends on the whole debt due from it to the bank than belonged to it to pay as between the estate and Foskett, we think it cannot be said that the estate has paid any thing in Foskett's behalf. There was but one note or debt due to the bank, not two separate notes or debts. Foskett was surety, not a creditor of the estate. This case does not involve an adjustment between creditors.

It is claimed that as only half the note could have been allowed by the court of insolvency, if Foskett had paid his half before it was allowed, he should have no greater advantage by not paying his half until after the note was proved. We think the fact that Foskett might have lost by pursuing a different course is not the test of his right under existing circumstances. The advantage gained by not paying his half of the note sooner is not undue or unlawful.

By the assignment of the note and proved claim by the bank to Wolcott as Foskett's agent after the allowance and before the dividend was paid, Foskett neither gained nor lost any thing. The allowance of the claim by the court of insolvency fixed the amount upon which a dividend was to be paid, and the assignment carried the right to that dividend.

Judgment reversed, and judgment for the defendant for his costs.

Taft, J., dissented.

HASTIE v. KELLEY.

October, 1884.

TRUSTEE PROCESS — PROCEEDS OF EXEMPT PROPERTY — LIFE ANNUITY.

Where one sells property, a part of which is exempt and a part non-exempt, an amount of the debt equal to the value of the exempt part cannot be attached by trustee process. If in such case there was no fraud, and it was the understanding between the parties that a debt due from the vendor to the vendee should be paid out of the non-exempt, it will be so applied, and only the balance held.

Nor can the avails of exempt property be reached by trustee process, although the debt assumed the form of a *life annuity*, and the defendant had left the State to reside in New Hampshire.

HOMESTEAD — PRESUMPTION.

The defendant owned two lots of land, one containing an acre and a half with a house on it kept for his home, worth \$450, and the other lot, forty rods distant, kept and occupied as a part of the homestead, worth \$650, and sold both. *Held*, that \$500 were exempt, as the homestead included not only the house and lot on which it stood, but \$50 in value in the other lot. It will not be presumed that defendant had exempt property of the same kind in New Hampshire.

Trustee process. Heard by the court on the report of a commissioner. Judgment that the trustee be held for \$24.05, less his taxable cost.

The deed by which the land was conveyed to the trustee contained this condition: "That if the said Alex. Roy shall pay to the said Sidney Kelley the sum of \$100 each year during the remainder of the said Sidney Kelley's life, then this deed to be of full force, otherwise null and void."

The fifty-acre lot consisted of "mowing, pasture and woodland." The commissioner found that the defendant carried the land on himself; that he took and used all the products and got his wood there; and that immediately after the conveyance in 1882 to the defendant, the trustee and his wife moved to New Hampshire, where they have since resided. The other facts are sufficiently stated in the opinion.

Leslie & Laird, for plaintiff. *Bates & May*, for trustee.

VEAZEY, J. It is here sought to hold the trustee for the value of property sold and conveyed by the defendant to the trustee. The property was real and personal, and amounted in value to \$1,330.50. The amount of exempt property included in the sale was \$640.50; the amount of non-exempt property was \$690. In part payment of this property the trustee relinquished a debt of \$665.95, which the defendant then owed the trustee. Adding this to the exempt property, and the difference between this sum and the whole value of the property conveyed is \$24.05. The county court adjudged the trustee chargeable for this sum less his costs, to which the plaintiff and trustee excepted, but the trustee waived his exceptions. The plaintiff's debt existed against the defendant when this transaction took place; but the trustee did not know of it, and there was no fraud in fact between the parties. The sale and conveyance by the defendant to the trustee included all the property the defendant had; and the consideration, in addition to the discharge of the debt to the trustee, was to be an annuity to the defendant of \$100 per year while he lived.

The defendant could not make such a provision for himself by a transfer of all his property that would avail against the plaintiff's claim then existing, if this provision was the only consideration. The trustee having sold the non-exempt real estate for \$600, has a fund that would be trusteeable unless the defendant has been paid for that part. Under the provisions of our statute, § 1076 of the Revised Laws — the trustee is not chargeable for the exempt portion of the property conveyed to him. Neither is he chargeable for the proceeds of the non-exempt part sold by him unless the finding of the commissioner is such as to compel the court to apply the debt due from the defendant to the trustee, and which the latter relinquished, proportionately between the parts exempt and non-exempt, as was done with a payment in *White v. Capron*, 52 Vt. 684, in which the commissioner found the payment was *general*. We think this report does not compel such application. After a full statement of the facts the commissioner says: "If the defendant Kelley has the right to purchase an annuity with his home-

stead and the exempt personal property, and has also the right to prefer Mr. Roy as a creditor, I find that there was property subject to attachment by plaintiff in trustee's hands to the amount of \$24.05." We understand this to be intended as a finding that the parties understood that the transfer of the non-exempt property was to be, so far as necessary, a payment of the debt due from Kelley to Roy, and the exempt property was to be for the purchase of the annuity. The transfer having been made with this understanding, Roy is not chargeable as trustee except for said balance of \$24.05. *White v. Capron, supra.*

We do not think the fact that Kelley went to New Hampshire to live after this transaction should vary the rule applicable to the case; or that we should presume on that account that he had other exempt property in New Hampshire of the same kind as that conveyed by him to Roy. The report leaves but little ground for such inference or presumption, if, indeed, ever proper. The real estate conveyed by Kelley to Roy consisted of two pieces, being all he had, one containing one and one-half acres and having the house thereon occupied by Kelley as his home, and of the value of \$450; and the other containing fifty acres, worth \$650, and being from thirty to forty rods distant from the first-mentioned piece. The plaintiff claims that the fifty-acre piece was no part of the homestead exempt from attachment and execution, because not adjoining the acre-and-a-half piece where the buildings stood. It was to all intents kept and occupied as a part of the homestead. It was land "used in connection" with the "dwelling-house" and "out-buildings." We think that under the Homestead Act, as it now is and has been since the compilation of 1863, the exemption, to the extent of \$500, may apply in part to a separate parcel from the lot where the house stands, when such parcel is kept by the housekeeper or head of the family as a part of the homestead, and is used in connection therewith, and where the lot on which the buildings stand is, including the building, of less value than \$500. *West River Bank v. Gale*, 42 Vt. 27.

The exemption of the homestead, therefore, included not only the one and one-half-acre piece where the buildings stood, but \$50 in value in the other piece. These views render it unnecessary to notice the other points argued.

Judgment affirmed.

BARRETT v. PRENTISS.

October, 1864.

RECORDING ACT—INDEX.

An index is not necessary to the validity of the record of a mortgage. A mortgage was recorded, but no index was made; a subsequent mortgage was executed, and assigned to the defendant, who purchased without notice. *Held*, that the first mortgage was superior to the second and could be foreclosed.*

STATUTE OF LIMITATIONS—LAPSE OF TIME—PRESUMPTION OF PAYMENT.

Payment by the mortgagor after he had sold and quit possession, rebuts the presumption of payment arising from lapse of time, not only as to him, but *his grantees* affected with constructive notice of the mortgage.

Foreclosure of mortgage. Heard on bill, answer, and a master's report. Decree of foreclosure.

The master reported that Austin G. Prentiss, on the 2d day of April, 1860, executed the mortgage in question to secure three \$200 notes, the last of which was payable April 1, 1864; that on said April 2, 1860, the orator's intestate became the owner of the mortgage; that said Holden held the mortgage and notes during

* See 45 Am. Rep. 189; 29 Alb. L. J. 65.

The statutes of New York do not make the index of conveyances an essential part of the record for the purposes of notice; and a mortgage which has been duly recorded, though not entered in the index, is constructive notice, even as against a *bona fide* purchaser or mortgagee who took his conveyance on the faith of finding no incumbrance entered in the index. *Mut. L. Ins. Co. v. Dake*, 1 Abb. N. C. 381.

A defect in the record of an assignment of a leasehold interest, or a failure to properly index it, will not prejudice the rights of the assignee under the recording acts. *Bedford v. Tupper*, 30 Hun, 174.

his life, and that he died in 1879, when they came into the possession of the orator as administrator; that the interest was paid by said Prentiss on the notes up to April 1, 1870, and nothing since; that on the 22d day of April, 1866, said Prentiss conveyed said premises to A. J. Tubbs, and that said Tubbs, being ignorant of said mortgage, executed a mortgage back to Prentiss to secure certain notes, given for the purchase-money, which mortgage and notes are now owned by the defendant Kelton; and that on the 25th day of March, 1871, said Tubbs conveyed a portion of said premises to Hiram Hathaway.

The master found:

"It was conceded on trial, and I find, that the defendant Kelton took said notes and mortgages without notice in fact of the prior mortgage of the orator's intestate, and that, at the time he took them, the said mortgage of your orator's intestate was recorded but not indexed in the land records of said town. And it is also conceded, and I find, that when the said Hiram Hathaway took his warranty deed, and prior to his taking the same of the said Tubbs, but during the negotiation therefor, the said Hathaway made diligent search of the records by their indexes, but found no trace of the mortgage now sought to be foreclosed; and that there was no index of said mortgage in the land records of said Moretown. But I find that the said Johnson and Holden left said mortgage deed for record on the date of its execution and delivery with the town clerk of Moretown, at the town clerk's office in said town."

"The mortgage . . . is recorded in book 10, page 616, of the land records of said Moretown. The certificate of the town clerk shows that it was received for record April 2, 1860, at six P. M., and in this corresponds with the filing on the deed itself. It is, in fact, the last deed recorded in book 10, and it is on the last page which is numbered of the book. The deed recorded on page 615 of the same book is certified by the town clerk to have been received for record April 30, 1860, at nine o'clock, P. M. The deed on page 614 of the same is certified by the town clerk to have been received for record August 15, 1860." . . . "That as late as 1876 the records of Moretown did not show by their index this mortgage deed;" that the town clerk "denied to A. J. Tubbs that such mortgage existed, and that it was at last discovered in the fall of 1876 by the said Tubbs, after careful searching, leaf by leaf, of books 10 and 11, and that the said mortgage is now indexed."

T. J. Deavitt, for defendants. *W. P. Dillingham*, for orator.

TAFT, J. There are two questions made in this case.

I. Was the deed in question duly recorded? It was spread upon the records, but not indexed. Does the fact that it was not indexed render the record invalid? We think not. This was so decided in *Curtis v. Lyman*, 24 Vt. 388; and the rule there laid down is not affected by the statute, passed since that decision, requiring a general index to be kept by the town clerk.

The recording of two deeds of a later date on the preceding pages was not such an irregularity as to render the record null. Such instances undoubtedly often occur; a recorder may turn over two leaves at once and have a deed recorded before he discovers the error, and then fills the intervening pages with deeds of a later date, or he may have several unrecorded deeds, and a deed of the latest date being called for, he records that one first and the deed of the earliest date afterward. Had the deed in question been recorded on page 614 instead of 616, there is no probability that such fact would have aided in its discovery. The deed was duly recorded.

II. Was the claim barred by lapse of time? The payment was made by Prentiss, the maker of the mortgage and notes, after he had sold and quit possession of the premises. He was liable upon the notes as maker; and a payment made by him, we hold, would rebut the presumption that the mortgage debt had been paid, not only as to him, but as to all who were grantees under him, they having taken their interest with constructive notice of the mortgage. *Hughes v. Edwards*, 9 Wheat. 489.

Decree affirmed and cause remanded.

LITTLE v. DWINELL.

October, 1884.

MARRIAGE—ANTE-NUPTIAL AGREEMENT—PROVISIONS IN LIEU OF DOWER—HOMESTEAD.

When the heirs of a deceased husband's estate refuse to pay an annuity, to a widow, after it had been paid for several years, which annuity had been provided by an ante-nuptial agreement, and intended to be in lieu of the provisions of law, she is entitled to take under the statute, a homestead and dower, the same as though no ante-nuptial agreement existed, the court never having decreed a distribution of the estate. And in such case, when the administrators, after paying the debts, turned a large part of the property over to the heirs, the rights of the widow may be enforced by bill in equity, not only against the heirs, but their grantees affected by notice of the widow's claim. The homestead and dower should be set out of that portion which was not sold by the administrators.

ANNUITY—CONTINGENT CLAIM.

The annuity was not strictly a contingent claim. Its payment was a condition precedent to the right of the heirs to take the estate. Sections 2204-2208, Rev. Laws, are not applicable. The oratrix is not a common creditor; she stands upon the rights of a widow to share in the distribution of the estate.

NOTICE—KNOWLEDGE OF ATTORNEY.

The records of the town showing that the title to the realty was in the oratrix's husband, the probate records showing that the estate had not been distributed by decree of court, and that the oratrix was entitled to an annuity, the knowledge of the mortgagee's attorney, who took the mortgage, of the condition of the property, constitute a sufficient notice to the grantees.

COSTS.

The oratrix is entitled to costs against all the defendants, except the administrator, although the decree below in her favor was modified to some extent.

Bill in chancery. Decreed that the annuity provided for the oratrix in and by the ante-nuptial contract is a valid and subsisting claim against the estate of Walter Little, upon which she is entitled to be paid the sum falling due thereon, July 27, 1875, and all sums falling and to fall due thereon thereafter; that the defendant Sibley, and those through whom he claimed to hold the property mortgaged by the heirs of said Walter Little, took with notice of the claim of the oratrix, and her right to be paid from the assets of that estate; that said property being all of the unadministered and undistributed assets of said estate stands charged as with a lien for the payment of said sums due and to fall due upon said annuity—such payment to be enforced against said property by foreclosure. The bill was dated August 1, 1880.

J. A. Wing, Geo. W. Wing, and S. C. Shurtleff, for defendants. *Pitkin & Huse*, for oratrix.

Ross, J. This is a bill in chancery by the widow of Walter Little, deceased, against his administrator, heirs, and a purchaser from the heirs, of most of the real estate of which the intestate died seized, to enforce the payment of an annuity agreed upon in an ante-nuptial contract between the oratrix and intestate; or to have ascertained and set out to her from the estate the homestead, dower, and other provisions made by law for the widow when no ante-nuptial contract exists. The essential facts pertinent to the case, admitted by the pleadings or proven by the testimony, are as follows: September 30, 1857, the intestate, oratrix, and a trustee in her behalf, in contemplation of a marriage, which was soon thereafter solemnized, between the intestate and oratrix, entered into an ante-nuptial contract, by which, among other things, the oratrix covenanted and agreed, that in case she should survive the intestate, she would not claim, as his widow, any portion of the estate which he might leave, "except an allowance, or annuity, of \$200 per year, during the time of her natural life," not including what he might leave her in his will. Walter Little deceased July 27, 1859, leaving a large estate; and administrators, appraisers, and commissioners were duly appointed on his estate. The real estate was appraised at \$20,000, and the personal estate at over \$21,000. The debts allowed against the estate were most \$13,000. The real estate consisted of a woolen factory, dwelling-houses, store, etc. There was quite a large amount of manufactured goods, and considerable stock unmanufactured and in the process of manufacture, belonging to the estate. This was manufactured and disposed of at a profit to the estate. There were

three heirs to the estate, two of whom were then of age, and one a minor. The heirs, who were of age, continued the manufacturing, and the factory with its belongings went immediately into their possession. There is no evidence that the original administrators took possession of any of the real estate, except the store. They delivered considerable personal property and paid large sums to the heirs; and procured an extension of the time allowed for the settlement of the estate until 1862, when notice was given that they would settle their administration account. The account was not then settled, and the matters of the estate ran along until both administrators deceased. The heirs remained in the possession of the real estate. The administrators paid the widow the annuity due under the ante-nuptial contract, while they were in the active administration of the estate; and heirs did also for several succeeding years. There was no other allowance asked for, or made to the widow from the estate, except the probate court assigned certain household furniture to her, and allowed her a small sum for support before the first installment of the annuity became payable. In 1869, an administrator *de bonis non* of the estate was appointed. His appointment, if not asked for by, was evidently agreeable to, the heirs, as two of them were the sureties upon his administration bond. He took possession of the real estate belonging to the estate, rented the factory, and other portions of it, obtained license from the probate court, and sold over \$4,000 worth of it; settled the account of the original administrators, in which it was found the estate was indebted to them \$1,000; got into litigation with the heirs, which was finally compromised, and his account was finally settled in the probate court, by which the estate was indebted to him \$965.29. At the time of the settlement of his account, the heirs applied to have the estate distributed.

During his administration the annuity to the widow was not paid when due, and she was pressing the administrator for payment, which he finally made. During the whole process of the administration thus far, her right to the annuity was recognized by the heirs and administrators. The ante-nuptial contract, she had presented in the probate court, whenever there was any move looking toward a final settlement and distribution of the estate. She appeared by counsel at the time of the settlement of the account of the administrator *de bonis non* April 22, 1872, and opposed a distribution of the estate unless her annuity was provided for. Walter Little, one of the heirs, appealed from the allowance of the account and from the denial of a distribution of the estate. The appeal was duly entered in the county court. February 19, 1873, the appeal was compromised by the administrator surrendering to the heirs all the real and personal property belonging to the estate, and by Hazen A. Little giving him a bond, with sureties, for the payment of \$341.88, as the balance for which he was to have judgment on his account, for the payment of the annuity of \$200 per year to the widow, and for the payment and saving him harmless from any other liabilities which he might be under for the estate. In the judgment, in the appeal suit, no judgment was asked or made in regard to the denial by the probate court of the petition of the heirs to distribute the estate to them. At this time, the annuity, so far as it had become due, had been paid. July 3, 1873, the widow caused the ante-nuptial contract to be presented to the probate court, and took witnesses there to prove the due execution of the contract. She left the contract with the probate court. The judge placed it in an envelope, and indorsed on the back of the envelope, "Filed in the probate court July 3, 1873, to be allowed as a contingent claim against the estate of Walter Little. Attest, N. A. Chase, Register."

On a separate paper, in the envelope, was written by the probate court: "July 3, 1873. Contingent claim presented against estate of Walter Little, being a contract before marriage, dated September 30, 1857.

"Ella A. Bliss, now Hutchinson, being sworn, testifies that she was present and saw W. Little, Daphne D. Bliss and Alpheus S. Bliss sign a certain contract, and she signed the same, with Harriett N. Bliss as witness.

"Alpheus S. Bliss, the trustee, being sworn, testifies to the execution of the paper with the other parties, and that the contract is now in force; that all the annuities had been paid to July 27, 1872."

The envelope thus filed, inclosing the contract, and the paper written upon, as

above, was placed in the safe used by the probate court, and there found after the commencement of this suit in August, 1880. In the mean time the then judge and register of probate had both deceased. There was no other mention of this contract of annuity shown to exist in the records of the probate court. At the time it was thus filed and placed in the safe of the probate court nothing was due upon the contract, and nothing would be due thereon until the 27th of the same July.

The sum then falling due, and the installment which fell due July 27, 1874, were duly paid by the heirs, since which time nothing has been paid on the contract. Thus the records of the probate court showed a widow surviving, nothing that the law requires to be set out to the widow set out to her, a recognition of the annuity by several payments thereon by the administrators, the lodging of it with filing and proof of it, as before stated, in the probate court, and no distribution of the estate to the heirs, but a denial thereof.

Before the administrator *de bonis non* was appointed the heirs, in running the factory, became largely indebted to Faulkner, Kimball & Co., of Boston, for advances. To secure the indebtedness thus created the heirs of the estate gave them a mortgage, April 27, 1868, of all the real estate belonging to the estate. Faulkner, Kimball & Co. were not then shown personally to have had notice of the annuity to the widow, except as effected by the land records of the town, showing the title to the property mortgaged to be in Walter Little, deceased, and the records of the probate court in regard to the settlement of his estate. The mortgage was taken through Homer W. Heaton, Esq., their attorney. He had been attorney for the oratrix in regard to the annuity, and when he took the mortgage knew all about the annuity as it stood related to the estate, and the heirs' right therein; and May 11, 1868, communicated to Faulkner, Kimball & Co. full knowledge in regard to the same. The amount due under the mortgage was finally settled in March, 1870. The annuity due the widow was then fully made known to Mr. Faulkner and to Chester Bugbee, who assisted the heirs in paying the sum due thereon, and took an assignment of the mortgage. Mr. Bugbee was a signer on the bond from Hazen A. Little to the administrator *de bonis non*, for the payment of the annuity among other things. He having deceased, his administrator, who also knew of the existence of the annuity, in March, 1877, procured a foreclosure of the mortgage against the heirs, but did not make either the oratrix or the administrator *de bonis non* parties to the same, the same to become absolute April 1, 1878. On the decree becoming absolute, by a previous arrangement with the heirs, the defendant, George S. Sibley, paid the amount due on the decree, about \$2,625, and took a deed of the premises covered by the mortgage from the administrator of Bugbee's estate. The premises conveyed are shown to have been then worth \$5,000. George S. Sibley is brother-in-law of Hazen A. Little, and, before making the purchase and taking the deed, knew of the ante-nuptial contract and the annuity due and falling due thereunder. He caused the land records where the estate is situated and the probate records to be examined before making such purchase, and finding no charge of the annuity upon the real estate, was advised he could safely purchase the same, without being affected by the oratrix's claim, if any she had. In the ante-nuptial agreement there is no express agreement of the intestate to pay the oratrix an annuity of \$200. The intestate therein covenants not to claim any property of which the oratrix was then possessed, either while she was living or after her decease; and the oratrix therein covenants, that, in case the marriage should be solemnized, and she should survive the intestate, "she shall not claim or have any portion out of any estate he may leave at his decease, except an allowance or annuity of \$200 per year, during the time of her natural life, and she hereby waives all other and further allowance," etc. This covenant was a limitation on her rights in the estate, beneficial to the heirs. There being no express agreement by the intestate that his estate should pay the annuity, it might be doubtful whether the oratrix could claim that the heirs should pay her the annuity, rather than allow her to take that portion of the estate which the law, in the absence of such a contract, would give to her. But this question does not arise in the case. The heirs and administrators have all acquiesced in the

right of the oratrix to receive the annuity in lieu of the provisions made by the law. She has also manifested a purpose to perform the covenant she entered into with the intestate. The question is, what are the oratrix's rights under the facts of the case, as already stated? The counsel for the defendants has furnished a most elaborate brief, and therein discussed many questions, which, in the view we take of the law applicable to the facts, do not arise in the case. The main fallacy underlying the entire brief is the treatment of the oratrix as a common creditor of the estate. The ante-nuptial contract created no debt in favor of the oratrix against Walter Little, or his estate. A right to receive money from his estate might or might not arise out of the contract in her favor. If her decease antedated his, or she deceased within less than a year after his decease, she would be entitled to nothing under it from his estate. It is merely a contract provision for what she shall receive in a certain event out of his estate, in lieu of the provisions made for the widow by law. It was not even a contingent claim against his estate which existed at his decease, in the ordinary acceptation of that term, and sections 2204 to 2214, Rev. Laws, relating to such claims, are not applicable to the claim she now presents. If it were such a claim, she did enough, if it were seasonably done, to protect her rights under section 2204. That section only requires that such claims shall "be presented with the proof to the probate court, or to the commissioners, who shall state in their report, that such claim was presented to them." There is no provision of the statute which requires that the probate court or commissioners shall allow the claim. From its very nature it cannot be allowed; because it is not as yet a debt against the estate, but only a contingent claim, which on the happening of the contingency becomes a debt against the estate. All the provisions of the statute on the subject of contingent claims relate to such claims as on the happening of the contingency may become a debt against the estate—such a debt that the holder would have the right to share in the distribution of the estate with the other creditors. An annuity is contingent, and if the intestate was under contract obligation to pay it from year to year, so far as it was not due at the decease of the intestate, a proper contingent claim to be presented under the provisions of the statute against the estate. Such was the claim—a debt upon the bond of the intestate for the payment of an annuity of \$100 during the life of the annuitant—in *Blackmer v. Blackmer*, 5 Vt. 355. In the case at bar, the oratrix had no right to share with the other creditors of the estate in the payment of their debts. The ante-nuptial contract did not relate to nor touch the estate until the creditors were all paid in full. It related solely to the distribution of what was left of the estate after the creditors were all paid. The present application is, that she may receive from the estate left after paying the creditors, her due share and proportion of the same as determined by the ante-nuptial contract, or the provisions of the law. By the provisions of the statute a homestead and dower in the real estate immediately upon the decease of the intestate, and a right to one-third of the personal estate above what was necessary for the payment of the debts, vested in the oratrix, unless she was barred therefrom by the provisions of the ante-nuptial contract. Her covenant to receive the annuity in lieu of the provision of the law did not bar her from claiming the homestead, dower, and one-third of personal property. *Mann v. Mann's Est.*, 53 Vt. 48. It is there shown that a performance of the ante-nuptial contract on the part of the intestate or his estate is an essential prerequisite of the right of the estate to set up the widow's covenant therein as a bar to her rights in and to the estate as declared by the statute.

The only section of the statute relating to barring a widow or dower is section 2219, Rev. Laws. There is no statute which in terms bars her of a homestead. That portion of section 2219 which is applicable to the oratrix reads as follows: "But if the widow was not the first wife of the deceased, and he leaves no issue by her, and an agreement was entered into between them, previous to their marriage, in relation to the widow's claim on the estate of her husband in lieu of dower, and if, in the opinion of the court, she has a sufficient provision for her comfortable support during life, the court may deny to such widow her dower, or any provision other than such as is provided by the agreement between the parties." The homestead is only inferentially extinguished by the provision; and the ora-

trix's right to homestead and dower is not barred by it until the probate court has so adjudged. The heirs have never called upon the probate court to make any adjudication upon the oratrix's right to homestead, dower, and thirds in the estate. The probate court never has passed upon the sufficiency of the annuity in lieu of homestead, dower, and thirds, except by refusing to distribute the estate to the heirs, on her objection that she was not secured in the payment of the annuity. The oratrix, instead of standing like a common creditor of the estate, stands upon the right of a widow, to share with the heirs in the distribution of the estate.

She is not, therefore, affected adversely by a failure to present the ante-nuptial contract to the commissioners or to the probate court, seasonably, or within the time limited by the statute for the presentation of contingent claims. She was willing to receive the annuity in accordance with the contract, in lieu of homestead, dower, and thirds, if it should be paid to her. She was only bound to be vigilant against a distribution of the estate to the heirs, unless her rights were recognized and secured. This she has done. The payment of the annuity is a condition precedent to the right of the heirs to take the whole estate. When they cease to pay the annuity, she, as against them, has the right to assert her claim to that portion of the estate which the law gives to her, at least until the heirs procure a decree of the probate court declaring that she shall be barred therefrom, by reason of the sufficiency of the provisions of the ante-nuptial contract. If the administrators and heirs had refused to recognize and pay the annuity, her right to homestead, dower, and one-third of the personal estate remaining after the payment of the debts would have been absolute, and they could not, in the probate court or in a court of equity, have set up her covenant in the ante-nuptial contract to defeat her claim and right thereto. It is manifest that the probate court would make no decree barring her of homestead, dower, and one-third of the personal estate, without requiring ample security for the payment of the annuity promptly as it should fall due. It is equally manifest that the statute contemplates that such a decree shall be made by the probate court, if at all, while the estate is in hand, and the homestead, dower, and a third of the personal property, or some portion of them, can be awarded to her, if the provisions of the ante-nuptial contract are found insufficient. The oratrix is no more in the fault, in failing to procure such a decree seasonably, than are the heirs and those who stand upon their rights. Both parties have gone along under the ante-nuptial contract until the heirs have received and used up all the personal property and a considerable portion of the real estate of the estate. Now the heirs and those who stand in their rights continue to hold, and to take the use of the remainder of the real estate, and refuse to pay the annuity. It is certainly inequitable to allow the heirs to do this. The payment by the heirs and estate of the annuity for fourteen years, and the receipt of the same by the oratrix, together with the other facts in regard to the receipt and use of the property by the heirs, make it a proper case for equitable jurisdiction. The functions and powers of the probate court are not adequate for the proper adjustment of such a case, and probably not at all to extinguish the homestead. *Mann v. Mann's Est., supra.* As regards the heirs, we think there can be no doubt but they are in law and equity bound either to pay the oratrix the annuity in arrear, and to secure the payment of that which hereafter may fall due, or to yield to her the homestead and dower in the whole real estate originally belonging to the estate, out of that portion of the real estate not sold by the administrator *de bonis non*, — which sale was really for the payment of the debt of the heirs to the former administrators, — and to account for the rents and profits of the same since they ceased to pay the annuity. By the ante-nuptial contract the annuity takes the place, if in the judgment of the probate court sufficient, of homestead, dower, and one-third of the personal estate. The oratrix's dower would be, in this case, a life estate in one-third of all the real estate of which the intestate died seized. In this one-third, she would also take the reversion of the homestead of the value of \$500. The annuity being a substitute for these provisions of the statute, when the heirs refuse to furnish the substitute, it is the duty of a court of equity, as against the heirs, to give to her the homestead and dower

right in the real estate, and the use of the same from the time they refuse to pay the annuity.

Nor do we think that defendant Sibley stands in any better position in regard to the claim of oratrix than do the heirs of Walter Little. He stands upon the rights secured by a foreclosure of the mortgage given by the heirs to Faulkner, Kimball & Co. The heirs could convey no greater right to the real estate than they had under the statute. By the statute they did not take the right of the oratrix to a homestead and dower, only provisionally under that portion of section 2219, already quoted. Faulkner, Kimball & Co., and all intervening holders of the mortgage, besides the actual knowledge of the rights of the oratrix to a portion of the estate, took the same affected by the notice and knowledge which the land records of East Montpelier, and the probate record showed, as to the existence of the widow and her rights to the estate. The notice and knowledge thus furnished are ample to protect the oratrix's rights in the estate, without resorting to the knowledge which Mr. Heaton had when, as attorney for Faulkner, Kimball & Co., he took the mortgage. But knowledge of an attorney, especially when immediately communicated to his client, is the knowledge of the client. Besides, Faulkner, Kimball & Co. took the mortgage to secure an antecedently existing debt. They parted with nothing on the strength of the mortgage. Under the decision of *Austin v. Curtis*, 31 Vt. 64, this would not make them *bona fide* holders of the mortgage security for value, so as to cut off any equitable rights which the oratrix had to the premises mortgaged. The result is that the oratrix is entitled to a decree, that the defendants pay to the oratrix the annuity now due, with interest from the time it fell due from time to time, and secure future payments thereof to the satisfaction of the court of chancery, upon which being done, the oratrix is to relinquish all rights which she as the widow of Walter Little otherwise would have under the law to his estate; and in default of compliance with the foregoing, then the oratrix is to have decree setting out to her a homestead and full dower of all the real estate of which Walter Little died seized, from that portion thereof not sold by the administrator *de bonis non*, and to have the rents and profits of the same since July 27, 1875, when the first installment of the annuity fell due, the same to be ascertained by a proper reference to a master; and the cause is remanded to the court of chancery, with a mandate modifying the *pro forma* decree to correspond with the views here expressed.

Some question has been made as to costs. We think that, notwithstanding the modification of the decree of the court of chancery, the oratrix is entitled to her costs against all the defendants except the administrator *de bonis non*, Dwinell, in the court of chancery and in this court. He is a proper party to the bill, and not entitled to recover costs. But as his connection with the case arises wholly by reason of his being administrator, and if costs were awarded against him, he would have the right to charge them to the estate, no costs are allowed against him.

MCNEISH v. HULLESS OAT COMPANY.

October, 1884.

PARTNERSHIP DISSOLUTION — DEATH OF PARTNER — WHEN FOR THE JURY TO DETERMINE — EVIDENCE — RULE 21 — WASHINGTON COUNTY COURT — DEPOSITION — PRACTICE.

While the death of a partner generally works the dissolution of a partnership, it does not have that effect when the partnership contract shows the intention of the parties was to give it a continuing existence; as when it takes the form of a joint-stock association, with transferable shares, officers, records and a general agent to transact the business.

— ARTICLES OF — CONSTRUCTION FOR JURY.

It is for the jury to determine on a reasonable construction of the articles of agreement, interpreted by the kind of business contemplated, and the manner of transacting it, whether the intention was that the partnership should be continuing, or dissolved by the death of a partner.

— BOUND BY ACTS OF AGENTS — DECLARATION OF.

Dealing in hulless oats was the main business of the partnership, under the control of a general agent, with a provision that its "affairs" were to be kept secret. *Held*, that the partners might be liable for common oats purchased by an agent, although it was not

proved that they knew of the transaction; and that it was their duty to see to it, that their agents transacted no business outside the scope of the partnership.

What the agent said to the vendor at the time of the sale as to who the partners were and what their responsibility, was admissible evidence.

DEPOSITION — CHARGE — PRACTICE.

It is presumed that there was no error in the charge of the court, or in admitting a deposition, when no copies of them were furnished the supreme court, though referred to and made a part of the exceptions; and that the court exercised its discretion in admitting a deposition.

EVIDENCE — DEPOSITION — NOTICE.

A rule of court has been complied with, which requires notice to be given for the taking of a deposition out of the State fifteen days before the term of court, when notice was given only fifteen days prior to an adjourned term, the adjournment having been announced through the public press; and also, although the taking of the deposition was adjourned to a time only three days prior to the adjourned term, the opposite party not appearing.

The depositions were properly in the hands of the jury, although no special leave was granted by the court, the court having remarked in its charge that the "depositions would be before them."

• It is in the discretion of the court to relax the rules of court.

Assumpsit. Trial by jury. Verdict for the plaintiff.

The plaintiff lived in New York. It was claimed that the defendant company was composed of members in New York and Vermont. The writ was served on Sidney Wallace, Wm. F. Gillett, N. W. Vinson, Wm. Clark; and Charles S. Wallace was afterward cited in. It appeared on trial, that the said parties, who lived in Vermont, and certain other parties living here, and one J. K. Sanborn, who lived in Pennsylvania, some years ago, and before the account in question accrued, agreed to form a copartnership, and drew up and signed articles of agreement. The plaintiff's account was for five hundred and fourteen bushels of common oats, claimed to have been sold to the said U. S. Hulless Oat Company, and purchased by said C. S. Wallace, a sub-agent, at the instance of said Sanborn, who claimed to be the general agent of the company. It appeared that two of the parties who signed the original articles of agreement, deceased before said account accrued: and it did not appear that the defendants, Vinson and Gillett, ever consented to continue said partnership, or to proceed with that or any other partnership after their decease. But the business after their decease was not closed up or liquidated, but proceeded as before, though there was no evidence that Gillett and Vinson knew what was being done by the company. It did not appear that said Vinson and Gillett knew any thing about the purchase of common oats, or ever consented to the purchase of such oats. It did appear that some of the other defendants held meetings, and agreed to continue the partnership, and extend it beyond the scope of the original agreement; but it was not claimed, and it did not appear, that said Vinson and Gillett ever consented to any such arrangement, or ever knew what said company was doing.

The main question was as to the liability of Gillett and Vinson. The articles of agreement stated in part, that the subscribers

"Do form themselves and create themselves into a copartnership or company, to do the business of cultivating, and fitting for use, as food for man and feed for animals, and for seed, the grain known by the name of hulless oats, and find a market for the same in every portion of the United States of America, and in every portion of the world.

"And the duration of this copartnership shall be the term of five years from the first day of January, A. D. 1876.

"And this copartnership shall be known and designated The United States Hulless Oat Company."

"The general agent shall not, nor shall any of the officers of the company, contract any debt for any purpose whatever, unless authorized to do so by the company. Neither shall the company contract any debt without the consent of each member made in writing."

"It shall be the duty of the officers and members of the company to keep a profound secret the rules and regulations of this company, together with all its contracts and affairs of whatever kind or nature, except to parties in interest with the company to know."

The officers consisted of a president, secretary, and general agent.

N. L. Boyden, for defendants. *C. W. Porter*, for plaintiff.

Ross, J. I. As contended by the counsel of Gillett and Vinson, generally the death of a partner works the dissolution of the copartnership. Usually, each partner is the agent of all the other partners in regard to the transaction of the partnership business; and thus, special confidence and trust are reposed by each partner in all the others. When one partner is removed by death, his judgment and discretion in the management and transaction of the partnership business is forever at an end; and, in an ordinary partnership, it is not within the contemplation of either the deceased partner, or of his associates, that the partnership business should proceed so as to bind his estate, or the surviving partners, by new transactions after such decease. The law holds, in ordinary partnerships, that the decease of a partner works its dissolution, because such is clearly the intention and scope of the contract of partnership. But the partnership contract may be such as to clearly show that it was the intention of the parties to it to give it a continuing existence, although there should intervene a withdrawal of some of its members by transfer of stock, or their interest in the partnership, or by death. Hence, where, as in the case at bar, the partnership takes the form of a joint-stock association, with shares transferable, with the form of a corporation, with regular officers, meetings and records, with a limitation upon the agency of the different partners in the transaction of the partnership business, and the transfer of the transaction of the business wholly to a general agent, when one or more of the partners decease, the question that arises is, whether, upon a fair and reasonable construction of the articles of agreement, interpreted by the kind of business contemplated, and the manner of transacting the business, it was the intention that the partnership should be continuing, or that it should be dissolved by the death of one or more of the partners. In *Tenney v. N. E. Protective Union*, 37 Vt. 64, and in *Walker v. Wait*, 50 id. 668, it is held, that, in this class of cases, it is proper to submit to the trier of facts to determine whether the partners contemplated and intended, under the articles of partnership, and all the facts and circumstances attending the transaction of the partnership business, both before and after such death, and the provisions for the transfer of the stock, that the partnership should continue and go forward in its business notwithstanding some of the members might decease. There was clearly evidence in the case, which entitled the plaintiff to go to the jury on this question, as it was submitted in *Walker v. Wait*, *supra*. The defendants, Gillett and Vinson, were not entitled to have the county court hold as a matter of law that the death of Smith and of Jones, two of the subscribers of the articles of partnership, wrought a dissolution of the partnership. The business continued after their decease the same as before. The business was done in a name other than the name of any of the members. The partnership articles of agreement provide that the partnership shall continue five years; that the stock may be increased and diminished, and transferred in a particular way; that the business shall all be transacted by one general agent, clothed with power to appoint sub-agents; and that two-thirds of the members present at any regular meeting may transact the business of the meeting. All this was evidence on which the plaintiff had the right to have the jury pass in determining whether the partners did not intend that the business should continue, notwithstanding the decease of some of the members. The charge of the court on this question, or on any question in regard to the liability of Gillett and Vinson, though referred to and made a part of the exceptions, has not been furnished by the excepting party to this court. No presumption arises that it was erroneous or lacking in any essential requisite of a proper charge on this subject. The presumption is that it was full and to the point, and for that reason the excepting parties do not furnish it, nor their counsel point out any errors in it. It must, therefore, be held that there was no error in the action of the county court on this contention.

II. It is also contended that the purchase of common oats was not within the scope of the partnership business, and that the excepting defendants cannot be made liable for their purchase without proof that they knew of the transaction and assented to it. Raising, selling for seed, and manufacturing *hulless oats* was

the main business of the partnership, as set forth in the articles of agreement. The articles of agreement also provide that the plan of the business for each succeeding year shall be determined by the stockholders; and, except to parties in interest with the company, the rules, regulations, contracts, and affairs of whatever kind or nature, of the partnership, are to be kept a profound secret. Under these conditions, those dealing with the partnership through its general agent and sub-agents appointed by him could only have knowledge of the scope of the partnership by what it allowed the general agent to do in fact. The evidence tended to show that the partnership in its name, and through its general agent, did deal in common oats, and manufacture at its mill oat meal therefrom. The plaintiff, when he sold the oats, which are the subject-matter of the suit, did not know, and had no means of knowing, that the purchase of common oats was not within the scope of the partnership agreement. In fact, that agreement, by its terms, precluded him from ascertaining the scope of the partnership agreement. He could only judge of its scope from the business conducted in its name through its accredited general agent. But it is contended, that it should have been shown that the excepting defendants knew of the transaction and assented to it. When they became members of a partnership which placed the transaction of all its business in the hands of a general agent, with a provision that all its "affairs" were to be kept a profound secret, they thereby imposed upon themselves the duty to see to it that neither two-thirds of the members authorized the transaction of any business outside the scope of the partnership, nor did the general agent transact any such business. The only means they furnished the plaintiff to judge of the scope of the business was what they allowed the general agent in fact to do in the name of the partnership. The *onus* of proving what, by the articles of the partnership he was precluded from knowing, cannot be cast upon the plaintiff. In regard to the plaintiff's knowledge, and means of knowledge, of the scope of the partnership business, the case is widely distinguishable from *Chapman v. Devereux*, 82 Vt. 616. Ostensibly, the partnership was dealing in common oats; and not only it did not furnish information that this was without the scope of its business, but it actively withdrew all facilities of learning that it was from the plaintiff. The county court, on the evidence, could not do otherwise than submit the liability of the defendants, Gillett and Vinson, to the determination of the jury. As the charge is not furnished the presumption is that it was full and correct on this point also.

III. The deposition of the plaintiff, though referred to and made a part of the exceptions, has not been furnished to this court. No presumption arises that it contains any immaterial matter, or that if it does, it is of such a character as would be injurious to the defendants. If, as asserted by the defendants' counsel, in it, he relates a conversation with the sub-agent who purchased his oats, in regard to who were the partners and their financial responsibility, we do not think it was error to admit it. He had the right to testify to whom he gave credit in making the sale, and how he came to give such credit.

IV. The taking of the deposition of Jeremiah Smalley was within the spirit of Rule 21, Washington county court. That rule is to the effect that an *ex parte* deposition, taken without the State, must be taken at least fifteen days prior to the first day of the term at which it is to be used. The time for taking the deposition by the notice was August 30; and the time for holding the September term of Washington county court for that year, as appointed by law, was September 11. This was less than fifteen days. But before the notice was issued, it had been announced through the public press that the commencement of the term for actual business would begin September 18; and that the court, on convening, would be adjourned to September 18. This was done to enable the presiding judge, assigned to hold the court, to fulfill another official appointment. By this announcement, that term of court was in fact, and for all business purposes, to commence September 18, more than fifteen days subsequent to the time set for taking the deposition. The manifest object and purpose of the rule is to free parties and attorneys from the necessity of being absent from the State to take depositions, within less than fifteen days before they would be required to enter upon the active duties of the term of court in which the deposition is to be used.

Treating the term as in fact commencing September 18, the notice was within the spirit and requirements of the rule. But the taking of the deposition was adjourned to September 18. This was again within fifteen days of the actual commencement of the term. But the defendants did not attend at the place appointed for taking the deposition on August 30. They were not, therefore, prejudiced by the adjournment. The magistrate had legal power to adjourn the taking as he did. On these facts it is difficult, on the presumption that the deposition was material, to discover any error that has worked any injury to the defendants. But not having furnished the deposition, nor a copy, this court cannot presume that it was, in substance, injurious to what they claimed on the trial. Besides, the enforcement and relaxation of rules of court are within the sound judgment and discretion of the court making them. It is neither asserted in the exceptions, that the county court did, nor did not, exercise its discretion, in admitting the deposition. It admitted it *pro forma*. The question is, was it error thus to admit it? Whatever may be held, in regard to its inhibition by the rule, to find error in its admission, it must be held that the county court did not exercise its discretion in regard to the enforcement of the rule. It is a sufficient answer, that the exceptions do not assert that he did not exercise its discretion. Error must appear. The presumption is, there is no error, when from the statement in the exceptions, none appears affirmatively.

V. The remark of the court, in the charge to the jury, that the "depositions would be before them," was sufficient leave of the court to allow the depositions to go to the jury under the rule of the court in that behalf. These are all the points insisted upon by the defendants in this court.

Judgment affirmed.

DEWEY v. ST. ALBANS TRUST CO.

January, 1885.

CORPORATION—INSOLVENCY—ASSESSMENTS—LIABILITY OF STOCKHOLDERS.

The charter of the St. Albans Trust Company provided: "If at any time the capital stock paid into said corporation shall be impaired by losses or otherwise, the directors shall forthwith repair the same by assessment." The trust company being insolvent and under the control of a receiver,—*Held*, that a personal liability is not imposed upon the stockholders, and that they cannot be assessed for the purpose of paying the creditors: and that the purpose of said provision was rather to prevent the continuance of business with impaired capital.*

Petition by the receiver of the St. Albans Trust Company. The petition was addressed to the court of chancery, was filed July 29, 1884, and heard by Chancellor ROYCE October 25, 1884. The cause was heard on the petition, the several answers of the National Life Insurance Company and of C. W. Witters, assignee of Lawrence Brainard, and of oral proofs. Petition dismissed. See *Dewey v. St. Albans Trust Co.*, 56 Vt. 476; S. C., 48 Am. Rep. 808; 30 Alb. L. J. 446.

Daniel Roberts, for the receiver. *Pitkin & Huse*, for the National Life Ins. Co.; *Cross & Start*, for National Life Ins. Co. and other stockholders.

ROWELL, J. This is a petition in said cause by the receiver of said company, setting forth that debts to the amount of \$580,000 have been proved and allowed against said company, and a dividend of twenty per cent ordered to be paid thereon, and that the same has been paid to the extent of the funds in his hands; that there is not enough property and assets of said company remaining that can be collected and made available to satisfy the residue of said debts into more than \$100,000—the amount of the chartered capital stock of said company, so that, before and at the time the petitioner was appointed receiver, said capital stock had become, and was and now is, impaired by losses and otherwise to the full amount thereof; that, therefore, it became and now is the duty of the directors of

* The entire section of the charter was: "§ 20. If at any time the capital stock paid into said corporation shall be impaired by losses or otherwise, the directors shall forthwith repair the same by assessment; and no dividends shall be made or declared upon the capital stock of said corporation until the same are actually earned and realized over and above all losses and expenses."

said company to forthwith repair the same by assessment thereon and on the holders thereof, but that they have neglected and refused so to do, or in any other way to make good such loss, although specially thereunto requested by the petitioner; and praying the court to order such assessment to be laid, and paid to the petitioner or into court, for the purpose of enabling the petitioner to pay the residue of said debts.

The facts found and certified up sustain the allegations of the petition, and show that the company stopped business on August 8, 1883, and has done no corporate act since.

Section 20 of the charter of said company — Stat. 1868, No. 157 — provides that "if at any time the capital stock paid into said corporation shall be impaired by losses or otherwise, the directors shall forthwith repair the same by assessment."

It is contended on behalf of the petitioner, that by force of this provision, the stockholders are bound to the creditors of said company to contribute to the amount of their capital stock toward the payment of the debts of the company, the assets of the company being insufficient; that the obligation thereby imposed is an asset, to be used for the benefit of creditors; that the case stands as it would if it had been incorporated into the stock subscription; that the subscribers would not only make up the full capital subscribed, but would maintain it in its integrity, each contributing his just proportion. In other words, it is contended that said provision imposes a personal liability on the stockholders for the debts of the company, and obliges them to keep the capital stock of the company at all times unimpaired for the benefit of existing creditors.

But we are unable to adopt this view. No such liability exists at common law; and we must suppose that if the mind of the legislature was specially drawn to the subject of departing from the common law in this respect, and conceived a purpose to make the stockholders thus liable, such purpose would have been indicated with some distinctness, and the language used fairly adequate to express with reasonable certainty the real sense intended by the legislature. But the language of the provision before us, taken in connection with the whole act, is not fairly adequate to express an intention to impose personal liability on the stockholders; nor yet to impose on them the obligation of keeping the capital stock unimpaired for the benefit of existing creditors; but it looks rather to a continuance of business by the company, and was intended to prevent such continuance with an impaired capital; and it was adequate to that intent, for if the company undertook to continue business without repairing an impaired capital, the general law, to which its charter made the company subject, made it the duty of the bank commissioner to apply to the court of chancery for an injunction against the company and the appointment of a receiver — Gen. Stats., chapter 86, §§ 31, 32; and the Stat. of 1874, No. 87, § 5, conferred on the inspector of finance in the inspection and examination of savings banks and trust companies, all and singular, the powers that were conferred on the bank commissioner by chapter 86 of the Gen. Stat.; and by section 3601, Rev. Laws, the provisions of law applicable to banking associations were made applicable to insolvent trust companies, except as to application of assets. Although the ancient rule, that statutes in derogation of the common law are to be strictly construed, has been considerably relaxed in modern times, if indeed it now has any solid foundation in our jurisprudence, yet it should ever be remembered that the rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language.

The duty to repair capital rested on the directors, if they desired to continue business, whether the company was insolvent in fact or not. Suppose the assets to be \$150,000 only, and the debts \$100,000; the capital is impaired one-half. Or suppose the assets and the debts to be just equal; the capital is all gone. But in neither case could creditors interpose to compel the capital to be repaired, for they would have no interest in the matter, as the assets are sufficient to pay the debts; and yet, the duty to repair the capital would not be discharged, but would continue notwithstanding. This shows that the purpose of repairing capital is,

not to provide means wherewith to pay the debts of a defunct institution, but rather to afford an earnest for the further prosecution of business.

The petitioner contends for an assessment to the amount of the par value of the stock only, and concedes that he can ask no more. But this very concession shows the reed on which he leans; for if an assessment can be made at all, no reason can be given for stopping short of assessing enough to pay all the debts in full, which would take many times the amount of the stock.

Note the explicitness with which the Federal statute has imposed liability on shareholders of national banking associations. They "shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof." Rev. Stat., § 5151. Again: "Persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liability as stockholders," but the estate in their hands is liable instead. § 5152. How unlike the provisions of the statute under consideration. Indeed, it is scarcely conceivable that the legislature intended to impose the liability here contended for, and yet came so far short of using language adequate to that end.

Petition dismissed, with costs.

GREEN v. ST. ALBANS TRUST CO.

January, 1885.

CORPORATION — FORFEITURE OF FRANCHISE — SCIRE FACIAS — QUO WARRANTO — CONSTRUCTION OF STATUTE.

The mode of process, by which the corporate franchises of an incorporated trust company may be adjudged forfeited, is by writ of *scire facias*, under the statute—Rev. Laws, chap. 72—prosecuted in the name of the State, and not by complaint for a writ of *quo warranto*, prosecuted in the name of a private person, under chapter 74, Rev. Laws.

The statutory remedy by implication supersedes the common law.

Complaint for a writ of *quo warranto*.

The complaint set forth, that the defendant, an incorporated trust company, commenced business about the 1st day of January, 1869, and continued to transact business under its charter until about the 1st day of August, 1883; that the defendant, on or about January 1, 1880, in accordance with the powers of its charter, received from the said Alice L. Green, wife of said Wm. Green, the sum of \$2,000 on deposit; that the deposit was received under the provision of the charter, that, in case of the dissolution of the company by act of law or otherwise, it should have a preference; and that "by reason of the said deposit, which has ever since continued subject to the right and preference aforesaid, *she still remains a creditor* to an amount exceeding the sum of \$500; and, therefore, the complainants say that they are interested in the matter of this complaint and the judgment herein sought; and prosecute this complaint in their own behalf and in the behalf of all others of like interest."

The complaint also set forth, that the defendant had misused its franchises, in that it had not invested its deposits in the prescribed securities, but had fraudulently and illegally loaned the same to its officers, who were financially irresponsible; that on the 1st day of August, 1883, the deposits amounted to about the sum of \$580,000, of which sum nearly \$500,000 were illegally loaned to said officers; that the capital stock was wholly exhausted, but the directors had not repaired the same by assessment; that the corporation was hopelessly insolvent and unable from lack of funds to perform the function of a moneyed corporation; that its president had absconded from the State, and had been adjudged an insolvent; that the defendant, having become insolvent on or about the 1st day of August, 1883, then closed its doors, and refused payment to the said Alice, and to all other depositors; that it has not used its franchises since that time; that it is not possible for it to provide means of paying its depositors in full, nor do any of the stockholders or officers expect to or intend to perpetuate the existence of the corporation for the purpose mentioned in the act of incorporation; that the inspector of finance for the State of Vermont had proceeded

against the defendant, and as a result a receiver was appointed by the court to take charge of the defendant's property and effects. The prayer was that, inasmuch as said Alice could not secure that preference guaranteed to her by the charter, the "corporate franchises of the said St. Albans Trust Company may be declared forfeited, and a judgment dissolving said corporation be entered according to law."

The answer, signed and sworn to by C. W. Rich, the receiver, and by H. E. Burgess, treasurer, claimed that the court ought not, on the facts alleged, to grant the prayer; that said receiver entered upon the duties of his appointment; that he had collected debts due to the defendant; that he had made one dividend under the order of court; that he had brought suits, which were now pending, etc., and that the corporate powers of the trust company would be needed. See the case of *Dovey v. St. Albans Trust Co.*, ante; and the same case in 56 Vt. 478, for other facts bearing on this case.

A. G. Safford and Farrington & Post, for relators. Daniel Roberts, for defendant.

ROWELL, J. This is a complaint under chapter 74, Rev. Laws, for a writ of *quo warranto*, preferred and prosecuted in the name of the complainants alone, for the purpose of obtaining a judgment of forfeiture of the corporate rights and privileges of the defendant company.

At the common law, both *scire facias* and an information in the nature of a *quo warranto* were the appropriate remedies to enforce the dissolution of a corporation for cause of forfeiture; but our legislature early made specific provision in this behalf by the act of October 23, 1797, entitled "An act directing the mode of taking forfeitures of grants and charters," whereby it was provided that "in all cases in which the grantee or grantees shall have done or omitted any act or thing which shall amount to a forfeiture of his, her, or their grant or charter, the mode of process to ascertain the fact and take the forfeiture shall be by writ of *scire facias*, . . . brought forward and prosecuted in the name of the State, by the attorney of the State, or by any other person who shall think himself injured by the non-performance of the condition of any such grant or grants," who should indorse his name on the writ as prosecutor, and give security for costs, and be liable to pay costs if he failed in the suit, and a trial by jury was accorded. Stat. 1797, chap. 49.

This provision for a private prosecutor continued in the statute until the revision of 1839, when it was dropped out, and a provision incorporated, making it the duty of the State's attorney to prosecute on the application of twenty or more freeholders, etc., and the statute has ever since remained substantially as now found in chapter 72, Rev. Laws, which defines the word *grant* as therein used to mean, among other things, "acts of incorporation for any purpose," provides for what they may be adjudged forfeited, and prescribes that "the mode of process shall be by writ of *scire facias*," returnable, in the case of corporations, to the county court of the county in which any part of the business of the corporation is done; or, by the terms of the act, should be done; that the writ shall be prosecuted by the State's attorney of the county in which it is returnable, in the name of the State, and that he shall, on the application of twenty or more freeholders of the county, commence such writ and prosecute the same against a corporation, if, in his opinion, the grant of such corporation is forfeited, and the public good requires that it should be adjudged forfeited. The statute also provides that issues of fact shall be tried by jury, and that, notwithstanding a verdict of forfeiture, the grantee may show cause against a judgment of forfeiture, the court adjudging the matter according to equity and good conscience.

On the other hand, we had no statute providing for the remedy of *quo warranto*, except the general statute conferring jurisdiction of the writ on the supreme court, till the statute of 1876, which now forms chapter 74, Rev. Laws. This act was passed, not to extend the remedy of the writ, but to simplify and expedite the proceedings in cases proper for issuing the writ, which must be determined at common law.

We have then this case; an ancient statute, specially and positively providing a mode of process, procedure, and trial, to obtain an adjudication of forfeiture of corporate franchises and other legislative and governmental grants, and yet a dif

ferent mode resorted to; and the question is, Is the statutory mode exclusive? We think it is.

The fact that after an experience of more than forty years the legislature changed the statute so as to take away the right of private persons to prosecute under it, clearly indicates a purpose no longer to allow private persons in any mode to prosecute in such cases, but to confine the right to the State alone; which is usually the chief party in interest. Indeed, it is scarcely conceivable that the legislature should prescribe with such particularity a mode of process and procedure, to be instituted and prosecuted in the name of the State, according a jury trial, and yet have left it to the option of private persons, in their own names or otherwise, to resort to a different remedy, and that, too, in a forum in which a jury trial cannot be had.

The words of the statute are, "the mode of process shall be by writ of *scire facias*." This language is imperative in form and ordinary signification, and ought to be construed as obligatory if such be the intention of the framers of the act as collected from every part of it. It is true, the language is *affirmative*, and does not *necessarily* take away the common-law remedy of *quo warranto*; but it will have that effect if the apparent intention of the act is that the two rights shall not exist together, as we think it is.

It is held that when an act that was before an offense at common law only is made an offense by statute, the common law on the subject is superseded by implication, the same as a statute is impliedly repealed by a subsequent statute that revises its whole subject-matter. *Commonwealth v. Cooley*, 10 Pick. 37; *State v. Boogher*, 71 Mo. 631.

In *Commonwealth v. Garrigues*, 28 Penn. St. 9, it was held that a statute, providing that the returns of all municipal elections should be subject to the inquiry and determination of the court of common pleas of the county of Philadelphia upon the complaint of fifteen or more of the qualified voters of the proper ward or division, the court, in judging in the premises, to proceed upon the merits, and determine finally concerning the matter, was binding on the State, although not named therein, and by necessary implication, excluded the remedy of *quo warranto*.

Section 9 of the Banking Copartnership Act—7 Geo. IV, chap. 46—provides that all actions, suits, etc., to be commenced or instituted by any persons against such copartnership, "shall and lawfully may" be commenced and prosecuted against one or more of the public officers for the time being of the copartnership as the nominal defendant for and on behalf of the company. The remedy thus given is not in terms expressed to be a substitute for the common-law right of action; but from the nature of the case it was held in *Steward v. Greaves*, 10 M. & W. 711, that this must have been what the legislature intended. The evil to be guarded against was, the inconvenience to which creditors would be put if they were driven to bring actions against parties as numerous as those of whom joint-stock banks might and probably would consist. The remedy provided was, the naming of a person who, for the purposes of litigation, should represent the company; and the anomalies that would be produced if this right were to co-exist with the previous common-law right of action were so great as to warrant the court in holding that that right must have been intended to be taken away altogether. Equally strong are the grounds for holding the remedy provided by the Forfeiture of Grants Act to be exclusive. Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the State or country generally of common right. The abuse of a franchise is a public rather than a private injury. Hence it follows, that proceedings having for their object the recovery of a forfeited franchise to the State ought to be instituted and carried on by a public prosecutor or other authorized representative of the State, and not be left to the control of private parties who have no interest but their own to subserve. Such cases are clearly distinguishable from cases involving only the administration of corporate functions, and do not go to the life of the corporation itself.

Complaint dismissed, with costs.

WETHERBEE v. CHASE.

January, 1885.

WILL—FRAUD—COURT OF CHANCERY, JURISDICTION OF—LEGACY—CHARGE ON LAND.

When a testator devises his real estate to his heirs, and in the same will gives certain sums of money to persons who are not his heirs, making the payment of the legacy a charge on the land, it is a fraud for the heirs, by agreement exclusively between themselves, to procure the county court to render a judgment disallowing the will. In such a case, the court of chancery has jurisdiction, and, the land still being in the possession of the heir, has power to charge the legacy upon it, and this on the ground of fraud.

PARTIES.

Only that heir is a proper party defendant who received the parcel of land burdened by the will with payment of the legacy.

Bill in chancery. Heard on bill, answer, and the report of a special master, September term, 1883, ROYCE, Chancellor. Decree for the orators, that the legacy of \$600 with interest is due to them, and that the payment of the same be made a charge upon lot of land held by Wait Chase's estate. The bill was originally brought only against said Wait Chase; but on petition, at said term of court, Peter Wetherbee, Abigail Wetherbee, and Hannah Chase, by a *pro forma* ruling of the chancellor, were also made parties defendant. Hannah Chase was the widow of the testator, Ichabod Chase; Wait Chase and Abigail Wetherbee were his children and only heirs; the three orators were his grandchildren, and the children of said Peter and Abigail. The defendant, Ella R. Chase, is the administratrix of the estate of Wait Chase, deceased. That part of the will relating to Wait Chase was as follows:—

"I give, devise, etc., unto my son, Wait Chase, and his heirs, the mountain lot (so called) containing eighty-seven acres of land, etc., . . . on the following conditions, to-wit: that the said Wait Chase pay to the children of my daughter, Abigail Wetherbee, the sum of \$600, to be divided in equal proportions among the children of my said daughter."

The bill alleged as to the settlement of the case in the county court: "That the said agreement upon which said judgment was rendered, and the said judgment of said county court, and the said agreement for the division of the estate of Ichabod Chase between said Hannah Chase, Wait Chase, and Abigail Wetherbee, were entered into, had, and consummated for the express purpose of depriving your orators, Byron J., Elbert J., and Luna D. Wetherbee, of said legacy of \$600 given to them by said will," etc.

H. S. Royce & Daniel Roberts, for defendant. *Geo. A. Ballard and Edson, Cross & Start*, for orators.

TAFT, J. In May, 1873, Ichabod Chase made his last will. By it he devised to Wait Chase, his son, eighty-seven acres of land, on condition that he, the said Wait, paid to the orators, who were not his heirs, the sum of \$600. Wait Chase was named as executor. The will was allowed by the probate court, and an appeal taken to the county court by said Wait. An agreement was entered into by the heirs of said Ichabod, by which the estate was divided among them; and by consent a judgment was entered in the county court disallowing the will; and the judgment was certified to the probate court and therein recorded. The orators were minors at the time of the proceedings above recited, and were in nowise parties to the agreement. By the agreement Wait Chase took the eighty-seven acres of land free from any incumbrance. The bill in this case is brought seeking to charge the said land, which is still owned by Wait Chase, with the payment of the \$600. The defendants insist that equity has no jurisdiction for that purpose; that granting the relief prayed for would be, in effect, establishing a will, and in contravention of Rev. Laws, § 2049, providing that "no will shall pass either real or personal estate, unless it is proved and allowed in the probate court or by appeal in the county or supreme court." It is said that the doctrine is settled, that a court of equity will not entertain jurisdiction to set aside a will

obtained by fraud or establish one suppressed by fraud; for, in such cases, the proper remedy is exclusively vested in the probate or ecclesiastical courts. Smith Man. Eq. 56; Story Eq. Jur., § 184, and note. But it is also as well settled that "where the fraud does not go to the whole will but only to some particular clause, courts of equity will lay hold of the circumstance to declare the executor a trustee for the legatee." Story Eq. Jur., § 440; Smith Man. Eq. 57; Mitf. Eq. Pl. 257; 1 Perry Trusts, § 183. It is insisted, and we think correctly, that the reason why a court of equity has no jurisdiction, either to establish or set aside a will, is, that those questions are within the exclusive jurisdiction of the probate courts, but that reason does not extend to the case at bar. The proceedings in this cause do not seek to establish the will of Ichabod Chase; but to charge upon the land in question the legacy given the orators, of which they have been deprived by the fraud of the defendant Wait. To make the payment of the legacy a charge upon the land, without reference to establishing the will, the probate court has no power whatever. The case, therefore, falls within the general rule that courts of equity have jurisdiction in all matters of fraud.

All the heirs of the testator were parties to the agreement; his garments were parted among them. The orators complain of the nullification of the particular clause giving them a legacy. The action of Wait Chase and his co-heirs effectively suppressed the will; in no way or manner can the orators apply to the probate court for proof of it. That court has on record the certificate of the county court that the will has been disallowed; there is no remedy for the orators in the law courts. They have been deprived of it by the act of Wait Chase himself, and he is not now to be heard to say that they once had a remedy at law. A court of equity might as well be abolished, if under such circumstances it could grant no relief. The orators are not seeking the establishment of the will and the settlement of the testator's estate under it; they only ask payment of the legacy given them, and of which they have been deprived by the act of Wait Chase and his co-heirs. We think for this purpose that a court of equity has jurisdiction. This case may well be governed by that of *Mead v. Langdon's Heirs*, cited in *Adams v. Adams*, 22 Vt. 59, where this court set up and decreed payment of legacies, given in a will never proved in the probate court but which had been suppressed by those interested in the estate, and administration granted without regard to the will. See, also, 2 Redf. Wills, 8; and Story Eq. Jur., § 98, n. 1, and § 254.

Section 2049, Rev. Laws, which, the defendants insist, bars the relief sought by the orators, does not, we think, have that effect. It was not intended to prevent a court of equity taking cognizance of a cause within its jurisdiction, and granting suitable relief. As between the parties to this cause, the will may well be considered as proved in the probate court, and the appeal vitiated by the fraud of Wait Chase. The orators' title to the legacy or the land is by virtue of the decree of the court of chancery, not by virtue of the will. The effect of the decree below was not to establish the will; and the persons made defendants by the order of the chancellor are not proper parties to this proceeding; and the *pro forma* decree making them such is reversed. As to them, the bill should be dismissed; in all other respects the decree is affirmed and the cause remanded.

JONES v. BENNOTT.

January, 1885.

BANKRUPTCY — NEW PROMISE — CHARGE TO JURY.

The plaintiff held two notes against the defendant, one a renewal of the other, and both for the same debt. In an action of *assumpsit*, to the defendant's plea of discharge in bankruptcy, the plaintiff replied a new promise. The plaintiff's son acted in her behalf at the time it was claimed the promise was made; but he had the old note with him and did not know of the new one. The court in effect told the jury, that in order to recover, both parties must have mutually understood what the promise applied to — the old or the new note. And this was made prominent by repetition. *Held* error; as there was but one debt to which the promise could apply; and that it was sufficient if the defendant understood that he was promising to pay his debt to the plaintiff.

PRACTICE — PETITION FOR NEW TRIAL — LACHES.

The petitioner in her original suit claimed that the defendant, in a public store, promised to pay a debt discharged in bankruptcy; but in this proceeding she failed to show that she made inquiry whether any one present heard the talk with the defendant; and the case had been tried once before, and so the defense was known. *Held*, that the defendant had been guilty of *laches*, and the petition was dismissed.

Assumpsit. Plea, general issue, with notice of discharge in bankruptcy. Replication, new promise after the discharge was obtained. Trial by jury, September term, 1885, ROYCE, Ch. J., presiding. Verdict and judgment for the defendant.

Wilson & Hall, for plaintiff. *W. D. Stewart and Cross & Start*, for defendant.

VEAZEY, J. The action is *assumpsit* upon a promissory note. The defense was a discharge in bankruptcy; to which the plaintiff replied a new promise. The testimony of the plaintiff tended to show a new promise, after the discharge in bankruptcy, to the plaintiff's son Henry, acting in her behalf. The note in suit was a renewal of a former note, but given before the bankruptcy proceedings were instituted. When the son had the talks with the defendant in which, as the son testified, the new promise was made, he had with him the old note, and did not know that a new one had been given. There was but one debt. The son testified that the defendant promised to pay the indebtedness. The defendant in his testimony denied making any promise, but admitted that the son asked him to pay something "on the indebtedness, or something like that," to his mother; and admitted that he did not owe her any thing else other than the note in suit.

The court charged the jury, among other things, on the question of the alleged promise, that there must have been a *mutual understanding* between the defendant and the plaintiff's son as to what the defendant was promising to pay, whether the old note or the new one, and that the son as well as the defendant must have understood what the promise applied to; that is, which of the two notes. To this exception was taken. The court think this exception must be sustained. The material thing was whether the defendant promised to pay his debt to the plaintiff. There was but one debt, and the defendant knew it, and knew he owed it, but for the discharge in bankruptcy. There being but one debt, and the defendant and Henry so understanding it, and the promise, if any, being made in reference to that debt, it is immaterial that Henry understood that the debt was evidenced by the old note only, and that the promise applied to that note. If the defendant understood what he was promising, and that he was promising to pay his debt to the plaintiff, it was sufficient.

The above instruction was repeated and made prominent in the course of the charge, so that the jury might well understand that it was a condition of the plaintiff's right of recovery, notwithstanding the rule was correctly stated in other connections.

For this error judgment is reversed, and the cause remanded.

The petition for new trial must be dismissed on the ground that the petitioner was guilty of *laches*. If the petitioner's son, who acted for her and had charge of the suit, and was the principal witness for the petitioner, had used any thing like the same diligence before the trial that he apparently did after it he would have obtained the evidence now produced. True, he may not have known, as he told his counsel, that any one heard the defendant make the alleged promise in Mr. Huntington's store; but he knew that Mr. Huntington, or some person in charge of that store, was present. He fails to show that he made any inquiry to find out whether any one present heard his talk with the defendant. The case had been once tried before a magistrate, so that the attitude of the defendant was known. Without passing upon other grounds of defense argued, we think the petition is glaringly defective in the respect stated, and it is dismissed, with costs.

HALBERT v. SOULE.

January, 1885.

ATTACHMENT—RECEIPTOR OF ATTACHED PROPERTY—PLEADING.

The defendants with two others formed a partnership by verbal agreement and engaged in manufacturing shade rollers. The sign over the door of their place of business was "St. Albans Shade Roller Manufacturing Company," and their bills were made out in that name. Property owned by the partnership was attached on a writ in which the defendant was described as "The St. Albans Shade Roller Manufacturing Company, a corporation under the laws of Vermont." The two defendants receipted. In an action against the receiptors,—*Held*, that the receiptor could set up his ownership of the property as a good defense; that the original writ did not run against the defendants in this case, but really against nobody.

Adams v. Fox, 17 Vt. 361, followed.

Trover. Plea, the general issue. Trial by court, March term, 1882, ROYCE, Ch. J., presiding. Judgment for the defendant.

The property for which the two defendants gave their receipt was attached on a writ in favor of Thomas W. Clark, and judgment was obtained by default in the county court. At the time the attachment was made and the receipt given the defendants, Hiram B. Soule and George Gregory Smith, were engaged in the business of manufacturing shade rollers at St. Albans, as partners, as the exceptions stated, "under a verbal understanding." The other facts are sufficiently stated in the opinion and head-note.

M. Buck & Son, for plaintiff. *Noble & Smith*, for defendants.

VEAZEY, J. This is an action of trover for goods receipted to an attaching officer, which he had attached. In *Adams v. Fox*, 17 Vt. 361, the court held, that one who has executed a receipt to an attaching officer, for property attached, thereby promising to deliver the property to the officer upon demand, may show, in defense of an action against him upon the receipt, that the property receipted was, at the time of the attachment, his property, and not liable to the attachment, and that he then so informed the officer; and such showing will entitle him to judgment in his favor.

We think that case controls the one at bar. In this case the writ was against nobody. There was no such defendant as the writ described. The property attached and receipted by these defendants was their property; and the officer was so informed at the time, and that they were not sued in the writ in favor of Clark. We think it is quite clear that if a person can defend against his receipt for his own property to an officer attaching it on a writ against somebody else actually existing, he may do the same when attached on a writ against simply an imaginary defendant.

Judgment affirmed.

NORRIS v. SOWLES.

January 1885.

CHATTEL MORTGAGE—NEW YORK STATUTE—LAW OF PLACE GOVERNS.

A chattel mortgage executed in New York, and valid there, is valid here, when the owner comes into this State with the property.

SAME—MORTGAGOR'S INTEREST.

After breach of condition the mortgagor has no attachable interest in the property.*

SAME—VALID ONE YEAR.

A chattel mortgage is valid during one year under the New York statute, requiring it to be refiled at the expiration of one year, irrespective of what is necessary to be done to keep it on foot for a succeeding year.

Trover for taking two washing machines and two ironing machines. Plea, not guilty. Trial by jury, September term, 1884, ROYCE, Ch. J., presiding. Verdict ordered for the defendants. Counsel moved the court to order a verdict for the plaintiff, which was denied. The plaintiff's mortgage was executed in New York,

* See 23 Moak's Eng. Rep. 503.

where the parties to it resided, and where the property was situated. The plaintiff agreed that the mortgagor, Langworthy, could remove the property into this State.

Wilson & Hall, for plaintiff. *E. A. Sowles*, for defendants.

POWERS, J. Section 9 of chapter 7, New York Revised Statutes declares mortgages of goods and chattels to be absolutely invalid against creditors and subsequent purchasers and mortgagees in good faith, unless accompanied by immediate delivery and followed by actual and continued possession by the mortgagee, or unless the mortgage or a true copy thereof be filed in the proper office.

Section 12 of the same chapter provides that every mortgage filed as aforesaid shall cease to be valid, as against the creditors of the person making it, and against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless it be refiled as specified in that section.

The significant language of this section pertinent to the present inquiry is this: The mortgage "shall cease to be valid against creditors, etc., after the expiration of one year." The unmistakable meaning is *that during the year the mortgage is valid, irrespective of the matters and things necessary to be done to keep it on foot for a succeeding year.*

The property in question, therefore, could not be taken by the creditors of Langworthy in New York during the year, dating from April 15, 1881, the day the mortgage was registered. The plaintiff's mortgage debt matured October 14, 1881.

In New York, as here, a chattel mortgage duly executed and registered vests the title in the mortgagee, subject to the mortgagor's right of redemption at the time fixed in the condition. Failing to redeem, the mortgagor's right is lost at law, and the mortgagee gets an absolute title.

If the creditors of the mortgagor attach the chattel mortgaged, or subsequent mortgages of it be executed, such creditors and mortgagees take only the interest of the mortgagor in the chattel and hold it exposed to forfeiture for breach of condition by the mortgagor. After breach of condition the mortgagor has no attachable interest in the chattel. *Champlain v. Johnson*, 89 Barb. 608; *Judson v. Easton*, 58 N. Y. 664.

This court held in *Jones v. Taylor*, 30 Vt. 42, that a chattel mortgage executed in New York and valid there, without a change of possession, would protect the property here against attachment, though found here in the possession of the mortgagor; and the court overruled the earlier case of *Skiff v. Solace*, 23 Vt. 279, holding a contrary doctrine.

The same doctrine was reaffirmed in *Cobb v. Buswell*, 37 Vt. 337, where the property mortgaged was brought to Vermont from New Hampshire by the consent of the mortgagee.

In some States a different rule prevails, but the law in this State is firmly established by the cases cited.

The doctrine of these cases is that the mode of alienation of property is governed by the law of the place where the owner resides and the property is situated; and the rule requiring a change of possession is a rule of local policy, not reaching to a title valid by the law under which it is vested. On this ground a subsequent mortgage in this State within the year following the execution of the plaintiff's mortgage would give the mortgagee no better title than an attaching creditor could get.

The plaintiff's mortgage was duly executed and registered April 15, 1881. The Sowles and Burton mortgage in this State was executed June 1, 1881, within a year, and so is subordinated to the plaintiff's title; and the attachment by defendant Halbert was made April 3, 1882, within such year, and after the condition in the plaintiff's mortgage was broken. On the latter date the mortgagor, as already seen, had no interest in the property that could be attached.

It follows, then, that the plaintiff's motion for a verdict should have been granted.

The judgment is reversed and judgment is rendered on the verdict for the plaintiff for the sum of \$544.66, and interest from September 19, 1884.

RUGG v. BRAINERD.

January, 1885.

MORTGAGE — APPORTIONMENT — MARSHALING SECURITIES — SUBROGATION — PAYMENT OF NOTE.

When one purchases a part of a farm with a mortgage on the whole farm, and assumes the entire mortgage by being secured to pay the excess above the consideration paid for his parcel, and he pays such excess, the notes so paid are extinguished; and on a foreclosure of the mortgage he cannot share in the security afforded by it. And the mortgagee is not affected by any equities arising between the separate owners, whereby such excess could be apportioned.

Petition to foreclose a mortgage. Heard on petition, several answer and cross-bill of A. O. Brainerd, the report of a special master and exceptions thereto, April term, 1884, ROYCE, Chancellor. The petition was taken as confessed against all the defendants except the said A. O. Brainerd; and as to him, the chancellor decreed a foreclosure of the mortgage, and dismissed the cross-bill. It appeared from the report "that said farm by the conveyance of part thereof by said Clarks on said November 6, 1873, and by subsequent conveyances of other parts, became parceled into three parts, one of seventy-five acres, one of sixty-three acres, and one of twenty-five acres." The cross-bill alleged that the parcel of seventy-five acres "is primarily liable for the payment of said mortgage notes in said original bill set forth; and that said twenty-five acres now owned by said Rugg mentioned in said answer is secondarily liable for said notes; and that the residue of said premises in said bill mentioned, and conveyed by your petitioner to said Brown, ought not to be applied to the payment of said notes until said seventy-five acres and twenty-five acres are applied upon said notes; and that your petitioner is entitled to a decree" to that effect, etc. The other facts are sufficiently stated in the opinion.

Cross & Start, for A. O. Brainerd. George T. Mooney and Wilson & Hall, for orator.

TAFI, J. On the 6th day of November, 1873, the Clarks owned the Holyoke farm consisting of one hundred and sixty-three acres, subject to a mortgage in favor of the petitioner of \$10,570. The Clarks on that day conveyed seventy-five acres to A. O. Brainerd, Herbert Brainerd and Stranahan, the grantees agreeing to pay the Rugg mortgage. The consideration of the purchase was \$9,875. On the same day the Clarks mortgaged the remaining eighty-eight acres with other lands to Aldis O. Brainerd to secure him among other things in paying the excess of the mortgage over the purchase-price of the seventy-five acre lot, viz.: \$1,382.50, and for the payment of all other sums that the Clarks might thereafter owe the said Brainerd. It was understood at the same time that A. O. Brainerd should pay the said sum of \$1,382.50, and an unsecured debt due from the Clarks to the petitioner. Aldis O. released his mortgage on twenty-five acres of the land so mortgaged to him, and the Clarks then mortgaged the same to the petitioner to secure such unsecured debt; and the twenty-five acres passed to the petitioner by foreclosure of his mortgage, Aldis O. being a party defendant. The petitioner subsequently sold the twenty-five acre lot. Said Aldis O. in pursuance of the agreement between him and said Clarks paid the said sum of \$1,382.50, and the Clarks conveyed to him the residue of said farm. Said Aldis O. gave them a receipt for the deed in full of the notes he held against them, being those upon which he had paid the said sum of \$1,382.50, and agreed to give them up provided there had been no liens of a recent date placed on said property. Aldis O. insists that having paid these notes he should share with the petitioner in the security afforded by the original mortgage. Upon the facts reported by the master, it is very clear that the payment of the \$1,382.50 was a payment made by the Clarks themselves. It is true Aldis O. paid the petitioner the money, but he had agreed with the Clarks that he would pay it; they had secured him for so doing, and after he had paid it they conveyed to him the remaining portion of the farm, which he received in full of said notes, upon which he had paid the \$1,382.50. The notes, having been paid for the Clarks, were thereby extinguished. Aldis O. may have the right to insist that the purchase-price of

seventy-five acres, the fair ground lot, as between him and the owners of the lot, shall be charged upon such lot; but the petitioner is not affected by any equities arising between the separate owners of the different portions into which the premises have been divided.

It is unnecessary to say any thing upon the questions of evidence presented by the report; for treating the facts found from it as properly in the case, the petitioner is entitled to the relief sought notwithstanding such facts.

Decree affirmed and cause remanded.

WOODWORTH v. COLEMAN.

January, 1885.

PRACTICE — PETITION UNDER THE FRAUD, ACCIDENT AND MISTAKE STATUTE — VERIFICATION BY ATTORNEY WHEN INSUFFICIENT.

A petition under the fraud, accident and mistake statute — Rev. Laws, § 1429 — must be verified by the oath of one having personal knowledge of the facts alleged. The oath of the petitioner's attorney, "according to his best knowledge, information and belief," is not sufficient.

Petition under Rev. Laws, § 1428, to vacate and set aside a judgment of a justice of the peace, and to enter and defend the suit. Heard on motion to dismiss, April term, 1884, ROYCE, Ch. J., presiding. Motion overruled. The motion to dismiss the petition was on the ground that it was not verified by the oath of the petitioners.

E. C. Smith and A. K. Brown, for petitioners. *P. Coleman*, for petitioner *ag.*

ROWELL, J. The statute provides that a petition of this kind *shall be verified by oath*. Rev. Laws, § 1429. To verify, in the sense of the statute, means to establish the truth of; to confirm. But how shall the truth of a thing be established except it be by the oath of him who has personal knowledge thereof? This petition is sworn to only by the attorney of the petitioners, who makes oath that the facts stated therein are true according to his best knowledge, information and belief; but it nowhere appears that he had or could have any personal knowledge or information whatever of the truth of the things to which he swears, and so the petition in no just sense can be said to be "verified by oath"; and it is dismissed, with costs.

STATE v. BRAINARD.

January, 1885.

CRIMINAL LAW — INFORMATION, MINUTE ON BY CLERK, WHEN EXHIBITED.

The minute on the information was, "Filed Oct. 15, 1883," and under the official signature of the clerk. *Held* sufficient.

Heard on motion to dismiss the information, April term, 1884, ROYCE, Ch. J., presiding. Motion overruled; and cause passed to the supreme court under Rev. Laws, § 1390. The motion to dismiss was, in effect, that the minute made by the clerk of the court on the information was not sufficient, in that it did not state when the information was exhibited.

Edson, Cross & Start and Stephen E. Royce, for respondent. *George W. Burleson*, State's attorney (*E. R. Hard* with him), for the State.

ROWELL, J. It is considered that the minute on this information is sufficient to answer the purpose for which it is required to be made, which is, that the court may know with certainty whether or not the offense charged is barred by the statute of limitations. It is as follows: "Filed Oct. 15, 1883," and is under the official signature of the clerk. The information could not have been filed by the clerk until it was exhibited to him; and the minute of filing imports such exhibition, nothing else appearing, and the two things will be taken to have been concurrent. *State v. Bartlett*, 11 Vt. 650.

The respondent takes nothing by his exceptions, and the cause is remanded.

DARBY v. FIRST NATIONAL BANK OF ST. ALBANS.

January, 1885.

USURY—REFEREE'S REPORT SHOULD STATE THE FACTS.

In an action against a bank to recover the penalty for the taking of illegal interest, the usurious transaction having been conducted nominally at least by the cashier, but claimed by the plaintiff to be a mere cover of the bank to conceal its part in receiving the usury, the referee failed to find the material fact, which of the two the plaintiff negotiated with,—the bank, or the cashier individually; but reported the facts for and against the plaintiff's theory, and submitted to the court, not to infer the *fact*, but to decide whether the "things done amounted *in law* to a mere cover," etc. *Held*, that it was not an inference of law but a pure question of fact, and that the court had no authority to infer from the reported facts, that the loan was made by the defendant, and the manner of it a trick to evade the usury laws.

Action to recover the penalty for the taking of illegal interest. Heard on the report of a referee, September term, 1883, ROYCE, Ch. J., presiding. Judgment for the plaintiff to recover the sum of \$3,191.70.

The referee found, that, in the latter part of 1875, the plaintiff, wishing to effect a loan of about \$3,000, applied to Jed P. Ladd, Esq., an attorney, to find the money for him; that said Ladd consented to act in the matter and saw Albert Sowles, cashier of the defendant, in regard to it; that on January 20, 1876, the plaintiff and said Ladd went to St. Albans, saw Sowles at the bank, and the terms of the loan were agreed upon; that, accordingly, the defendant gave his notes to said Sowles, secured by mortgage for \$3,600, but received therefor only \$3,120; and that after the notes and mortgage were executed, Sowles went into the bank vault, brought out the money in bills, which he counted out to the plaintiff over the bank counter; and that the plaintiff supposed he was dealing with the bank. Various other facts, tending to support the claims of each party, were set forth in the report; but in view of the decision of the court it is unnecessary to state them. The referee submitted questions to the court, in part, as follows:

"If the court should be of opinion as a matter of law from the facts above found and reported, that the things done and said by the said Sowles with reference to said loan prior to and on said 27th day of May, 1876, which are claimed by the defendant to establish in fact, and in law, that said loan was made on the 21st day of January, 1876, by said Sowles and not by the defendant, amounted in law to a mere cover for an usurious transaction by the defendant, and ought therefore to be held in law, so far as this plaintiff's rights and remedies are concerned, void and of no effect, and that in contemplation of law, said loan was made by the defendant to the plaintiff on said 21st day of January, 1876; then I find that on said last-mentioned day the defendant loaned to the plaintiff the sum of \$3,120, and that up to and including said 26th day of November, 1881, when said transaction was finally closed up as above set forth, the defendant knowingly took and received from the plaintiff, on account of said loan, the principal thereof in full, and the further sum of \$1,595.85 as and for interest on the same, which being a rate of interest greater than six per cent per annum, the plaintiff should recover of the defendant twice the amount of interest thus paid, being the sum of \$3,191.70. If the court should be of opinion, as a matter of law, from the facts above found and reported, that said loan was in contemplation of law made to the plaintiff on said 21st day of January, 1876, by said Sowles, and not by the defendant, and that the defendant on said 27th day of May, 1876, purchased said debt and notes from said Sowles, paying therefor the sum of \$3,600, being the face of said notes, then I find that at the time of such purchase, the cashier of the defendant had full knowledge that said notes contained the sum of \$480 of usury, being given for the loan, in fact, of the sum of \$3,120, and that the president of the defendant knew that said Sowles took said \$480 from the cash drawer May 27, 1876, as aforesaid."

"I am unable to find from the evidence before me, unless it is to be presumed as matter of law from the facts above found, which question is respectfully submitted to the court, any willful intention upon the part of the defendant to charge the plaintiff a greater rate or amount of interest than six per cent upon the face of said notes."

Roberts & Roberts, for defendant. *Jed P. Ladd and Edson, Cross & Start*, for plaintiff.

VEAZEY, J. In order to say that the transaction between the plaintiff and the cashier was the transaction of the bank, when it occurred, and was conducted by the cashier as a mere cover of an usurious transaction by the bank, this court would have to infer this fact from what is reported. The fact is not found, and yet is essential to the plaintiff's right of recovery. It is not an inference of law; nor is it a mixed question of law and fact. It is purely a question of fact. The court cannot, upon the report of a referee, infer facts from other facts reported. *Kimball v. Baxter*, 27 Vt. 628. It can only pronounce the law upon the facts found by the referee. *Fuller v. Adams*, 44 Vt. 543. It is not the form of expression that is controlling. If, for instance, in this case, the referee had added a finding that in the transaction the cashier was not acting in his own behalf, but for the bank, it would have been equivalent to a finding that it was the transaction of the bank. The point is illustrated in the case of *Alexander v. Bank of Rutland*, 24 Vt. 222, where it was held, that if a referee reports such facts as constitute an agency, the court can find the agency as matter of law, without an express statement of such conclusion by the referee. But such is not this case. Here the referee reports one set of facts tending to show the transaction was that of the bank, and another set of facts tending to show it was not, but was the individual transaction of the cashier; and does not submit to the court to find or infer the ultimate fact from what is reported, as was done in the case of *Durant v. Pratt*, 55 Vt. 270, which was a cause in equity; but says that "if the court should be of opinion as *matter of law* from the facts" stated that the "things done amounted *in law* to a mere cover," etc., "and ought, therefore, to be held *in law*," so and so, and that "in contemplation of law" said loan was made by the bank, then he finds that the defendant made the loan, etc.

The right of the plaintiff to recover is made to depend on a fact not found, and which the court, as established in several cases, has no right to infer as a fact from what is found. When a referee cannot find a material fact, which some evidence tends to prove, it would be much better to so state, if it is necessary in drawing the report to state the evidence, in substance *pro* and *con* in reference to it. Any uncertainty in statement of conclusions by a referee should be avoided, as it is liable to lead to injustice in the decision upon the report.

This report also fails to show that the defendant bank subsequently adopted the transaction as it took place. On this point, as on the other, the report states what was done, or what the evidence tended to show took place, when the notes were turned over to the bank, some four months after the original loan. The findings on this part of the case leave the bank free and clear of any usury. From these findings it appears that the bank paid the full face of the notes and has received only legal interest thereon. It is not found that the bank ever became a party to, or a beneficiary of, the usurious feature of the transaction. It is strenuously argued that the defense is a pretense and a sham, and that the loan was by the defendant, and that the manner and form of the transaction was a mere cover and trick, as many of the facts reported tend to show. This may be so; but however convincing the argument ought to have been to the referee, or might have been to us if we were at liberty to infer the additional fact, no argument can supply a fact that is wanting and necessary to recover.

Judgment reversed, and judgment for defendant.

BARNES v. TOWN OF BAKERSFIELD.

January, 1885.

TOWN — COMPENSATION OF LISTER.

A lister can recover only such compensation for his services as the town votes him, in a case where long usage is not an element.

General *assumpsit*. Plea, general issue and notice. Trial by court, September term, 1884, ROYCE, Ch. J., presiding. Judgment for the defendant.

The action was brought to recover pay for the plaintiff's services performed as lister. He was elected one of the listers of the defendant town at the annual March meeting in 1882, accepted the office, and rendered the services charged in his specification. The court found that the amount charged was reasonable, and that the plaintiff should recover it, if he was entitled to recover any thing. The plaintiff's specification was: Twenty days' services as lister, and expenses of self and team, \$40; making list for said town, \$10; two days' expenses, self and team, at St. Albans before equalizing the board, \$10," making \$60 in all. At the March meeting, in 1883, the town accepted, by vote, the following amendment to the auditors' report:

"*Resolved*, By the legal voters of the town of Bakersfield, in town meeting assembled, that the auditors' report, just read and submitted to the town, be, and is hereby amended, by allowing Junius Barnes and William B. Shattuck for services as listers of said town in 1882, fifteen days' work as services each, and the sum of \$1.50 per day each, in lieu of the sum the auditors allowed them, making \$22.50 for Mr. Barnes, and also \$20 for making the list and attending the equalizing board at St. Albans, and \$22.50 for Mr. Shattuck."

The town tendered the plaintiff \$42.50. It did not appear that the town ever promised to pay the plaintiff for his services as lister; or that it took any action in regard to his compensation when he was elected; or what the town had paid its listers per day, except in 1881, when \$2 per day were paid. The town records showed what amount had been paid the listers for a long series of years — sometimes showing what was paid the whole board, as in 1875, viz.: \$100, and then what was paid each lister, as in 1876, viz.: \$18.30. It appeared by these records that the plaintiff was paid for his services as lister, in 1879, \$32.

G. W. Burleson, for plaintiff. *Cross & Start*, for defendant.

POWERS, J. The right of town officers to recover pay for official services is regulated by statute. Section 2673 reads. "Towns, at the annual meeting, may fix the compensation of town officers." Section 2727 requires the auditors to examine and adjust the accounts of town officers, and report the items of such accounts to the town at its annual meeting. Section 2728 forbids the allowance by the auditors of any claim for personal services except when compensation is fixed by law or by vote of the town, but requires the auditors to report the nature and extent of such services to such meeting.

By these sections it is clear that the plaintiff is not entitled to recover for his services beyond the sum tendered. When he accepted office he was bound to know that the "nature and extent of his services" would be reported to such meeting by the auditors, and that at such meeting the town, being informed by the auditors of the character of his services, would "fix the compensation."

He took office impliedly agreeing to accept pay as the law contemplates. It is not a case where long usage has made the law, but a case of explicit statutory regulation.

Judgment affirmed.

LONGEY v. LEACH.

January, 1885.

CHATTEL MORTGAGE — TRESPASS — HUSBAND AND WIFE — BILL OF SALE.

L., owning a gray horse, purchased a bay horse of the defendant's wife, and gave her a lien on both to secure the payment. Subsequently he executed a chattel mortgage on the gray horse and some other personalty to the plaintiff, who had notice of the lien. Afterward L. sold the horses to said wife, but delivered them to the husband. They remained in the joint possession of the defendants on a farm owned by the wife, until the gray horse was sold by the husband. *Held*, (1) that the mortgage was superior to the lien; (2) that the mortgagee could maintain an action of trespass, without first exhausting his other security, although his mortgage debt was not due; (3) but that the action could only be sustained against the husband, as the joint possession of the horse was not at law the wife's tort.

A mortgagee under a chattel mortgage has a right to take possession of the property at any time, if there is no stipulation to the contrary.

Trespass and trover for a horse. Heard on a referee's report, September term, 1884, ROYCE, Ch. J., presiding. Judgment for the plaintiff.

On February 20, 1883, Joseph Longey, owning a gray horse, purchased a bay horse of defendant Emma, and gave her the following writing (the note on demand): . . . "Said horse is to be and remain her property until said note is fully paid; and as a further security for the payment of said note, I hereby sell and deliver to the said Emma S. Leach one gray horse, now owned by me; and in case I do not pay said note as agreed, and take good and prudent care of said horses, I hereby authorize said Emma S. Leach to take possession of both of said horses at any time she sees fit." This writing was duly recorded in the town clerk's office, March 21, 1883. Said Joseph retained possession of both horses until November 6, 1883, when they were delivered to said C. S. L. Leach, as the property of said Emma, under an arrangement by which the note given for the bay horse was surrendered to said Joseph. The horse was then kept on a farm owned by said Emma, and occupied by the defendants, until it was sold by said C. S. L. Leach.

On October 15, 1883, said Joseph gave a chattel mortgage of the gray horse, a wagon, and a heifer to the plaintiff, which mortgage was duly recorded. At the time the mortgage was executed, the mortgagor informed the plaintiff that the horse was subject to a lien in favor of said defendant; and when the mortgage was filed for record, the town clerk also gave the plaintiff notice of the lien. The note secured by the mortgage was payable in one year from its date.

C. G. Austin, for defendants. *P. Colman*, for plaintiff.

POWERS, J. Our Chattel Mortgage Act makes all mortgages of personal property invalid as to all persons except the mortgagor, unless the mortgaged goods pass into the possession of the mortgagee, or a registry of the mortgage be made in the proper town clerk's office. Hence, notice to a mortgagee, who observes the statute, of a prior unrecorded mortgage, is merely notice of a conveyance that the law declares to be inoperative against him.

The bill of sale, therefore, of the gray horse executed by Joseph Longey to the defendant February 20, 1883, though good between the parties to it as a common-law mortgage, must be held to be subordinate to the plaintiff's later mortgage executed agreeably to the statute.

Section 4158, Rev. Laws, providing a penalty for neglect to give notice of such prior bill of sale, does not have effect further than its language imports. It does not in terms declare the validity of such bills of sale as against subsequent conveyances if such notice be omitted, although there is great force in the argument that such is the fair implication of its terms. The Chattel Mortgage Act is the later statute; and it has, in fact, in a large measure supplanted former modes of conveying personal property by way of security; and was doubtless intended to lessen the chances for fraud in such conveyances by requiring more formal and more public evidence of the transfer of title. The plaintiff's mortgage was duly executed upon good consideration, and vested in him the title to the horse, subject to Joseph's right to redeem upon payment of his debt. If there be no stipulation in the mortgage to the contrary, the mortgagee had the right at any time to take possession of the horse, if he saw fit to exercise it. Until this right is exercised, the possession of the mortgagor is merely permissive, and would terminate by transferring it in any manner that sets the rights of the mortgagee at defiance. *Jones Chat. Mort.*, § 447. And the mortgagee in such cases may maintain trespass and trover for the chattel without first exhausting other security which he holds. *Id.*, § 448.

On November 6, 1883, Joseph Longey and the defendant C. S. L. Leach, husband of the defendant Emma, made an agreement whereby both the gray and bay horses were delivered into the possession of the said C. S. L. Leach, as the property of said Emma, and the note of Joseph secured upon said horses was surrendered, and the horses thereafter remained upon said farm in the possession of C. S. L. and Emma until November 20, 1883, when C. S. L. took said gray horse to Swanton and sold it. This agreement and transfer of possession was after the execution of the plaintiff's mortgage, and did not impair the plaintiff's

rights, which vested in him the moment his mortgage was duly executed on October 15, 1883.

Under this arrangement of Nov. 6 there was no intermeddling with the mortgaged property by the defendant Emma Leach, except that after her husband took possession of it, it remained on said farm in her and her husband's possession. The husband took the possession of the horse mortgaged on its surrender by Joseph Longey; and in this act the wife did not participate; and the subsequent possession of the horse by the husband and wife jointly is not a tort on the part of the wife. Torts committed by the wife jointly with or in the company of her husband are in law the torts of the husband, unless, at least, the presumption of coercion by the husband be rebutted by proof. Sch. Dom. Rel. 102.

The mere wrongful detention of property by the wife is not her tort, but that of her husband. 2 Greenl. Ev., § 647. This action being against husband and wife jointly can only be maintained for some tort of the wife. *Shaw v. Hallihan*, 46 Vt. 393.

The judgment is reversed, and judgment is rendered on the report for the plaintiff against the defendant C. S. L. Leach for \$110 and interest, and for the defendant Emma S. Leach to recover her costs.

FELTON v. SOWLES.

January, 1885.

EXECUTOR AND ADMINISTRATOR—WHEN COURT MAY ORDER TO GIVE BOND—ORDER NOT APPEALABLE.

When one is both executor and trustee, and by the will is not required to execute a bond, the probate court under the statute, if deemed proper from a subsequent change of the executor's circumstances, can order him to give a bond, *and such order is not appealable* to the county court.

Appeal from the probate court, Sept. term, 1884, ROYCE, Ch. J., presiding. Motion to dismiss the appeal overruled.

Cross & Start and Wilson & Hall, for petitioners. *E. A. Sowles*, pro se.

TAFT, J. The question is made by the appellees, on their motion to dismiss the appeal. The appellant was appointed executor of the will of Hiram Bellows, and under the statute gave his individual bond for the payment of the legacies under the will. He was also appointed trustee of a fund for the benefit of St. Luke's church, and gave a similar bond as trustee. The will provided that his individual bond should alone be taken. The appellees in the first case being legatees, and in the latter representatives of the church, petitioned the probate court, representing that there had been a change in the circumstances of the executor and trustee subsequent to his appointment; and also, in case of the church, a mingling of the trust funds with his own, and asking that under sections 2067 and 2284 of Rev. Laws, he should be required to execute to the court a bond with the usual conditions. Answer was made, and, upon hearing, the court ordered the appellee, for the reasons stated in the petition, to furnish a bond, with surety, in each case conditioned as prayed for in the petition. An appeal was taken by the executor and trustee, and upon its entry in the county court a motion to dismiss was filed by the appellants for the reason that the order was one from which no appeal would lie. The county court overruled the motion and heard the case, and it is before us on exceptions. The first question argued is the one above stated. No appeal lies from any order of the probate court unless given by statute. The section relating to appeals is 2270, Rev. Laws, which reads: "A person interested in an order, sentence, decree or denial of a probate court who considers himself injured thereby may, except as otherwise provided by law, appeal therefrom to the county court." Was the order in this case such a one as is contemplated by the section? It is well-settled law in this State that the order must have been one which made a final disposition of the subject-matter. *Timothy v. Farr*, 42 Vt. 43. And it was held in the same case that an appeal would not lie from an order renewing the commission of claims; nor in *Hodges v. Thacher*, 23 Vt. 455, from one refusing to accept and record the report of commissioners; nor

that an administrator ought to render an account, in *French v. Winsor*, 24 Vt. 402; and there are other similar cases. In *Leach v. Leach*, 51 Vt. 440, this court held that an order of allowance for the maintenance of the widow and children could not be appealed from. In the latter case the order appropriated the property of the estate, disposed of it absolutely, and might have exhausted it all; yet the court held the action of the probate court could not be appealed from. In the cases at bar the order made did not require the appropriation of a dollar, did not affect the assets of the estate in the least, but was calculated to preserve the estate for the purposes designed by the testator; and if the executor could delay the case by an appeal he might defeat the important object which the statute was designed to effect. The matter of giving a bond with surety, in cases like those at bar, is not, in the respect of an appeal, different from the ordinary case of an administrator or executor. It is simply the exercise of such a power as the court of probate should be intrusted with, in order to properly administer the law relating to the settlement of estates. We think the order in question was one from which no appeal should be allowed. The objection made by the appellees appears sufficiently from the copies of appeal. The disposition of this question renders it unnecessary to examine the ones arising upon trial.

Judgment reversed, appeal dismissed, and cause ordered certified to the probate court.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.

CUMMINGS v. RENWICK.

July 31, 1885.

PRACTICE — REFERENCE — GENERAL FINDING FOR DEFENDANT.

Upon a general finding for the defendant by a referee, the defendant is entitled to judgment, notwithstanding the referee states in his report that he has been unable to reach a decision which he is satisfied is correct, and that he finds for the defendant on the ground that the burden of proof is on the plaintiff.

Writ for entry for the Stevens place in Lisbon. The defendant filed a brief statement disclaiming title in himself and alleging title in his wife. At the trial before the referee, the question was whether the demanded premises were bought with the defendant's money, and the deed taken to his wife to defraud his creditors. Upon that point the referee stated in his report that the evidence was so conflicting that he was unable to reach a decision that he felt satisfied to be correct. But he found generally for the defendant, "upon the ground that the burden of proof is on the plaintiff on this point." The court ordered judgment for the defendant on the report, and the plaintiff excepted.

Rand & Morse, for plaintiff. *Bingham, Mitchells & Bachellor*, for defendant.

SMITH, J. The general finding or award, that the defendant did not disavow the plaintiff includes the finding that there was no preponderance of evidence in favor of the plaintiff. The referee's statement that the evidence was conflicting, and that he was unable to reach a satisfactory decision, is not a finding that there was a preponderance of evidence in favor of the plaintiff. If the case had been on trial before a jury, the defendant would have been entitled to the instruction that if there was a balance of evidence in his favor, or if the evidence was evenly balanced, the verdict must have been for him. He was only required to put in as much evidence as the plaintiff to keep the scales in equilibrium. The referee's statement that the evidence was so conflicting he was unable to reach a satisfactory decision, can have no other legal meaning than that the ground upon which the plaintiff claimed to recover was not proved by a balance of the evidence.

Exceptions overruled.

BLODGETT and CARPENTER, JJ., did not sit; the others concurred.

NICHOLS v. SHEPARD.

July 31, 1885.

DESCENT — CHILDREN OF DECEASED BROTHERS AND SISTERS — PER CAPITA.

Under the statute of distributions, there being none nearer of kin living, the children of deceased brothers and sisters take equal shares, *per capita*.

Petition for leave to appeal from a decree of distribution by the judge of probate. Facts found by the court.

Blanchard Nichols died intestate, leaving as next of kin and heirs at law, thirty-one nephews and nieces, children of seven deceased brothers and sisters, there being eight children of one brother, five of another, four each of three sisters and another brother, and two of another brother. The eight children are the plaintiffs and reside in Massachusetts. The defendant is the administrator of the intestate's estate and resides in Amherst.

By the decree from which this appeal is sought, the probate court ordered the personal estate in the hands of the administrator to be distributed and paid, one-seventh to the children of each deceased brother and sister of the intestate, *per stirpes*. The petitioners were prevented from taking an appeal through accident, mistake and misfortune, and not by their own neglect.

SMITH, J. The personal estate of a person dying intestate is distributed:

I. To the widow, the share by law prescribed; the residue to the children of the deceased and the legal representatives of such of them as are dead.

II. If there be no issue, to the father, if he is living.

III. If there be no issue or father, in equal shares to the mother and to the brothers and sisters or their representatives.

IV. To the next of kin in equal shares. Gen. Laws, chap. 208, §§ 1, 6. In this case the intestate left no widow, father, mother, brother, sister, uncle or aunt. His heirs at law and next of kin are thirty-one nephews and nieces, children of different deceased brothers and sisters. The words "next of kin" in the statute are words of purchase, — denoting the persons who are to take the estate, — and not words of limitation. The heirs, therefore, do not take by representation. Being all next of kin, they take as such, and in equal shares, *per capita*. *Snow v. Snow*, 111 Mass. 389. In *Hill v. Nye*, 17 Hun, 457, it was held that the maternal grandmother and paternal grandparents, being the next of kin, took the estate of the intestate *per capita*. *Knapp v. Windsor*, 6 Cush. 156, is a similar case. The next of kin were the paternal grandmother and the maternal grandparents of the intestate. It was held that each was entitled to a distributive share (one-third) in the estate. SHAW, Ch. J., said: "It is a plain rule of the law that those who take property as a class of persons described, when there is nothing to distinguish their respective rights, take in equal shares. . . . The rule of representation applies only from necessity, or where there are lineal heirs in different degrees, as children and the children of a deceased child, or brothers and sisters and the children of a deceased brother or sister." In *Jackson v. Thurman*, 6 Johns. 322, the question was whether B. and C., children of the intestate's deceased sister, and D., son of the intestate's deceased brother, took *per stirpes*, or *per capita*. It was decided that they took *per stirpes*, because the statute made them inherit such share as their parents respectively would have inherited, if living; but the court said this was carrying the doctrine of inheritance *per stirpes* further than it was carried in the case of lineal descent and further than it was carried in the novel of Justinian (118) from which the New York statute was copied.

The rule is nowhere better stated than by Chancellor KENT — 2 Kent Com. 425: "It is the doctrine under the statute of distributions, that the claimants take *per stirpes* only when they stand in unequal degrees, or claim by representation, and then the doctrine of representation is necessary. But when all stand in equal degree as three brothers, three grandchildren, the nephews, etc., they take *per capita*, or each an equal share; because in this case, representation, or taking *per stirpes*, is not necessary to prevent the exclusion of those in a remoter degree; and it would be contrary to the spirit and policy of the statute which aimed at a

just and equal distribution." See, also, *Page v. Parker*, 61 N. H. 65, and authorities cited; 2 Wms. Exrs. (6th ed.) 1518; 8 Redf. Wills. 425.

It having been found that the plaintiffs were prevented from appealing within sixty days through accident, mistake and misfortune, the petition for leave to appeal is allowed. The decree of the probate court is reversed and a decree of distribution ordered, that the sum to be distributed be divided into thirty-one equal shares and one share be paid to each of the eight plaintiffs.

Decree accordingly.

ALLEN, J., did not sit; the others concurred.

ERROL v. BRAGG.

July 31, 1885.

PRACTICE — EXCLUSION OF EVIDENCE — EXCEPTION NOT SPECIFYING GROUND.

Upon the hearing before a referee the defendant was asked this question: "Did you at any time inform the town of Errol, or the selectmen of the town, that you had used securities of the town to raise money, which you had appropriated to your individual use and which you had not accounted for to the town, and if so, when and to whom was that information communicated?" Ans. "I never did at any time, or to anybody." *Held*, that as upon the issue of concealment the evidence was relevant, an exception to its admission that did not point out the ground of exception, was unavailing.

SAME — EVIDENCE HARMLESS — EXCEPTION.

Defendant was asked whether one S. testified in a former suit that he paid a certain sum of money to the defendant. This was excepted to, and on being permitted to answer said that he did not know what S. testified to. *Held*, that his answer rendered the testimony harmless.

FORMER ADJUDICATION — PAROL EVIDENCE — MATTER NOT APPEARING FROM RECORD.

Parol evidence is competent to prove that matters not appearing of record were adjudicated in a former suit.

Ladd & Fletcher, for plaintiff. *Aldrich & Remick*, and *Dudley*, for defendant.

SMITH, J. The defendant's cause for complaint seems, the way the case has been argued, to be, that the referee has not returned a specific finding, as requested, upon the question whether there was any concealment by him of his dealings with the Rich and West notes, and that he has not reported the evidence upon that point. The report of the referee, twice recommitted, was returned into court at the September term, 1881. No exception was taken to the report by reason of the omission of the referee to make a specific finding upon the issue of concealment. Both parties moved for judgment on the report and the defendant also elected a trial by jury. The court was not asked to rule and made no ruling upon the report, but reserved all questions of law raised by the report. The only questions raised by it relate to the admissibility of certain evidence at the hearing before the referee.

1. Upon the hearing, the defendant was a witness, and was asked this question: "Did you at any time inform the town of Errol, or the selectmen of the town, that you had used securities of the town to raise money, which you had appropriated to your individual use and which you had not accounted for to the town, and if so, when and to whom was that information communicated?" Ans. "I never did at any time, or to anybody." To the admission of this evidence the defendant excepted. The ground of the exception has not been pointed out. Upon the issue of concealment the evidence was relevant.

2. The defendant was required, subject to exception, to testify in regard to a note for \$300, included in a former suit between these parties, and to give a history of the note. The particular grounds of this exception have not been stated. The case does not show that the evidence was incompetent.

3. The defendant was asked whether one Sanborn testified in a former suit that he paid a certain sum of money to the defendant. The question was excepted to. The answer of the witness that he did not know what Sanborn testified to rendered the testimony harmless.

4. One question tried, was whether the claim of the town for the proceeds of the Rich and West notes had been adjudicated in a former suit. If this did not

appear from the record, parol evidence was admissible to prove it. It appears that this claim was included in the specification in the former suit. The plaintiffs contended that it was withdrawn during the trial. It is not claimed that the withdrawal appeared from the record. The testimony of Jordan was, therefore, competent. For the same reason paper "J" produced by him was competent, it having been used on the former trial.

5. The defendant moved for a nonsuit upon the ground that the plaintiff had not shown that the defendant had any of the town's money in his hands. The referee denied the motion, and the defendant excepted. The evidence upon this branch of the case not having been furnished us, we cannot say the motion was not properly denied.

The exceptions are overruled. They do not seem to have been of sufficient importance to warrant the delay and expense of a transfer to the law term.

Case discharged.

DOE, C. J., and BINGHAM, J., did not sit; the others concurred.

STATE v. RAY.

July 31, 1885.

CONSTITUTIONAL LAW — LIBERTY OF THE CITIZEN — COMMITTING TO INDUSTRIAL SCHOOL.

A statute which authorizes a justice of the peace to commit to the industrial school a minor under the age of seventeen years, upon a complaint charging a crime with respect to which the jurisdiction of the justice only extends to requiring the accused to recognize in sureties for his appearance at court, is in conflict with article 15 of the Bill of Rights.

Habeas corpus. The relator is the father of John Cunningham, aged sixteen years, and of Eddie Cunningham, aged thirteen years, who were arraigned upon a complaint for burglary before a justice of the peace, June 10, 1884, and pleaded not guilty. After an examination, the justice ordered them to recognize in the sum of \$100 each, with sureties, for their appearance at the October term of this court, but immediately thereafter, upon the application of the State's counsel, under chapter 287, section 14, and without the consent of said minors or their friends, the justice revoked the order to recognize, refused to take bail, and sentenced John to the industrial school for two years, and Eddie for three years, and issued a *mittimus* for their commitment, which was executed June 12.

At this time, Ray, as superintendent of the industrial school, having produced them before the court on a writ of *habeas corpus* issued upon the relator's petition, a hearing was had and they were discharged on the ground that the justice had no jurisdiction to impose the sentence aforesaid, and the defendant excepted.

Haskins & Stoddard, for relator. *Lane & Dole*, for respondent.

SMITH, J. "When any minor under the age of seventeen years charged with offense punishable by imprisonment, otherwise than for life, shall be convicted and sentenced accordingly, or shall be ordered to recognize for his appearance at the supreme court, the court or justice, upon application of such minor, his friends or the State's counsel, may order, that instead of such imprisonment or recognizance the said minor may be sent and kept employed and instructed at the reform school for such term, not less than one year nor extending beyond the age of twenty-one years, as said court shall judge most for his time, interest, and benefit, provided he shall conduct himself according to the regulations of said school; and a copy of such order shall be sufficient authority for his commitment and detention at such school." Gen. Laws, chap. 287, § 14. By Laws 1881, chap. 37, the name of the institution was changed to the industrial school. Under the authority of this statute, the relator's minor sons, one of the age of thirteen and the other of the age of sixteen years, have been sent to the industrial school for the terms of three and two years respectively, neither having been convicted of any crime or offense. They were brought before a justice of the peace upon a complaint charging them with having committed the crime of burglary — a crime of the gravest character and punishable with imprisonment in the State prison for a long term of years. The crime was one which the magistrate had not jurisdiction to determine, but only to inquire if just cause appeared to hold the

accused to answer at the supreme court. They were heard upon no other charge than that set out in the complaint, and were not in law required to defend against any other. An order was made requiring them to recognize for their appearance before the supreme court. So far the justice had jurisdiction.

At this stage of the proceedings the counsel for the State moved for an order that the accused be sent to the industrial school, and the justice, declining the offer of the accused to recognize agreeably to the order then just made by him, issued an order committing them to the school for the terms above mentioned. The commitment was not for the purpose of securing their appearance at the supreme court, for the shortest term for which they might be sent to the school would extend much beyond the next term of the supreme court. If they were committed as a punishment for having committed the crime of burglary, they have never been tried or convicted of that crime by the judgment of their peers. Article 15 of the Bill of Rights provides that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." This clause in our Constitution is a translation from *magna charta*, and dates from 1215. Its meaning has become fixed and well determined "and asserts the right of every citizen to be secure from all arrests not warranted by law." *Mayo v. Wilson*, 1 N. H. 53, 57. It guarantees the right of trial by jury in all cases where the right existed at common law in this State at the adoption of the Constitution. That a person charged with having committed the crime of burglary is entitled to a jury trial has never been questioned. As the justice only had jurisdiction to inquire and not to convict, the accused have had no trial. Provision is, and ever since the adoption of the Constitution has been, made by statute for a trial by jury of every crime indictable by a grand jury, and of every offense where an appeal is taken from the judgment of a justice or police court. Final judgment cannot be enforced for the commission of any police offense, however trivial, until the appellant has been convicted by a jury of his peers. If the relator's sons were sent to the industrial school for some other crime or offense, it was one of which they have never been convicted, and in relation to article 15 of the Bill of Rights, which provides that "no subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally described to him, or be compelled to accuse or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to himself, to meet the witnesses against him face to face, and to be fully heard in his defense by himself and counsel."

But the commitment and detention of the relator's sons is justified by the respondent upon the ground that the industrial school is not a prison, that the order of the commitment was not a sentence, and that their detention is not a punishment. The contention is that the industrial school is part of the school system of the State, and that the State as *parens patriæ* may detain in the school such scholars as may need its discipline. If it is a privilege to be admitted a member of the school, it is a privilege limited to "offenders against the laws." At no time since its institution in 1855, have its doors been open to the admission of any other class of scholars. Its advantages have not been offered to every minor under the age of seventeen years who might desire to enter, or whose parents or guardian might seek to place him there. The relator's sons were sent to the school, either because they had committed some crime or offense, or because the justice judged it to be for their "interest or benefit" to be placed there. For whichever of these causes they were committed, the commitment was illegal. As already remarked, they have never been convicted of the crime of burglary; and they have not been tried or had any opportunity to defend against any other charge. If the order for their commitment was made because the justice judged it to be for their "interest and benefit," the answer is that he has no authority by statute to commit them for that cause.

Whenever a court or a justice may send a minor to the school he may fix the term during which he may be kept at the school at not less than one year nor extending beyond the age of twenty-one years, as the court or justice "shall judge

most for his true interest and benefit." The limit of his stay or confinement in the school is determined by the consideration of what shall be "most for his true interest and benefit;" but the statute does not confer upon the court or justice the power to send a minor to the school solely for the reason that the court or justice may be of opinion that it may be for the interest or benefit of the minor to be sent there. The original name of the school, "house of reformation for juvenile and female offenders against the laws,"—Laws 1855, chap. 1660—indicated the character of the institution. The act provided that any boy under the age of eighteen years, or any female of any age, "convicted of any offense known to the laws of this State and punishable by imprisonment other than such as may be punished by imprisonment for life," might be sentenced to the house of reformation. *Id.*, § 4. At no period in its history could a person become an inmate of the institution unless, being within the prescribed age, he or she had been convicted of a crime or offense. The only exception is the unconstitutional provision inserted in the revision of 1867—Gen. Stat., chap. 269, § 14; Gen. Laws, chap. 287, § 14—authorizing a justice to send to the school a minor less than seventeen years of age when he shall have ordered to recognize for his appearance at the supreme court. We cannot ignore the fact that in the public estimation the school has always been regarded as a *quasi* penal institution, and the detention of its inmates or scholars as involuntary and constrained. The great purpose of the institution was, the separation of youthful offenders from hardened criminals of mature years, in the hope of their ultimate reformation and of their becoming useful citizens. But the fact cannot be overlooked that the detention of the inmates is regarded to some extent in the nature of a punishment, with more or less of disgrace attached on that account. If the order committing a minor to the school is not a sentence but the substitute for a sentence, as claimed by the respondent, what is a substitute for a sentence but a sentence in and of itself? It is worthy of remark that the legislature has not undertaken to authorize the commitment of a minor to the industrial school upon the mere presentment of the grand jury.

In this case the relator, the natural guardian of his sons, has been deprived of their care, nurture, education and custody against his consent, and without any trial or hearing to which he was a party, upon the ground, and only ground, that the justice found there was just cause to require them to appear at the supreme court to answer further. If he is not a suitable person to have the care and education of his children, that fact has not been found, nor does it appear that their education has been neglected. But how far he is entitled to be heard upon that question we do not decide. We have only alluded to the matter as showing what consequences may flow from the unlawful commitment of a minor to this school. Where the commitment is lawful, the loss by the parent of his custody of his child follows as one of the incidents for which there is no remedy, and perhaps in many instances, because of his unfitness, there ought to be none.

It is further deserving of consideration, that the relator's sons, if indicted for the crime of which they were charged before the justice, cannot plead *autrefois convict*, although they may remain at the school the full term for which they were sentenced; and if their detention at the school is a punishment, they are liable to be punished twice for the same offense, in violation of the fundamental maxim, "*Nemo debet bis puniri*," etc. Broom Leg. Max. 348.

In coming to this conclusion we have not overlooked the decisions in other States. *Milwaukee Industrial School v. Supervisor Milwaukee County*, 40 Wis. 328; S. C., 22 Am. Rep. 702; *McLean County v. Humphreys*, 104 Ill. 378; *Petition of Ferris*, 103 id. 367; S. C., 42 Am. Rep. 10; *Roth v. House of Refuge*, 31 Md. 329; *Ex parte Crouse*, 4 Whart. (Penn.) 9. In those cases, the detention of abandoned, dependent or depraved children, in houses of refuge or in industrial or reform schools is upheld, upon the ground that the power of magistrates and county courts to commit, and of such institutions to detain such children is "of the same character of the jurisdiction exercised by the court of chancery over the persons and property of infants having foundation in the prerogative of the crown, flowing from its general power and duty as *paterfamilias* to protect those who have no other lawful protector, 2 Story Eq. Jur. 1338." SHELTON, J., in

Petition of Ferrier, supra. Or as stated in *Ex parte Crouse, supra*, "May not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patrie*, or common guardian of the community?" As to the soundness of the reasons given in these cases we have nothing to say. No one of them is an authority for the commitment of a minor charged with the commission of a crime to such an institution, without some kind of a trial and conviction.

People v. Turner, 55 Ill. 280; S. C., 8 Am. Rep. 645, was an application by the father for a writ of *habeas corpus* for the discharge from a reform school of his minor son. A statute of Illinois authorized the commitment to a reform school of children between six and sixteen years of age who are "vagrants or destitute of proper parental care, or are growing up in mendicancy, idleness or vice, to remain until reformed, or until the age of twenty-one years." The relator's son, committed to the school under this statute, was discharged, the commitment being held not to have been for any criminal offense, and the statute was declared unconstitutional. His confinement was held to be imprisonment without due process of law. THORNTON, J., said: "Such a restraint upon natural liberty is tyranny and oppression. . . . If a father confined or imprisoned his child for one year, the majesty of the law would frown upon the unnatural act, and every tender mother and kind father would rise up in arms against such monstrous inhumanity. Can the State, as *parens patrie*, exceed the power of the natural parent, except in punishing crime?"

In *Commonwealth v. Horregan*, 127 Mass. 450, it was held that certain statutes relating to juvenile offenders, so far as they purport to give inferior tribunals jurisdiction of offenses punishable by infamous punishment, are unconstitutional.

A statute of Ohio authorized the grand jury, where a minor under the age of sixteen years is charged with crime, and the charge appears to be supported by evidence sufficient to put the accused upon trial, instead of finding an indictment, to return to the court that the accused is a suitable person to be committed to the house of refuge, and directed the court thereupon to order his commitment without trial by jury. The statute was declared constitutional. *Prescott v. The State*, 19 Ohio St., 84; S. C., 2 Am. Rep. 388. The decision is put upon the ground that the case "is neither a criminal prosecution nor a proceeding according to the course of the common law, in which the right to a trial by jury is guaranteed. The proceeding is purely statutory, and the commitment, in cases like the present, is not designed as a punishment for crime, but to place minors of the description and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they are reformed, or arrive at the age of majority. The institution to which they are committed is a school, not a prison, nor is the character of their detention affected by the fact that it is also a place where juvenile convicts may be sent, who would otherwise be condemned to confinement in the common jail or penitentiary."

The statute further provided that in case the cause for the child's detention shall be inquired into by a proceeding in *habeas corpus* it shall be a sufficient return to the writ that he was committed to the guardianship of the directors of the school, and that the period for his discharge had not arrived. It is intimated in the opinion of the court that it is questionable whether this provision can operate to restrict the power of the court, invested by the Constitution with jurisdiction in *habeas corpus*, from inquiring fully into the cause of the detention of a person restrained of his liberty.

With due respect for the learned court which pronounced this opinion, we are not convinced of the soundness of its reasoning or conclusion. The proceedings by which the accused was adjudged a suitable person to be committed to the house of refuge were conducted in secret, without his knowledge or consent or that of his parent or guardian, with no opportunity to be represented by counsel, to be confronted with and cross-examine the witnesses for the prosecution, or to produce witnesses in his own behalf. The liberty of the minor during the term of his minority, which might be for a period of many years, was made to depend upon the deliberations of a secret tribunal. A judgment rendered upon such an

ex parte hearing is as little calculated to command the respect of the community as the proceedings of the ancient court of the star chamber. And so far as the other cases cited are like the Ohio case in legal effect, we cannot follow them.

Whether what has been called a trial in other jurisdictions in cases of this class is a trial within the meaning of our Constitution, and whether on any ground than that of a charge of crime, the legislature can authorize minors or persons of age to be committed to the industrial school without a trial by jury, if it were claimed, and without the consent of parent or other guardian, are questions on which we give no opinion.

Persons poor and standing in need of relief may and must be cared for by the overseers of the poor, and may be sent to the alms-house for support; but their detention cannot be regarded as involuntary. They are in no sense deprived of their liberty without the judgment of their peers or against the law of the land. They are neither criminals nor charged with the commission of crime, and this provision of the Constitution was not understood by its framers as restricting the power of the legislature to prescribe for the relief of the worthy poor. So children of profligate parents, or with vicious surroundings, may be taken from the custody of their natural guardians and committed to the guardianship of those who will properly care for their moral, intellectual and physical welfare. *Prime v. Foote*, ante, 52. But this is a power exercised by the State as *parens patriæ* in the welfare and interest of its citizens. 2 Story Eq. Jur., § 1333.

The common-law principle of reasonable necessity has an extensive constitutional operation — *Aldrich v. Wright*, 53 N. H. 398, 399, 400; *Haley v. Colcord*, 59 id. 7, 8; *Hopkins v. Dickson*, id. 235; *Johnson v. Perry*, 56 Vt. 703; *State v. Morgan*, 59 N. H. 322, 325 — and in many cases authorizes the restraint of an insane person — *Colby v. Jackson*, 12 N. H. 526; *Davis v. Merrill*, 47 id. 208; *O'Connor v. Bucklin*, 59 id. 589, 591; *Keleher v. Putnam*, 60 id. 30; *Hinchman v. Richie*, Bright. (Penn.) 143; *Fletcher v. Fletcher*, 1 E. & E. 420; *Buswell Insanity*, §§ 19-24 — even when he is committed to an asylum upon a defective process. *Shuttleworth's Case*, 9 A. & E. (N. S.) 651. But a magistrate's power to commit to the industrial school for detention during minority, every person, under the age of seventeen years, charged with, but not convicted of, an offense punishable with imprisonment otherwise than for life, on the ground of the "true interest and benefit" of the accused, does not come within any constitutional idea of reasonable necessity that has prevailed in this State. For his interest and benefit the magistrate might as well be authorized to send him to the State prison as to the industrial school, or any other penal institution.

We are of opinion that so much of section 14, chapter 287, Gen. Laws as authorizes a justice of the peace to commit to the industrial school a minor under the age of seventeen years upon a complaint charging him with the commission of a crime of which the justice has jurisdiction only to require him to recognize for his appearance at the supreme court, — on the motion of the State's attorney and without the consent of any person authorized to bind the minor by consent, — is in violation of article 15 of the Bill of Rights.

Exceptions overruled.

BLODGETT, J., did not sit; the others concurred.

LEVY v. WOODCOCK.

July 31, 1835.

REPLEVIN — THIRD PERSON DEFENDING — TITLE RESTING ON FRAUD.

A third person is not admitted to defend in an action of replevin when the only right he shows to the goods rests upon his own fraud.

Replevin for ten cases of merchandise. The plaintiffs are assignees of Clarence B. Frost under the insolvent laws of Massachusetts. The defendants were defaulted, and William A. Stone, being admitted by the court to defend, pleaded that the goods were not the property of the plaintiffs, but were his goods.

The plaintiffs' evidence tended to show that Stone and Frost obtained the goods by means of a fraudulent conspiracy, the plan of which was that Frost should

pretend to buy from Stone a large stock of old and shop-worn goods, which Stone had in a store at Clinton, Mass., and go to carrying on business then in his own name; that he should buy new goods in his own name and pay promptly for them until he established a credit sufficient for the purpose had in view; that then he should buy largely on credit in his own name, and then Stone should secretly remove the goods from the store for his own use without paying for them, and then Frost should fail and go into insolvency. All this business was to be entirely the business of Stone, though done in the name of Frost, and for his services and conduct in the matter Frost was to be paid by Stone \$12 a week and nothing more.

At the close of the plaintiffs' case the defendants moved for a nonsuit on the ground that there was no evidence of property in the goods in the plaintiffs. The motion was denied and the defendants excepted, and afterward consented to a verdict for the plaintiffs.

Lane & Dole, Batchelder & Faulkner, Henry W. King, for plaintiffs. Hersey & Abbott, F. A. Gaskill, for defendants.

SMITH, J. Third persons are not admitted to defend in a suit as a matter of right. They are only admitted to prevent an unjust diversion of property or some other wrong. *Reynolds v. Damrell*, 19 N. H. 894, 897; *Kimball v. Wellington*, 20 id. 439; *Clough v. Curtis*, 62 id. —. In *Reynolds v. Damrell*, the motion of a subsequent attaching creditor to quash the writ for defect in mere form was denied.

In *Kimball v. Wellington*, a subsequent attaching creditor was not allowed to fill a plea in abatement at the second term, although that was the first term he appeared.

In *Clough v. Curtis*, a subsequent attaching creditor was allowed to show by evidence *aliunde* that the writ was fraudulently altered after service.

In *Blaisdell v. Ladd*, 14 N. H. 129, the trustee was discharged on motion of a subsequent attaching creditor, because the trustee was also one of the plaintiffs.

In *Davis v. Fogg*, 58 N. H. 159, a claimant of funds in the hands of the trustee was not allowed to defeat the plaintiffs' prior right, his own title being shown to be invalid. In that case the appearance of a claimant, or of a subsequent attaching creditor to defend, was held to be an equitable proceeding, and that his right to resist the plaintiffs' suit is not conclusively established by the interlocutory order permitting him to appear and defend. It was said his right must remain open to question, so that when it appears he has no right to resist the suit: "he must retire from the field, which he is allowed to enter only for the purpose of showing that the right which he maintains is the right of the case."

As against the plaintiffs, Stone may have a technically legal title to the goods replevined. How that may be we do not decide, for the plaintiffs' rights, equitably considered, are superior.

The ground upon which Stone claims to hold the goods is, that Frost was his agent. But it was not an agency for the transaction of an honest mercantile business. Their ultimate and principal object, as disclosed by the evidence, was the perpetration of a fraud, not only upon the vendors of these goods, but upon as many other persons as they might be able to overreach. In the purchase of the goods Stone was not known, and it was not intended he should be. The goods were bought upon the sole credit of Frost and never paid for. It was never intended they should be paid for, or that Stone's credit should be pledged for them. In the sale of the goods the vendors understood they were dealing with Frost alone, and they gave credit to him alone, and both Frost and Stone intended they should so understand. As Stone never paid for the goods, and never intended to pay for them, and as his credit was never pledged for the goods and he never intended it should be, he is not entitled to the benefit of this equitable proceeding. He obtained possession of the goods, but it was in pursuance of a conspiracy entered into with Frost to cheat and defraud the vendors, and for which both might have been indicted. *Commonwealth v. Eastman*, 1 Cush. 189. The means he used to acquire possession were illegal and criminal.

The vendors of the goods had their election to treat the sale as valid and go against Frost or Stone for their price, or recover the goods because of the fraud.

Their election to treat the sale as valid, by proving their claims against the estate of Frost, is not a reason for extending relief to Stone in an equitable proceeding. They only accepted the position which both Stone and Frost intended they should take — that of creditors of Frost. The defendants have submitted to a default, and do not contest the plaintiff's right to recover the goods. The vendors interpose no objection to the appropriation of the proceeds of the goods for the benefit of all the creditors of Frost, themselves included. By proving their claims against his estate they invite that result. Justice does not require that Stone be admitted to divert this property from the honest creditors of Frost, when Stone has conspired with him to swindle. At the trial term the leave granted to Stone to appear and defend will be revoked and judgment will be rendered, on the default of the defendants, for the plaintiffs.

Case discharged.

CARPENTER, J., did sit; the others concurred.

SUPREME COURT OF PENNSYLVANIA.

In re ROAD IN BOROUGH OF PHOENIXVILLE.

March 2, 1885.

COUNTY — BOROUGH — OPENING STREETS AND ROADS — ACT OF MARCH 18, 1868 — ART. XII, § 8, CONST. OF 1838 — CONSTITUTIONAL LAW.

The purpose and effect of the act of March 18, 1868 — Pub. Laws, 352 — relating to the opening and straightening of roads and streets, was to transfer the burden of the damages therefor from the benefited property owners, in the boroughs wherein streets were opened or straightened, to the tax payers of the county at large.

The title to said act of 1868, being "An act relating to boroughs in the county of Chester"; and the purpose of the act, as above stated, — *Held*, that under article 12, section 8, of the Const. of 1838, which provides that "no bill shall be passed by the legislature containing more than one subject, which shall be clearly expressed in the title . . . " — said act was unconstitutional and void. The title not only failed to clearly express the purpose of the act, but was misleading.

Certiorari to quarter sessions of Chester county, bringing up the record in the matter of the opening of a road in the borough of Phoenixville. The commissioners of Chester county filed exceptions to the report of the jury of view, alleging that the act of March 18, 1868 — Pub. Laws, 352 — under which the said report was made, was unconstitutional, and that the proceedings not being in accordance with the previous legislation, were void. The court below dismissed the exceptions and the commissioners took this writ.

S. D. Ramsey & Thomas Butler, for plaintiffs in error. *H. H. Gilkysen*, contra.

STERRETT, J. It is conceded the validity of the proceeding in the court of quarter sessions depends on the constitutionality of the act entitled "An act relating to boroughs in the county of Chester," approved March 18, 1868. Pub. Laws, 352. If the act is constitutional the order complained of should be affirmed; if not, the entire proceedings are erroneous and must be set aside. The act in question consists of a single section, repealing the act of April 22, 1856, entitled "a supplement to the act regulating boroughs, approved April 8, 1851," and, also, the last proviso to the third article and the proviso to the fifth article of the twenty-seventh section of the last-mentioned act, so far as they relate to boroughs then incorporated or thereafter to be incorporated in the county of Chester; and then declaring that "like proceedings shall be had for the opening, widening and straightening of roads, streets, lanes, courts and alleys laid out and ordained in the said boroughs . . . and for the assessment and payment of damages sustained thereby as are provided by law for the laying out and opening, and the assessment and payment of damages sustained thereby, of public roads within the said county, outside of said boroughs."

The first section of the repealed supplement of April 22, 1856, provided for the

appointment of viewers to "assess and allow to all persons injured" by the opening, widening or extension of any street or alley in any of said boroughs, "such damages as they respectively shall have sustained over and above all advantages;" and also to "make assessments for contribution upon all such properties as shall be benefited by the opening, widening or extension of such streets and alleys, such sums respectively as they may have been benefited over and above all disadvantages." The second section required the viewers to describe in their report, "the respective properties assessed, whether for contribution or damages, and the amounts thereof respectively," and authorized the court to modify, approve and confirm said report, etc.—Pub. Laws, 525.

One of the repealed provisos prohibited the opening, for public use, of any such street, lane or alley until the damages, with interest from date of adjudication, shall be liquidated; the other required that all damages assessed beyond the value of the land appropriated to public use, shall be separately assessed and paid by the borough—Pub. Laws, 527.

Bearing in mind that damages incurred in laying out and opening public roads in the county, outside of the boroughs, are payable by the county, as provided in the eighth section of the general road law of 1836, it must be very evident that the design and effect of the special act of 1868 (*supra*), was to render the county liable for all damages occasioned by the opening, widening and straightening of roads, streets, etc., in the respective boroughs; in other words, to transfer the burden, whatever it might be, from the benefited property owners in the boroughs to the tax-payers of the county at large. The contention is that the last-mentioned act, under which the proceedings were had is void, in that it offends against article 12, section 8, of the Constitution of 1838, which declares: "No bill shall be passed by the legislature containing more than one subject, which shall be clearly expressed in the title, except appropriation bills."—Purd. 34, pl. 8.

The design and scope of this constitutional amendment, adopted in 1864, are readily understood when we consider the mischief it was intended to remedy. Prior to that date the vicious practice had obtained of incorporating in one bill a variety of distinct and independent subjects of legislation. The real purpose of the bill was often, and sometimes intentionally, disguised by a misleading title or covered by the all-comprehensive phrase, "and for other purposes," with which the title of many "*omnibus*" bills concluded. Members of the legislature, as well as the general public, were thus misled or kept in ignorance as to the true character of proposed legislation. To remedy this great and growing evil, the amendment in the first place prohibits the introduction of more than one subject in each bill. In determining the unity of the subject, regard must, of course, be had to the ultimate object to be attained. Details leading to the accomplishment of that object are cognate to the subject of legislation and, therefore, form a part thereof. The act under consideration is of that character and hence it does not offend against the prohibitory clause of the amendment.

But unity of subject is not enough. The mandatory clause of the amendment imperatively requires that the subject of proposed legislation, whatever it may be, shall be clearly expressed in the title of the bill. As the means of notice to representatives, as well as their constituents, the latter is quite as essential as the former. We are not called upon, however, to show the necessity or vindicate the wisdom of the constitutional requirement. It is enough for us to know that it is an express mandate of the organic law which the legislature ought to obey and courts are bound to enforce. While it may be difficult to formulate a rule by which to determine the extent to which the title of a bill must specialize its object, it may be safely assumed that the title must not only embrace the subject of proposed legislation, but also express the same so clearly and fully as to give notice of the legislative purpose to those who may be specially interested therein.

Unless it does this it is useless. While it has been repeatedly said the title of a bill need not be a complete index of its contents, it has never been doubted that the subject of proposed legislation must be so expressed in the title of the bill as to give notice of its purpose to members of the legislature and others specially

interested. *Com. v. Green*, 58 Penn. St. 283; *Dorsey's Appeal*, 72 id. 192; *Becket v. City of Allegheny*, 85 id. 191. In *Dorsey's Appeal*, *supra*, it is said: "The purpose of the amendment is to prevent a number of different and unconnected subjects from being gathered into one act, and thus to prevent unwise or injurious legislation by a combination of interests."

"Another purpose was to give information to the members or others interested by the title of the bill of the contemplated legislation, and thereby to prevent the passage of unknown and alien subjects which might be coiled up in the folds of the bill. The amendment was found necessary to correct the evils of unwise, improvident and corrupt legislation, and therefore is to receive an interpretation to effectuate its true purpose. It would not do to require the title to be a complete index to the contents of the bill, for this would make legislation too difficult and bring it into constant danger of being declared void. But, on the other hand, the title should be so certain as not to mislead. The language of the amendment is, 'one subject which shall be clearly expressed in the title.' To be 'clearly expressed' certainly does not mean something which is dubious and therefore not clearly expressed. If then the title seems to mean one thing, while the enactment as clearly refers to another, it cannot be said to be 'clearly expressed.'"

Speaking of the act under consideration in *Becket v. Allegheny City*, *supra*, our brother GORDON says: If it be true that the purpose of the constitutional amendment is "that members of the legislature and all others interested may have notice of the contemplated legislation in order that such as is secret and unwise may be discussed and prevented, then the act under consideration certainly comes within the prohibition and is of no effect as to all persons outside of the city of Allegheny."

The only case seemingly opposed to the views above expressed is *Blood v. Marcelliot*, 53 Penn. St. 391. The extreme limit of constitutional relaxation reached in that case is not likely to be again attained and certainly not exceeded.

In view of what has been said, we think the act in question is unconstitutional. While it perhaps conforms to the first clause of the amendment, it undoubtedly offends against the second in that the subject of legislation is not so clearly expressed in the title as to give any notice of the legislative purpose. That purpose, as we have seen, was to transfer the burden of street damages in the several boroughs of the county from the benefited property owners therein and impose the same on the tax payers of the county at large. No one reading the title of the act would for a moment suppose that such was the legislative intention. On the contrary he would, without hesitation, conclude that the operation of the act was restricted to boroughs, and that no property owner in the county outside the boroughs would be affected thereby. The title not only fails to give notice of the legislative purpose, but is actually misleading. The intention of the amendment was to require that the real purpose of a bill should not be disguised or covered by language calculated to mislead.

Conceding that it requires a clear case to justify us in declaring an act unconstitutional on the ground that it offends against the amendment above quoted, we think the one before us is of that character.

Proceedings reversed and set aside.

CARROLL v. BURNS.

March 23, 1885.

WILL — RULE IN SHELLEY'S CASE.

A testatrix, by her will, devised certain real estate to her daughters during their natural lives and after their death then to their lawful issue and the heirs and assigns of such issue. *Held*, that the devise was within the operation of the rule in Shelley's case and vested an estate tail in the daughters, which estate, under the act of April 27, 1855, was converted into a fee-simple.*

Error to the court of common pleas No. 1, of Philadelphia county. This was a case stated, in which T. J. Carroll was plaintiff and Mary Burns defendant, and

* Boone Real Prop. (Pony Series), § 180; 39 Am. Rep. 684.

from which it appeared that Jane Brooks, a widow, died seized of a certain premises in Philadelphia, which she devised by the following clause in her will:

"All the rest, residue and remainder of my estate, real and personal, I devise and bequeath unto my three daughters, to have and to hold to them during their natural lives, and after their death then to the lawful issue of my said three daughters and the heirs and assigns of such issue."

Two of the daughters conveyed their respective shares, in fee, to the third (Mrs. Antrim), and by sundry conveyances the title of this third daughter, thus acquired, became vested in the plaintiff. The plaintiff, by contract in writing, agreed to sell the premises to the defendant for \$500 cash and \$500 on ground rent, otherwise clear of incumbrance. The defendant refused to accept the deed, which the plaintiff subsequently tendered, on the ground that Mrs. Antrim's title, afterward vested in the plaintiff, was not a marketable title in fee.

Judgment was to be entered for plaintiff, for the amount of the purchase-money, if the court held that Mrs. Antrim took a good title in fee; but otherwise for defendant. The court entered judgment for defendant on the case stated, and the plaintiff took a writ of error to the supreme court, upon which, April 9, 1884, said court entered the following opinion:

"We have no doubt that the testatrix meant children when she used the word 'issue.' Considering the whole paragraph in which it is used, we cannot arrive at any other conclusion. The clear intent of the testatrix was to give to each of her daughters a life estate only, and on their death to give to their children and their heirs the estate in fee. The language used was, therefore, a word of purchase. Hence they took the remainder as purchasers, and not by descent. *Robins v. Quinliven*, 79 Penn. St. 333, rules this case. This rule of property is too well settled in Pennsylvania to admit of its being disturbed. Judgment affirmed."

Subsequently a re-argument was granted.

Joseph F. Gross, for plaintiff in error. *Hampton L. Carson, Wm. A. Redding and J. Levering Jones*, for defendant in error.

TRUNKY, J. The only case relied on by the defendant to sustain the judgment of the court below is *Robins v. Quinliven*, 79 Penn. St. 333. There the question arose upon a devise by the testator to his daughter, "for and during her natural life, and after her death to her issue and their heirs forever, in the proportions to which they would be entitled under the intestate laws of Pennsylvania, respectively." The clear opinion of Justice WILLIAMS places the judgment on the true ground, namely: "The gift of the remainder is not to the issue alone, but to the issue and their heirs forever, in the proportions to which they would be entitled under the intestate laws of Pennsylvania respectively; that is to say, in equal shares as tenants in common. The limitation to the heirs general of the issue, with the superadded words of distributive modification, clearly shows that by 'issue' the testator meant children, and intended that they should take the remainder as purchasers and not as heirs by descent." He then refers to the settled rule, citing some of the authorities, that where there is a devise to one for life, with remainder to his issue as tenants in common, with a limitation to the heirs general of the issue, the issue take as purchasers. There is no sign that had the devise omitted the words of distributive modification, the word "issue" would have been construed to mean children.

In the defendant's argument, it was suggested that the terms of that devise introduced no real distributive modification, but contained merely "an accurate periphrasis of the word 'heirs.'" Were this so, the fact would remain that the devise was construed to contain a distributive modification, in words equivalent to a provision that the issue and their heirs should take in equal shares as tenants in common. That construction was the basis of the decision. If erroneous, the mistake was of fact, not of law. But there was no mistake. The common-law rule relating to inheritance was materially changed by the statute which defines the persons who shall inherit the lands of intestates, and the proportions which they shall take. The devise of the remainder to the issue in the statutory proportions was conclusive that the testator used "issue" for children.

In this case, the testatrix devised the real estate to her three daughters, to have

and to hold to them during their natural lives, and after their death then to the lawful issue of her said three daughters and the heirs and assigns of such issue. The rule is unquestioned that *prima facie* in a will, the word "issue" means "heirs of the body," and will be construed as a word of limitation, unless there be explanatory words showing it was used in a restricted sense. It is urged that the word "such," with the form of expression where used, is sufficient to show that by "issue" the testatrix meant children. There is no other explanatory word. What difference is there between a devise to A. for life, and then to the issue of A. and the heirs and assigns of such issue, and a devise to A. for life, and then to A.'s issue and their heirs and assigns? Precisely the same persons are meant by issue in each phrase, and the word has the same power in one as the other. Each form expresses the same thing. If the word "children" were put instead of "issue," each phrase would then express the same meaning, and the children after their ancestor's death would take in fee as purchasers. The clause in the will where "such" is used, is the equivalent for "issue and their heirs." Technical words, or words of a definite meaning, must be construed according to their legal or definite effect, unless from other inconsistent words in the will, it be clear that they are used in some other definite sense. Applying the legal rules of interpretation the intentment of this devise is plain.

A long current of decisions in England and in this Commonwealth has established and continued in force a rule as follows: "When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases the heirs are words of limitation of the estate, and not words of purchase."

The rule operates to give the ancestors an estate for life in the first instance, and by force of the devise to his heirs, general or special, the inheritance also, by conferring the remainder on him as the stock from which alone they can inherit, and the source from which alone inheritable blood can spring. *Hileman v. Bou-slaugh*, 13 Penn. St. 344. GIBSON, C. J., also said that the rule subverts a particular intention in, perhaps, every instance of its operation; but it is an intention which the law cannot indulge, being an intention to create an inalienable estate tail in the first donee; and that the rule is too intimately connected with the doctrine of estates to be separated from it without breaking the ligaments of property.

Aside from the words of distributive modification, the devise in *Robins v. Quin-liven* would have been within the operation of the rule, and, therefore, that case does not determine this in favor of the defendant. Perhaps the testatrix intended to give a life estate to her daughters, and the remainder in fee to their children; but she has used words which definitely vest in her daughters an estate tail, and the courts are not at liberty to wrest them, so that they may mean any thing else. She has used apt words to create a particular estate in certain persons, and it ought not to be arbitrarily ruled that she intended some other thing than that expressed.

Judgment reversed, and judgment is now entered for the plaintiff, sum to be liquidated by the prothonotary of the common pleas.

MERCUR, C. J., and GORDON and STERRETT, JJ., dissent. They think the language of the testatrix so clearly shows she meant children, and not heirs generally, that the rule in *Shelley's case* does not apply.

NEAFIE v. PATTERSON.

April 13, 1885.

REPLEVIN — REPAIRS OF VESSELS — LIEN THEREFOR WHILE IN REPAIRER'S POSSESSION — TRANSFER OF POSSESSION OBTAINED BY ARTIFICE.

Where one, who has a lien on a boat for repairs, is induced by artifice and deceit to deliver possession of the same to the owner, upon the latter's promise to give forthwith a specified security therefor, and the owner afterward refuses the security, such delivery is not absolute and the repairer can maintain replevin for the boat.

In an action of replevin by A. against B. & C., plaintiff's evidence was to the following effect; B. & C., owners of a tug-boat, sent her to A.'s works for repairs and promised to give him notes with good indorsers in payment therefor. When the work was partly fin-

ished C. told A. that the indorsers could not be procured but that there was nothing against the boat except A.'s claim, and that B. & C. would give a mortgage on her to secure the notes. This A. agreed to and completed the repairs; C. then paid him \$500, and asked for the boat, which A. refused to deliver until a settlement. Afterward C. brought the notes and promised A. that as soon as the mortgage was drawn B. & C. would execute it, and meantime he asked for possession of the boat. Relying upon this promise A. gave him possession of the boat and took the notes. Subsequently B. denied C.'s authority to promise the mortgage and it was never executed nor was the boat returned. The court upon this evidence granted a compulsory nonsuit. *Held*, that this was error. The evidence warranted a finding by the jury of an intention to deceive and cheat A. It did not show an absolute delivery of the boat, but simply a delivery on condition that if B. & C. refused the security, they would retain the boat. Replevin would, therefore, lie.

Error in common pleas, No. 2, of Philadelphia county. This was an action of replevin by Neafie & Levy against Robert Patterson and Joseph G. Patterson, his son, trading as Patterson & Son, — to recover possession of a certain tug-boat, belonging to defendants, but upon which plaintiffs claimed a lien for repairs. The court below refused to submit plaintiffs' evidence to the jury and granted compulsory nonsuit against them, whereupon they took this writ. The facts as appearing from said evidence are set out in the opinion of the court.

J. Wurren Coulston, for plaintiffs in error. *Henry R. Edmunds*, for defendants in error.

TRUNKEY, J. That the plaintiffs had a lien on the boat for the value of the repairs is not denied. Nor is there dispute respecting the fact that the defendants took possession with the plaintiffs' consent. The plaintiffs allege that their consent was procured by artifice, and the possession was given upon condition that the defendants would execute a mortgage to secure the notes, and upon the refusal to execute the mortgage, they had right to immediate return of the property. Was this allegation sustained by the proof? For the present, what the witnesses testified must be taken as true, with every inference of fact in favor of the plaintiffs which the jury would have been warranted in finding.

At the outset the plaintiffs were induced to undertake the extensive and costly repairs by the defendants' promise to give notes with good indorsers. Payment in money was not to be made on completion of the repairs. After the work had progressed sometime, one of the defendants, Joseph Patterson, told the plaintiffs that they could not give the indorsers, that the boat did not owe a dollar except to the plaintiffs, and they agreed that the notes should be secured by a mortgage of the boat instead of indorsers. After the work was done, said Joseph paid \$500, and was informed by the plaintiffs that the boat could not leave the dock until settled for. In a few days he went again with notes already signed, ascertained and filled in the amounts and wanted possession of the boat; but the plaintiffs still insisted on the mortgage. He remarked that he "did not want the boat to lay around the shop while the mortgage was being drawn and executed, which would take some days. . . . You let me have the boat so that she can go to work and have the mortgage sent down to our office and we will execute it." After some further assurances on his part that the mortgage would be properly executed, the plaintiffs agreed he might take the boat. The mortgage was properly prepared and sent to the defendants' office, and Robert Patterson denied the authority of his son to promise a mortgage; would not give it because other parties had a mortgage on the boat, and refused to take back the notes or give up the receipt or return the boat. He repudiated nothing his son had done save the promise to give the mortgage. In fact, a large mortgage was on the boat at the time said Joseph represented it to be clear. This, if not pertinent for other purposes, shows the intent of the defendants. It was a false pretense to induce the making of expensive repairs on the security of the boat alone, and proper to be considered with other acts of the defendants.

It is clear that Robert Patterson had no more right to retain possession of the boat than his son, if the latter, by artifice and falsehood, got permission to take it on condition that the mortgage would be executed as soon as prepared and sent to their office. If the son had no authority to make the representation and promise, the defendants had no right to hold the possession obtained by means thereof. If they conspired to do the act, their claim is equally bad. The evidence would

warrant a finding by the jury of something more than an intention to get the boat on a promise to pay for the repairs, an intent to deceive and cheat the plaintiffs. And also the jury might infer from the evidence that the plaintiffs did not intend an absolute delivery, but one on condition that if the defendants refused the security they would return the boat.

In case of sale of personal property if the vendor rely on the promise of the vendee to pay and deliver the property absolutely, the right of the property is changed, though not paid for. But if the vendor did not rely on the promise to pay, but relied on receiving payment as soon as the last delivery was made, agreeably to contract, after delivery in default of payment, he could maintain replevin. *Henderson v. Lauck*, 21 Penn. St. 359. There the vendor sold a quantity of corn to be paid for on delivery at the vendee's mill. The corn was delivered on the 19th, 20th and 28th days of March, and thrown in a pile with other corn, the vendee taking a receipt for each load as delivered. When the last load was delivered, the vendor went to the residence of the vendee for the payment, but finding him sick and unable to attend to business, returned to the mill and notified the miller that he would reclaim the corn. After the vendee's death, the administrator refusing to permit the vendor to take away the corn, he recovered in replevin. Though the delivery was complete, the circumstances showed it was upon the condition of payment to be made as soon as complete, and that there was no intent on the part of the vendor to deliver absolutely and rely on the vendee's promise to pay.

This action concerns the parties to the transaction, and so far as appears no third person will be affected by the result. The plaintiffs promptly called for the execution of the mortgage, which the defendants refused, and refused to take back the unsecured notes and place the plaintiffs in the position they were at and immediately before the time they consented to the taking of the boat from the dock. Surely the defendants were not injured by the delay in bringing suit, the delay did not prevent them from returning the boat or complying with the terms on which they took it, and there was no such delay as defeats the plaintiffs' right. We are of opinion the evidence should have been submitted.

Judgment reversed, and *procedendo* awarded.

NEOLING v. ARNOT.

May 29, 1885.

EXEMPTION — CLAIM OF, BY DEBTOR — REFUSAL OF CONSTABLE TO ALLOW CLAIM — LEVY AND SALE — TRESPASS.

An officer who seizes property of a defendant under a lawful execution and refuses to permit him to have the benefit of the Exemption Act of 1849 — such defendant being entitled to the exemption, and having made demand becomes a trespasser *ab initio*.

An officer has no authority to sell goods which the debtor is entitled to retain under said act, unless the debtor waives his right or neglects to demand it.

A waiver of this right by the debtor is valid without consideration other than the debt itself; but mere silence on his part and a refusal to renew a demand once made, cannot be construed as a waiver of his claim.

Error to common pleas of Chester county.

Trespass, by Wm. Arnot against Boynton Neoling, a constable, to recover damages for a levy made by Neoling on Arnot's personal property and a refusal to allow the latter's claim for exemption.

On March 11, 1884, an execution was issued on a certain judgment against Arnot, and put in Neoling's hands; whereupon he went to Arnot's premises and levied on his mare and harness, taking them away the same day. The evidence showed that Arnot at this time demanded of the constable the reservation to himself of \$300 worth of property under the Exemption Act of 1849, but after some controversy as to the proper way of making the demand and of appointing appraisers, the constable took the property in spite of Arnot's demand, and advertised a sale thereof for March 24, 1884. The constable testified that he went again to Arnot the day before the sale, with witnesses, and after stating that there had been some misunderstanding, asked him if he claimed his exemption, but that Arnot declined to talk more about it.

Meantime, on March 18, 1884, Arnot brought his action of trespass. In his third, fourth and fifth points the defendant asked the court to charge that the plaintiff had no cause of action on the day suit was brought. This the court refused. Verdict for plaintiff and judgment thereon; whereupon the defendant took this writ.

McEnally & McCurdy, for plaintiff in error. *Wallace Brothers*, for defendant in error.

TRUNKY, J. It is settled by the verdict that at the time of the seizure of the property, Arnot demanded of the constable his right under the statute exempting property to the value of \$300 from levy and sale. In utter disregard of the demand the constable sold the property. An officer who seizes property of the defendant under a lawful execution, and refuses to permit him to have the benefit of the Exemption Act of 1849, such defendant being entitled to the exemption, and having made demand, becomes liable as a trespasser *ab initio*. *Wilson v. Ellis*, 28 Penn. St. 238. When a sheriff makes a lawful levy and sells the goods without giving the requisite notice, he is regarded as a trespasser from the beginning; in such case he has no authority to sell. *Carrier v. Esbaugh*, 70 Penn. St. 239. Nor has a constable or sheriff any authority to sell goods which the debtor is entitled to retain under the Exemption Act, unless the debtor has waived his right or neglects to make request for an appraisalment. If the levy was lawful, by abuse of the authority conferred by the writ, in the denial of the debtor's right of exemption, the officer puts himself in the same situation as though he had acted without authority. It follows that the defendant must be regarded as having committed the trespass on the day he seized the property and the plaintiff requested the benefit of the exemption, and therefore the plaintiff had a right of action on the 13th day of March, 1884. The defendant's third, fourth and fifth points were rightly refused.

We shall express no opinion upon the subject of the seventh and eighth assignments of error, for that was no part of the instructions to the jury. On the contrary, they were instructed that it was the right of the constable when he received the execution to promptly levy on Arnot's property, take it into possession even if Arnot was entitled to the benefit of the exemption law and made the demand, and to hold it a reasonable time to consider and perform his duty after he had made the levy. No question is raised in this record whether such instruction was correct.

The officer charged with the execution of any warrant for the levying upon and selling the property of a debtor shall, if requested by the debtor, summon three persons to appraise the property which said debtor may elect to retain, and the property thus chosen and retained, to the value of \$300, shall be exempt from levy and sale on said warrant. Unless so requested, the officer is not required to summon appraisers, and may levy and sell regardless of the debtor's right of exemption. The debtor may lose his right by neglect as well as by express waiver. And, if he made the request, he may withdraw it within the life of the writ and suffer the property to be sold in satisfaction of the debt. No consideration is required to support his waiver of the right at the time he contracts the debt, or his withdrawal of a request for an appraisalment, other than the existence of the debt he owes. Hence it was error to say to the jury that the debtor, having distinctly made his claim to the officer, "cannot afterward be deprived of it unless he waives it in consideration of some benefit received by him in lieu of it."* If that could have been hurtful to the defendant, the cause must go back for another trial. The evidence was ample to warrant the finding that Arnot demanded the exemption at the time of the levy. After the beginning of this suit, and the day before the sale, the defendant took some pains, not to summon appraisers, but to get witnesses to an interview between Arnot and himself; but, under the circumstances, Arnot declined to talk. The defendant states the interview thus: "I told him there was some misunderstanding, as I did not understand that he claimed the benefit of the exemption law, and that I was there to know if he wanted to have the benefit of

* Fourth assignment of error.

that law before I went on with the sale; he would not give me any reply; I told him I had witnesses to his action on this occasion. Q. He gave you no reply? A. No reply." From that there can be no legitimate inference of a waiver or of a withdrawal of a previous request. There being no evidence of such waiver or withdrawal, the erroneous remark set out in the fourth assignment is not cause for reversal. A request had been made, a suit was pending for its refusal, and waiver or withdrawal cannot be justly inferred from the fact that the plaintiff would have no more talk about it with the defendant.

The rulings complained of in the assignments, not specially mentioned, are clearly right.

Judgment affirmed.

MARYLAND COURT OF APPEALS.

PATTERSON v. WILSON.

June 25, 1885.

WILL—EXECUTION OF POWER.

A person taking under the execution of a power created by will does not derive his title from the donee, but from the donor, under the authority of the instrument creating the power.

The intention to execute a power must appear by a reference in the instrument to it, or to the subject of it, or from the fact that the instrument would be inoperative without the aid of the power. Accordingly *held*, where the testatrix, after certain specific bequests, described all the other property disposed of as "all the rest, residue and remainder of my estate, real, personal and mixed, wheresoever situated and to which I am in any manner whatsoever entitled," that it was not an execution of a power, it appearing that the testatrix had other property of her own to which the language used could have referred.

W. Hall Harris, Richard F. Kimball and E. Calvin Williams, for appellants.
William H. Brune, Jr., for appellees.

YELLOTT, J. The bill of complaint in this cause was filed in the circuit court of Baltimore city by the appellees, who are the surviving trustees under the last wills and testaments of James Wilson, deceased, and of Mary Wilson, deceased, who were husband and wife. The said James departed this life in 1851, and his widow in 1869, each having made and executed a testamentary disposition of property. These proceedings were instituted by the trustees for the purpose of obtaining directions from the court in relation to the transfer of certain property and estate left by said decedents to their daughter Mary L. Patterson, and for a judicial construction of certain clauses in the last will and testament of said Mary L. Patterson, the trustees holding said property in trust for the said Mary L. Patterson during her life, and in the event of her intestacy, then in trust for her issue in conformity with the following clause in the will of said James Wilson, and a similar provision in the will of said Mary Wilson. The clause in the will of the said James now referred to reads as follows:

"It is my will and desire that each of my said children including my daughters, whether single or married, shall have power by last will and testament, or instrument of writing in the nature of a last will and testament, whether the same shall be made in my life-time or after my decease, and although such child may die before me, to dispose of absolutely or in any manner he or she may think proper, all the property, real, personal or mixed, bequeathed or devised immediately or by way of remainder, to or in trust for him or her by this, my will, or which may come or pass to him or her under or by virtue of any of the clauses or provisions of this, my will, and such property shall pass and be distributed in all respects according to the will, or instrument in the nature of a will, of such child. None of my said daughters are to have the power of disposing of the property left in trust for them respectively, except by will as aforesaid."

In the will of Mary Wilson certain property is devised and bequeathed to the said Mary L. Patterson with the same limitations and powers.

By the last wills and testaments of her said parents it is also provided that if the said Mary L. Patterson should die intestate as to the property left in trust for her, the share or shares of such of her issue as may be under the disability of infancy shall remain and continue in trust until the son or sons shall arrive at the age of twenty-one years and the daughter or daughters at the age of eighteen, at which time their respective shares shall be payable, and the trust shall cease and close as to them respectively.

On the 12th day of August, 1884, the said Mary L. Patterson departed this life, leaving a last will and testament and children and grandchildren, one of her children having died leaving an infant surviving her, the said Mary L. Patterson. All the children and grandchildren are parties to these proceedings.

In the bill of complaint it is distinctly and explicitly averred that the said Mary L. Patterson, at the time of her death, had, besides that held in trust for her as aforesaid, other property, both real and personal, which she held in her own right absolutely and in fee-simple, and there has been no adduction of proof tending to show that there was no other property upon which her will could operate except that subject to the power created by the wills of James and Mary Wilson.

The said Mary L. Patterson in her last will and testament, duly admitted to probate, after certain specific bequests of articles of personal property, describes all the other property thus disposed of as "all the rest, residue and remainder of my estate, real, personal and mixed, wheresoever situated and to which I am in any manner whatsoever entitled."

In the court below it was decided that as the will of Mary L. Patterson did not, either in express terms or by necessary implication, indicate an intention to execute the power created by the wills of James and Mary Wilson, the property held in trust as aforesaid must be held and distributed in conformity with the provisions contained in their wills, to which reference has already been made. Whether there was a sufficient indication of an intent to execute the power created as aforesaid is, therefore, the sole question presented for determination by this appeal. Upon an inspection of the will of Mary L. Patterson it at-once becomes apparent that there is not the slightest reference made to the power created by the wills antecedently executed by her parents. It has, however, been decided that the donee of a power may execute it without referring to it and without taking any notice of it, provided the intention to execute the power really appears. *Smith v. Adkins*, 41 L. J. Ch. 628; *Doe, d. Smith, v. Bird*, 5 B. & Ad. 695; *Sugden Powers*, 378. But a person taking under the execution of a power does not derive his title from the donee, but from the donor, under the authority of the instrument creating the power. *Bradish v. Gibbs*, 3 Johns. Ch. 523.

If, therefore, there is no express reference to the instrument creating the power it is apparent that there should be some special reference to the subject on which it is to operate, or some circumstance leading to the conclusion that its execution was intended. Thus, in *Doe, d. Caldecott, v. Johnson*, 7 Man. & Grang. 1047, where it appeared that a testator, holding property for life with a power to devise or convey, had in general terms devised and bequeathed all his real and personal estates, it was held that the will was not a good execution of the power, because it contained no reference to the power, or to the property on which it was to operate, or to any thing from which it could be inferred that the testator, in framing the will, had the power in his contemplation. And there being no evidence adduced by either party at the trial as to whether the testator had or had not any other real estate upon which his devise could operate, it was further held that the *onus probandi* vested upon him who claimed under the will as an effective execution of the power, and that it lay upon him to establish the negative proposition that the testator possessed no such property.

It has long been the settled doctrine in England that where the power is not referred to the property subject to its operation must be mentioned, so as to indicate that the disposition was intended to affect it, or, in other words, the donee must do such an act as to show that he has in view the thing of which he has the power to dispose. When this question has arisen in the construction of wills it seems to have been firmly settled that a mere general devise or bequest, however unlimited in terms, will not comprehend the subject of the power unless it refer

to the subject or to the power itself, or unless an intent to execute it becomes apparent from circumstances tending to such a conclusion. *Lowson v. Lowson*, 3 Bro. C. C. 272; *Molton v. Hutchinson*, 1 Atk. 558; *Hales v. Margerum*, 3 Ves. Jr. 299.

In 3 Ves. Jr. 301 Lord ALVANLEY distinctly stated the true rule to be that "in the execution of a power there must be a direct reference to it or a clear reference to the subject or something upon the face of the will, or, independent of it, some circumstances which show that the testator could not have made that disposition without having intended to comprehend the subject of the power."

In recognition of this doctrine Chancellor KENT says that "in the case of wills it has been repeatedly declared, and is now the settled rule, that in respect to the execution of a power there must be a reference to the subject of it, or to the power itself, unless it be in a case in which the will would be inoperative without the aid of the power, and the intention to execute the power became clear and manifest." 4 Kent Com., marg. p. 384.

This court has recognized and adopted the rule as settled in England and as so clearly and concisely stated by the eminent jurist just mentioned. *Michael v. Michael*, 18 Md. 241; *Md. Mut. Ben. So. of Red Men v. Clendinen, Admr.*, 44 id. 429; *Foss v. Scarf*, 55 id. 309.

In the case in 55 Md. it is said that "the intention to execute the power must appear by a reference in the instrument to the power, or to the subject of it, or from the fact that the instrument would be inoperative without the aid of the power." In the will of Mary L. Patterson there is no reference to the power, nor to the subject on which it was to operate; and as it is averred, in the bill of complaint, and nowhere denied, that she had other property, her will would not be inoperative without the aid of the power. There was, therefore, no error in the ruling of the circuit court, and its decree should be affirmed. But as the appellants desired and invoked a judicial construction of the will in question the costs should be paid out of the funds in their hands as trustees.

Decree affirmed.

STATE, USE OF WILSON, v. McCARTY.

July 22, 1886.

APPEAL—CODE, ART. 5, § 44—TRANSCRIPT OF RECORDS—JURISDICTION—ORPHANS' COURT.

Under the Code the essential condition upon which the circuit court is empowered to entertain an appeal from the orphans' court is the mutual assent of the parties expressed in writing and filed with the register.

Under the statute providing that the orphans' court shall, upon an appeal being taken, direct a transcript of the proceedings to be transmitted to the circuit court, it is not indispensable to the jurisdiction of the circuit court that an absolutely full transcript of every thing transpiring or submitted in evidence before the orphans' court should be before it. Jurisdiction attaches to the circuit court when the appeal is entered into by agreement, in writing, and filed with the register, and a copy of the paper presenting the issue between the parties is transmitted.

D. J. Blackiston, James E. Ellegood and Wm. Brace, for appellant. *A. Beall McKaig*, for appellee.

RITCHIE, J. The petition of Sarah Wilson, the equitable plaintiff in the present suit, which was filed in the orphans' court of Allegany county, charged that she had not received from the executors of her father's, Edward McCarty's, will, the amount justly distributable to her; that they had passed sundry accounts, but had failed to render a true and full account of their administration, and that a large amount of debts were still due the estate, and a large amount of personal chattels were unaccounted for; and prayed that the surviving executor, James McCarty, be required to make a full and particular account of the administration in order that a true and correct distribution might be made, and for further relief. The surviving executor was cited to answer the petition and show cause why it should not be granted; and in his answer he averred that he had passed a final account in September, 1866, by which it appears he had overpaid the estate; denied that there are large debts due the estate and a large amount of chattels belonging to the estate unaccounted for; insisted that the estate had been fully

closed by the passage and approval by the court of his ninth administration account, and denied the jurisdiction of the orphans' court to require him to answer the petition or to require from him any further account of the estate whatever.

The case having been heard on bill and answer, the court on the 18th of June, 1880, dismissed the petition for want of jurisdiction. From this order an appeal was taken to this court, which decided the orphans' court had jurisdiction to entertain the petition, and upon that ground reversed that court's order and remanded the cause. *Wilson v. McCarty*, 55 Md. 277.

The orphans' court, in pursuance of that decision, exercised its jurisdiction, and after the answer of respondent and replication of petitioner were filed, the testimony of both sides was taken, and the court on the 13th of September, 1881, ordered a reopening and correction of the administration accounts from the fifth to the ninth inclusive and the stating of a tenth account whereby in conformity with the directions of the court the sum of \$556.39 was adjudged to be due to the said Sarah Wilson.

From this order or decree, there was an appeal taken by both parties, under an agreement in writing, to the circuit court for Allegany county or (to which being a controverted point) an appeal in the nature of a reference to Hon. GEORGE A. PEARRE, one of the judges thereof, personally. After a full hearing of the matter, in which both parties participated, the said judge rendered his opinion and filed the following order:

"It is thereupon ordered this 1st day of September, 1882, by the circuit court for Allegany county, that the order of the orphans' court for Allegany county, passed in this cause on the 13th day of September, 1881, be and the same is hereby reversed, and that the petition of Sarah Wilson be and the same is hereby dismissed, with the costs to the respondent, to be taxed by the clerk of this court."

Thereupon the respondent moved the orphans' court to pass an order and decree, based upon said order or judgment passed by Judge PEARRE, and the other proceedings previously had, dismissing the petition of Sarah Wilson with costs to said James McCarty, to be taxed by the register. But the orphans' court refused said motion, on the ground of the rendering of said judgment in the circuit court, and "there being no order by the appellate court for further proceedings in this court," and directed "that each party pay their own costs in this court."

From this order refusing his motion, respondent appealed to this court (No. 3, special docket, April term, 1884, unreported). This court affirmed the order upon the ground that the judgment of the circuit court, if valid, was a final disposition of the case; and if a nullity, was of no binding force.

The present case while standing on the docket, pending the appeal to the circuit court, and having been in the court of appeals on a judgment of *non pros.* in the lower court for failure of plaintiff to give security for costs at a certain term (which judgment was reversed in 60 Md. 873), was after Judge PEARRE's decision, actively prosecuted under amended nar. filed November 18, 1884, regardless of the action of said judge. The breach of the bond on which recovery is sought is the failure of the surviving executor to pay to said Sarah Wilson the said sum of \$556.39, adjudged to be due her on the final or tenth administration account as ordered to be stated by the orphans' court, as aforesaid, and which order had been reversed by the circuit court, or the determination of Judge PEARRE, as we have recited.

The defense taken, which was sustained by the court below, and which presents the question for our present consideration, is set forth in the ninth, tenth, eleventh pleas of the defendant, the demurrers of the plaintiff thereto, and the replications of plaintiff and demurrers of defendant to the replications.

The ninth plea avers (as does also the eleventh, while presenting other matter besides), after reciting the proceedings in the orphans' court, and that it was held by said orphans' court that the defendant should account for and pay over to said Sarah Wilson the sum of \$556.39, that "whereupon the said Sarah Wilson and this defendant both appealed to the court of appeals of Maryland from said order, ordering this defendant to account for and pay over to said Sarah Wilson said sum, and that it was afterward mutually agreed between the said Wilson and this defendant (which agreement was in writing, and was filed with the register

of wills of Allegany county) that said appeal should be taken to the circuit court for Allegany county instead of the said court of appeals, and the same should be heard by the Hon. GEORGE A. PEARRE, one of the judges of the circuit court for Allegany county, at his discretion, upon five days' notice of the time of hearing being given to the parties to said cause or their solicitors. And it was further agreed that no copy of the papers in said cause need be made by the register of wills, but that all the original papers, books, entries and of record in said orphans' court, or used as evidence or otherwise on the trial of the said cause in the said orphans' court, could be used at the hearing of said cause before said circuit court, reserving all other objections to their admissibility, and that they should have the same force and effect as if a regular transcript thereof had been made and sent to the circuit court by the register of wills, as in such case made and provided, and thereby waiving all objections as to the manner and time of sending up said cause to the said circuit court, and that the decision of said circuit court upon said appeal should have all the force and efficacy in law and equity as if the same had been regularly transmitted to the said circuit court upon a regular transcript of the record, in accordance with the act of assembly in such case made and provided; that afterward a duly certified transcript of the said petition, the answer of this defendant thereto, and the replication of the petitioner to said answer, was made out and sent up by said register of wills, to said circuit court, and filed therein; and afterward such proceedings were had, after full and proper notice to the solicitors of the parties to said cause, and after a full hearing of said appeal upon the said records, books, entries and other evidences before the said orphans' court, and the arguments of the said solicitors, by the said Hon. GEORGE A. PEARRE, one of the said judges of the said circuit court for Allegany county at the July term, 1882, thereof, it was afterward, to-wit, on the 9th day of October, 1882, by the said circuit court for Allegany county, adjudged that the judgment of the said orphans' court be reversed with costs to the defendant, James McCarty, surviving executor of Edward McCarty, deceased, and petition dismissed, and that said judgment was rendered in the same cause of action mentioned in plaintiff's amended declaration, and is still a subsisting judgment."

The tenth plea after setting out the proceedings in the orphans court and the said agreement, avers that said Hon. GEORGE A. PEARRE was empowered as an arbitrator of the differences and matters of dispute, and that by his award, the order of the orphans' court was reversed, and the petition of said Sarah Wilson dismissed with costs to the defendant.

The plaintiff's demurrers, and replications demurred to by defendant, go to the validity of the judgment of the circuit court pronounced by Judge PEARRE because no transcript of the proceedings was ever transmitted to said circuit court, and it was consequently without jurisdiction to pronounce the judgment; and that under the agreement, Judge PEARRE was not authorized to act as an arbitrator, and exceeded the authority alleged to be vested in him as said arbitrator, and the matters and things submitted to him were not the same matters and things in controversy in this case. As this case is before us, as to the demurrers, on the sufficiency of the facts alleged in the said pleas to constitute a bar to the action, the first question is, assuming the decision pronounced by Judge PEARRE to have been the judgment of the circuit court, had that court on the appeal and agreement entered into by the parties jurisdiction to determine the matter, notwithstanding a transcript of the original books, papers, entries, etc., used in the orphans' court in evidence was not transmitted, but was by the agreement themselves to be used, and were used as if a regular transcript of the same had been furnished, while a transcript of the petition, answer and replication, which presented the issues between the parties, had been sent up.

An appeal may be taken from the orphans' court to the circuit court under the Code, art. 5, § 44, which provides: "If upon an appeal being entered in the orphans' court the parties shall mutually agree and enter their assent, in writing, to be filed by the register of wills, that the appeal shall be made to the circuit court for the county, or superior court for Baltimore, the orphans' court shall direct the transcript of the proceedings to be transmitted to the circuit court or superior court for Baltimore, whose decision shall be final."

The essential condition upon which the circuit court is empowered to entertain an appeal from the orphans' court is the mutual assent of the parties expressed, in writing, and filed with the register. Such an agreement was made and filed in this case. The statute next provides that the orphans' court shall direct a transcript of the proceedings to be transmitted; but we do not deem it indispensable to the jurisdiction of the circuit court that an absolutely full transcript of every thing transpiring, or submitted in evidence before the orphans' court, must, in all cases, be made out. Jurisdiction clearly attaches to the circuit court when the appeal is entered into by agreement, in writing, and filed with the register, and a copy of the paper presenting the issue between the parties is transmitted. In this case a transcript of the petition, answer and replication was sent up; and we think it competent for the parties, when the orphans' court and the circuit court do not object, to agree to use the original evidence, or such parts as they need, instead of incurring the perhaps needless expense of having every thing copied. And, therefore, if the circuit court passes upon the transcript before it, and upon the original evidence submitted by consent of both parties, its determination cannot afterward be impeached at least by either of the parties to the agreement, because every thing was not embraced in the transcript. At most such a transcript could only be regarded as an irregularity, or an imperfection in the record that would not impair the validity of the judgment.

If, in the other aspect of the case, the appeal was taken in the nature of a reference to Judge PEARRE, personally, as an arbitrator, it is clear that the matter submitted was the identical matter in dispute in this case, namely, the right to recover because of the non-payment by James McCarty, as surviving executor of Edward McCarty, the sum of \$556.39, adjudged to be due Sarah Wilson on the statement of the tenth account of his administration. That his award was clothed in the form of a judicial order will not destroy its efficacy under the decision of this court in *Strite v. Reiff*, 55 Md. 92.

The rulings of the circuit court in this case are sustained, and its judgment will be affirmed.

Judgment affirmed.

Chief Judge ALVEY dissents on the point of jurisdiction of the circuit court to try the case on the original papers, deeming a full transcript necessary.

LOVE v. DILLEY. EDWARDS v. LOVE.

July 22, 1885.

EVIDENCE — DESTRUCTION OF PAPER SHOWING INDEBTEDNESS — ADMINISTRATOR — WITNESS.

D. upon the death of his father, took possession of all of his papers, including several notes held by the deceased against D., and he afterward retained possession of the same as administrator of his estate. It appeared that some of the most important of the papers showing D.'s indebtedness had disappeared in a manner not satisfactorily explained. In an action to charge him with his indebtedness to the estate, D., as a witness, identified certain notes produced and shown to him by his own counsel, and testified that they were notes made by him, and payable to the deceased, and that he paid them at maturity. Exception was taken to this evidence in so far as it proved the witness had paid the notes. *Held*, that the exception was well taken; that the notes, standing alone, implied an indebtedness of the witness to the deceased, and it was not competent, under the Evidence Act, for him to overthrow this presumption by his own testimony; that the fact that the notes were in his possession had no tendency, of itself, to show that he had paid them, inasmuch as his own unpaid notes would naturally come into his possession after the death of his intestate.

When it appears that a party has suppressed or destroyed evidence of his indebtedness to the deceased, such indebtedness may be established by testimony which, under ordinary circumstances, would be regarded as too vague and indefinite. In such case a presumption arises that if the truth had appeared it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance, and accordingly slight evidence of the contents of the instrument destroyed will usually, in such a case, be sufficient.

I. H. Gordon and *Wm. Walsh*, for appellants. *Wm. M. Price*, for Edwards and wife. *Benj. A. Richmond*, for Barney Dilley. *A. Hunter Boyd*, for Everitt heirs.

BRYAN, J. This is the second appeal in this case. The questions now before us

relate to the advancements made by Joseph Dilley to Barney Dilley, Mr. and Mrs. Edwards and Mr. and Mrs. Everitt. The deceased in his life-time made large advancements to his children, and carefully preserved the evidences of their several amounts. At the time of his death most of them were in a trunk which was kept in his bedroom. Some of the most important of the papers, which were kept in this trunk, have disappeared in a manner which has not been satisfactorily explained. Mrs. Margaret Edwards (daughter of the deceased) testifies that she came to her father's house a few moments after his death; that Barney Dilley and his daughter Edith (now Mrs. Brace), the servant Young and Daniel R. Long were in the house, and that the key was in the trunk and the trunk was empty. She also says that she made inquiry of Barney Dilley about the books and papers, and that he said that his father never kept any valuable papers about the house. Testimony was given by Mrs. Brace that shortly before his death, her grandfather burnt some of the papers which were in the trunk, and gave her the remainder to put back in it, which she accordingly did; that she next saw the papers three days after his death in the top of the trunk where she had put them; and that in the presence of her father and of Benjamin Edwards, Miss Ida Everitt and Miss Hoblitzell, she put them in a satchel and delivered the satchel to her father and Edwards. We will see hereafter how these papers have been accounted for.

A great many exceptions were filed in the circuit court to the auditor's reports and to the evidence. We shall not consider them in detail: but shall examine the conclusions which they are intended to affect; that is, the amounts of the advancements which are in question before us.

It is shown very clearly that Joseph Dilley gave his children large sums of money and that he kept an account of these sums, with the intention that when his estate was distributed after his death, each of his children should be charged with the amount he had received, so that his property might be equally and impartially divided among them. He usually, perhaps always, took notes from them showing the amounts of his gifts. These notes he preserved carefully up to the time of his death. There is some evidence that he also kept an account or memorandum book showing the amounts given to his children, but the proof on the point is not very distinct. Of course if his notes and papers could be obtained, there could not be the least difficulty in ascertaining these different amounts, and in making a perfectly fair division of his property among his children. But as in some instances they have disappeared, we are, of necessity, obliged to rely upon the more uncertain and unsatisfactory evidence set forth in the record. It is morally impossible that our conclusions should be accurate. We at best can only hope to make an approximation to the true results. But the blame must rest on those who have destroyed or concealed the evidence which would remove all obscurity on the subject, and when from the want of this proof, we fall into errors, the loss will justly fall on those whose misconduct has destroyed the means of arriving at the truth. The circuit court decided that the advancements to Barney Dilley amounted to \$21,792.52. His father through a long series of years had been supplying him with money, and in the course of this time had taken from him a large number of notes. He was the administrator of his father's estate, and as such administrator it was his duty to take charge of these notes.

He states in his testimony that his father told him that he had received from him more than his share of the estate. Other witnesses testify that his father made the same statement to him on different occasions, and he did not question its correctness. Seiss testifies that he said he had given him over \$40,000. We suppose that the witness means that this statement was made to Barney; but it is not altogether certain that this is his meaning. Barney in his answer states that with the exception of a certain judgment confessed by him in favor of his father, he has no knowledge of any evidence of his father's intention to charge him with money advanced in any manner, and that his father helped him from time to time with small amounts of money when he was in need, but that he never had the slightest idea at any time that such assistance was intended in any other way than as a gratuity, and that he is unable to say, and that no evidence can be found as to what said amounts were in the aggregate, so far as he is concerned, any more than as to his other children; and he insists that it would be

"the worst kind of injustice" to construe as advancements the amounts which he had received; for the reason that it is impossible to tell what amounts had from time to time been given to his several children by the decedent, or what was his intention as to the manner in which the same should be received.

Appearing as a witness in his own behalf, Barney testifies to various sums of money received from his father, for many of which he states that he had given notes. He says that he has not been able to find any of the notes which he had given, except two; or any note given by Mr. and Mrs. Edwards; or any given by Dr. Everitt, except those which will hereafter be more particularly mentioned. From the items mentioned in his testimony, the auditor compiled a statement showing that the advancements made to him amounted to \$30,894.52. It is found on page 52 of the printed record. All the charges against him in this statement, we think, are correct except those which we proceed to mention. We think the amount advanced to go into business with Jesse Bell should be \$2,400 instead of \$2,500, as found by the auditor. We think that the evidence shows that the amount of \$2,500 charged as having been given to buy out White's interest is erroneous. This money was obtained on notes which were paid by Barney Dilley out of his own funds. The amount of \$2,000 charged September 18, 1871, evidently represented the same transaction charged under date of September 17, the same year; and the charge of \$1,000, August, 1869, is for an amount included in the charge of \$5,000, advanced to go into business with White. These different sums aggregate \$5,600, and when they are deducted from the statement of the auditor, they reduce the amount to \$25,294.52. But it is necessary to make some additions to this sum. In his answer to the sixty-seventh direct interrogatory Barney Dilley identifies a bundle of notes produced and shown to him by his own counsel, and states that they were accommodation notes payable to Joseph Dilley, signed by the witness and paid by him at maturity after they had been indorsed by Joseph Dilley and discounted in bank, and in his answer to the sixty-eighth interrogatory, he states in detail the time at which each note was paid. Written exceptions were filed to these answers in so far as they prove payment of these notes. This exception must be sustained under the decision of this court on the former appeal. The notes standing alone implied an indebtedness to Joseph Dilley, or money advanced by him, and it was not competent under the Evidence Act for the witness to overthrow this *prima facie* proof by his own testimony. The aggregate amounts are \$4,671.77. In his answer to the eighty-seventh interrogatory, Barney says that the amount of \$4,000 given to him by his father in a check, which was deposited in his name in the Queen City Savings Bank, was paid out by him for his father's benefit. A written exception was also filed to this answer, so far as it showed the disposition of the money. The exception must be sustained for the reason just stated in reference to the notes. All the notes, papers and checks left by the deceased were or ought to have been in the custody of the witness; and it was his duty to produce them for the purposes of this investigation. His own testimony is incompetent to repel any legal inference justly arising from them, under any circumstances embraced by the Evidence Act. The fact that the notes were in his possession has no tendency of itself to show that he had paid them. His own unpaid notes would naturally come into his possession after the death of his intestate, and his own qualification as administrator. The possession, therefore, is no distinctive indication of a difference between notes paid by him and those remaining unpaid. As unquestionably a number of notes of this last description have been suppressed by the witness, or some one acting in his interest, we should do far less than justice, if we did not require strict and distinct proof by competent evidence that the notes produced by the witness were paid by him in the life-time of the intestate, before we discharge him from accountability for them. The addition of these notes and the check, to the amount found by the auditor as above corrected, will give as the result \$33,966.29; and this is the amount of advancements chargeable to Barney Dilley.

The circuit court determined that the advancements to Edwards and wife consisted of the Forsythe farm, at \$1,500; the Union street house, at \$2,350; the Union street lot, at \$950; the note to Edwards and wife, for \$10,000; and \$1,000

in April, 1874, amounting to \$15,800. We think that to this amount should be added the checks of Joseph Dilley drawn to the order of Edwards, and cashed by the Second National Bank at different times from October, 1872, to May, 1873. These aggregate \$5,500, making the amount of advancements \$21,300; and we determine that this sum is to be charged to them. We do not think that there is any satisfactory proof that they gave two notes of \$10,000 each. Their testimony fixed the date of the note somewhere in 1878, and states that it represents all the advancements to them, and also that they never gave any other note. They were testifying on their own offer, and their evidence was incompetent under the former decision in this case. As it was excepted to, it must be ruled out of the case. The preponderance of testimony fixes the date of the note in 1873. These witnesses in their answers to the bill of complaint, in reference to the question of advancement, make similar statements to those made by Barney Dilley in his answer.

Mr. Seiss testifies that on one occasion Joseph Dilley showed him a number of Dr. Everitt's notes payable to Dilley, and requested him to look at the amount, and that he added up the amounts of the different notes, and found the sum to be more than \$24,000, without interest. He says the time was soon after the return of Everitt from Parkersville, where he had been building a barrel factory, and he thinks it was in 1868. He states that some time after this occurrence, at the request of Joseph Dilley, he wrote a note for \$7,000 payable to Dilley, which, in his presence, Everitt signed, and gave to him, and that this note was in substitution for two others which Dilley then had, and which he said he had paid to L. Philip Roman for Everitt. These notes were signed by Everitt, payable to Joseph Dilley, and indorsed by him. Seiss also testifies that on the day he counted the notes Joseph Dilley said to Everitt something to this effect: "Now you see what I have done, I have kept you ever since you were here, and until the Roman notes are paid, yet you will have more than your share amounts to." There is no question whatever that Joseph Dilley had furnished sums of money to Everitt at different times, and that he had taken his notes for the amounts. But the only notes produced in evidence in this case are ten, which are in the ordinary form, and two with powers of attorney attached authorizing confession of judgments. The largest of these notes is for \$2,500; and their total amounts are but little more than \$9,000. It is stated that these were not found in the trunk where Joseph Dilley kept his valuable papers; but in an old bureau drawer, in which it was supposed there were no papers of importance.

We regret that the evidence is not more certain and distinct; but it is our duty to do justice as far as it is attainable with the materials within our reach. No trace is found of the note for \$7,000, nor do the notes which have been produced in evidence amount to any thing near the sums which Joseph Dilley stated in Everitt's presence had been given to him. It is very certain that Joseph Dilley never changed his intention that the sums of money which he had given to his children should be charged to them in the distribution of his estate; and there is not the least reason to suppose that he destroyed any of the notes which he had required from his children. We must, therefore, adopt the calculation made by Mr. Seiss as furnishing the best means of reaching a just conclusion amid the obscurities and embarrassments of this case. The statement of the auditor on page 53 of the printed record is correct. He deducts from the amount stated by Seiss, the notes given by Everitt before his marriage, and the Everitt and Conkling note, and finds the advancements to be \$29,511. We think this amount should be charged to the Everitt heirs.

This case is a very peculiar one. The notes which have been suppressed are chargeable to Barney Dilley, Edwards and wife and the Everitt heirs; while those chargeable to the other heirs of Joseph Dilley have been produced in evidence, and charged to them. Barney Dilley and Edwards took possession of Joseph Dilley's notes shortly after his death in the presence of Miss Edith Dilley and Miss Ida Everitt. It would be simply a denial of justice, if we should require the other heirs to prove with exactness and particularity the amounts and dates of the suppressed notes. The necessity of the case compels a reliance upon testimony which, under ordinary circumstances, would be regarded as too vague and

indefinite. The law has sometimes been laid down with great severity against those who wrongfully destroy evidence. We may quote a passage or two from Broom's Legal Maxims, page 843: "An account of personal estate having been decreed in equity, the defendant charged the plaintiff with a debt as due to the estate. It was proved that the defendant had wrongfully opened a bundle of papers relating to the account, which had been sealed up and left in his hands. It further appeared that he had altered and displaced the papers, and that it could not be known what papers might have been abstracted. The court, upon proof of these facts, disallowed defendant's whole demand against the plaintiff, although the lord chancellor declared himself satisfied, as indeed the defendant swore, that all the papers intrusted to the defendant had been produced; the ground of this decision being that, *in aelium spoliatoris omnia præsumentur*." Page 845: "If a person is proved to have defaced or destroyed any written instrument, a presumption arises, that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance, and, accordingly, slight evidence of the contents of the instrument will usually, in such a case, be sufficient." In dealing with the difficulties in this case, we have endeavored to draw from the competent evidence in the record only such conclusions as seemed to us legitimate and reasonable.

We have not considered any of the declarations of Joseph Dilley, except such as were made in the presence of the parties to be affected by them, and even as against them we have not relied upon the declarations as fixing the exact amounts to be charged. They showed undoubtedly that large sums had been advanced, but we have sought information as to amounts and details from other evidence. As to the testimony of Acklan Dilley we may say that he is supported in many particulars by other witnesses. Where he has been unsupported, we have not been willing to found any conclusion upon his evidence. As the circuit court seems to have permitted Barney Dilley and Edwards to retain in their hands the moneys which at one time they were ordered to bring into court, we do not think they should be charged with interest.

The result of our opinion is that the order ratifying the auditor's report and the accounts must be reversed and the cause remanded, with directions to state accounts in accordance with this opinion. There must be new accounts, but no further testimony can be taken. The costs in this court must be paid out of the estate.

Order reversed and cause remanded.

SUPREME COURT OF NEW HAMPSHIRE.

PARKER v. ROBERTS.

June, 1885.

ESTOPPEL—JUDGMENT BY DEFAULT FOR PRICE—SUBSEQUENT ACTION FOR BREACH OF WARRANTY.

A judgment rendered upon default for the price of goods sold, the amount thereof being fixed by agreement, is not a bar to an action by the purchaser for a breach of warranty of the quality of the goods. (*See note, p. 702.*)

Assumpsit on a warranty of a steam engine. The defendants, in a brief statement, pleaded a judgment recovered by them in Massachusetts, in 1884, against the plaintiffs, upon default, and an agreement as to the amount of damages, in a suit to recover the price of the engine, in which suit these plaintiffs, before submitting to a default, appeared and filed an answer in which they alleged the same breach of warranty of the engine, relied on here, and claimed to recoup the damages suffered by them on that account. The court ruled that the Massachusetts judgment is not a bar to this suit, and the defendants excepted.

The evidence tended to show that Young, the member of the plaintiffs' firm who bargained for the engine with the defendants in Boston, was not a practical

machinist and never run an engine, and it did not appear that he had any acquaintance with the mechanism or operating of steam engines. The defendants requested the following instructions: If the jury find that the engine was defective, and that the defects were not apparent to a person without some skill in the matter of engines and machinery of that nature, and further that Mr. Young had sufficient skill to see such defects and opportunity to examine the engine, and did examine it, and that the defendants did not practice any concealment or deceit in reference to such defects, the plaintiffs cannot recover. These instructions were refused and the defendants excepted.

The court instructed the jury that if Young had an opportunity to examine the engine and did examine it, and the defects complained of in this suit were apparent on simple inspection, and requiring no skill to discover them, the plaintiffs cannot recover because they were not misled by the defendant's representations. If the finding of the jury is against the defendants on this point, then the question is, whether there has been a breach of the defendants' warranty. If the engine was not what the defendants warranted it to be, the plaintiffs can recover, with instructions as to damages to which no exception was taken. The jury returned a verdict for the plaintiffs for \$397.91, being the difference in the value of the engine as warranted and the value of the engine delivered, and the matter of interest was not considered by them.

Burleigh & Adams, for defendants. *John L. Foster, O. Ray, Brigham, Mitchells, Bachellor*, for plaintiffs.

CARPENTER, J. The former judgment is not a bar. *Bascom v. Manning*, 52 N. H. 132. That case does not differ from this, except in the immaterial circumstance that here, the damages were fixed by agreement. A default admits all the material allegations of the writ except the amount of damages, which are assessed by the court, unless for special reasons an inquiry by the jury is ordered. *Huntress v. Effingham*, 17 N. H. 584; *Toppan's Petition*, 24 id. 43; *Manchester's Petition*, 28 id. 296; *Willson v. Willson*, 25 id. 229; *Bowman v. Noyes*, 12 id. 307; *West v. Whitney*, 26 id. 314; *Chase v. Lovering*, 27 id. 295. The law and practice are substantially the same in Massachusetts. *Jarvis v. Blanchard*, 6 Mass. 4; *Storer v. White*, 7 id. 448; *Folger v. Fields*, 12 Cush. 93; Colb. Prac. 225. Judgment for the plaintiff for nominal damages at least, follows a default as of course.

After the plaintiffs in the action against them in Massachusetts were defaulted, no question except the amount of damages remained open. To fix that amount was the only purpose of the agreement and its only effect. The operation of the judgment is the same as if the damages had been assessed by the court or by the jury. If the matter alleged in the answer was competent to be considered in the assessment of damages, the plaintiffs were not obliged to present it, and if not presented nor considered, it would not be barred by the judgment. *Seddon v. Tutop*, 6 T. R. 607.

There is no evidence that it was taken into consideration by the parties in settling the amount of damages by their agreement. It rests upon the party setting up a judgment as an estoppel to show that the matter in question was adjudicated by it.

It is unnecessary to determine whether the instructions requested by the defendants were abstractly correct or not. They were properly refused because the case did not call for them. There was no evidence that Young had any acquaintance with, or skill in relation to, engines and machinery of the kind in question.

Interest from the date of the writ may be added to the amount of the verdict.

Exceptions overruled.

SMITH, J., did not sit; the others concurred.

NOTE.—See *Moak's Van Santv.* Pl. 673; 24 Alb. L. J. 344; *Bigelow Estoppel* (3d ed.), 121, for an elaborate discussion of the question. *Neil v. Tolman*, 7 Pac. Rep. 103.

Where, in defense to an action to recover the purchase-price of two plows, the defendant pleaded that they were worthless and broke with ordinary and careful use, and were returned by him under the contract, it was held that the judgment in such action was a bar to a subsequent action in tort to recover damages for the breaking of the plows before their return by the defendant. *Newby v. Caldwell*, 64 Iowa, 102.

A judgment for the plaintiffs in an action for the price of machines manufactured for the defendants, under a contract, whereby the plaintiffs covenanted to construct the machines in a

certain manner and to do a certain work — when the complaint alleged a delivery to and acceptance by the defendants under the contract, and the answer alleged that the plaintiffs failed to perform, and that the defendants refused to accept the machines, because they failed to conform to the agreement — is a bar to any action by the defendants for a breach of the warranty contained in the agreement. *Bliss v. Locke*, 9 Daly, 526. In that case the court charged that if the defendants absolutely accepted defective machines, they must pay for them, and if the machines were accompanied by a warranty that they would accomplish a certain result, the remedy of the defendants was for a breach of that warranty. *Held* error.

To sustain a plea of a former judgment in bar, it must appear that the cause of action in both suits is the same, or that some fact essential to the maintenance of the second suit was in issue in the first action and was decided adversely to plaintiff.

The bare fact that two causes of action spring out of the same contract does not *ipso facto* render a judgment on one, a bar to a suit on the other.

Plaintiff brought an action to recover damages for an alleged wrongful dismissal from defendant's employment before the expiration of the stipulated term. *Held*, that the judgment thereon was not a bar to a subsequent action to recover wages earned during the time plaintiff was actually employed, and due and payable before the wrongful dismissal; that the two claims constitute separate and independent causes of actions upon which separate actions were maintainable. *Perry v. Dickerson*, 85 N. Y. 345; S. C., 39 Am. Rep. 668.

A judgment in justice's court in favor of a surgeon for professional services is a bar to any action by the defendant against him for malpractice in performing such services, and this is so, although the recovery in the justice's court was upon confession without trial, and although the surgeon's suit and judgment thereon, were interposed as a defense to it by supplemental answer.

While an action against a surgeon to recover damages for malpractice in setting an arm was at issue, he sued the plaintiff for the same professional services, the alleged unskillfulness and negligence in which constitute the malpractice complained of, and judgment was obtained before the justice by the surgeon without answer, upon a written consent to its entry. *Held*, that such judgment was a complete bar to the action for malpractice; and having been pleaded as such by supplemental answer, a demurrer thereto was properly overruled. *Gates v. Preston*, 41 N. Y. 118.

A physician sued for services, in a justice's court; the defendant answered, but withdrew his answer, and the plaintiff got judgment without contest. *Held* a bar to a subsequent action by the defendant against the physician for malpractice in rendering those services. *Blair v. Bartlett*, 75 N. Y. 150; S. C., 31 Am. Rep. 455. See, also, *Sailesbury v. Creswell*, 14 Hun, 460.

In *Deeves v. Lockhart*, 51 Super. Ct. 302, which was an action brought against a veterinary surgeon, to recover damages suffered by reason of his unskillfulness, etc., in the treatment of plaintiff's horse, the evidence showed, that before the action plaintiff had been sued by the defendant for said services, and had paid the amount of the claim prior to the return day of the summons, and plaintiff's counsel admitted that such payment was made without protest. On this the court directed a verdict for defendant. *Held* error; that such testimony and the admission at most were only matters of evidence to go to the jury on the question of the existence of defendant's negligence, and that neither the principles of "*res adjudicata*" nor estoppel have application in such a case.

The will of M. directed one-third of his residuary estate to be held in trust for his son A., during his life, the income, during his minority, to be added to the principal, and the income of the accumulated fund thereafter to be paid to him, the fund at his death to go to his issue, if any; if not, to other beneficiaries. A. brought an action against the executor and others interested, in which he asked judgment, declaring the trust void in its creation, and that plaintiff, as heir at law and next of kin, was lawful owner of the securities in which the share and the accumulations were invested, and directing the executor to assign and transfer to him "the money and securities in which the share had been invested and the accumulations thereof." Defendants, in their answer, averred the validity of the trust. The judgment therein held the trust to be valid, and that it was the duty of the executor to hold the trust fund upon the trust declared. In a subsequent action, brought by a judgment creditor of A. to reach the accumulations, on the ground that the trust, although otherwise valid, was as to the accumulations, void, and that they belonged absolutely to A. *Held*, that the relief sought was within the scope of the former action and might have been granted therein; that, therefore, the former judgment was a bar against the judgment creditors of A., as well as himself; and that it was available to a son of A., and his representatives, although he was not in *esse* when the judgment was rendered, as his subsequently accruing title was represented by the defendants in the former action, who were then presumptively entitled to the fund. *Pray v. Hegeman*, 98 N. Y. 351. The court said: "The general rule is well settled that the estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, are comprehended and involved in the thing expressly stated and decided, whether they were or were not actually litigated or considered. *Embury v. Conner*, 3 N. Y. 522; *Dunham v. Bower*, 77 id. 76. It is not necessary to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision is, for the purpose of the estoppel, deemed to have been actually decided. This is the principle upon which the malpractice cases, involving the right of a physician to recover for services, after a former judgment against him for negligence or want of skill in the employment for which compensation

is claimed, and conversely the right of the patient after judgment against him for services, to maintain a subsequent action for malpractice, were decided. *Gates v. Preston*, 41 N. Y. 118; *Blair v. Bartlett*, 75 id. 150; *Bellinger v. Craigie*, 81 Barb. 534. Conclusions of law or fact which necessarily flow from a judgment, although not expressly found, are not incidental or collateral so as to remove them from the scope of the estoppel within the qualification of the general rule stated by the judges in their opinion in the *Duchess of Kingston's case*, 11 St. Tr. 261. The cases where the qualification applies are well illustrated in *Campbell v. Consalus*, 2 N. Y. 618, and *Woodgate v. Fleet*, 44 id. 1."

A judgment for the price of goods sold is not inconsistent with a claim by the purchaser that they came again into the possession of the seller and were lost by the negligence of his agent, and is not, therefore, a bar to an action by the purchaser to recover back the amount paid therefor. *Purcell v. Jaycox*, 59 N. Y. 288.

A judgment in a former action to recover the first and second installments becoming due on a contract, in which the defendant set up the non-performance of the contract by the plaintiff and claimed damages for the breach, which were allowed him, is a bar to a recovery by the defendants for similar breaches of the contract, although alleged to have been committed at other times, in a subsequent action to recover the remaining installments. *De Wolf v. Crandall*, 34 N. Y. Supr. 14.

A judgment in favor of a carrier for the recovery of freight is, in effect, an adjudication that he has performed his contract for transportation except so far as his non-performance may be excusable, and is a bar to an action to recover damages for non-performance. *Dunham v. Bower*, 77 N. Y. 76; S. C., 88 Am. Rep. 570.

When a common carrier performs his contract to transport and deliver goods, a payment of the freight, or a submission to judgment therefor, does not prevent the owner from recovering damages for injury while *en route*; he may pay the freight and sue for damages or, refusing to pay, submit to suit, set up his damages by way of counter-claim, or bring a cross-action. *Schwinger v. Raymond*, 83 N. Y. 192; S. C., 88 Am. Rep. 415.

A contract to carry passengers and their baggage is separate and distinct from one to carry merchandise packed in boxes, for which extra freight is charged. One traveling both with baggage and such merchandise and having both destroyed in transit may bring an action for the value of either, though a former recovery has been had for the other. *Millard v. Missouri, K. & T. R. R. Co.*, 86 N. Y. 441.—Ed.

The recovery of commissions by a factor is no bar to an action for his breach of contract in selling at a price below his instructions. *Campbell v. Thompson*, 27 Hun, 541; S. C., 15 Week. Dig. 232.

JONES v. LANE.

June, 1885.

COSTS — GENERAL LAWS, CHAPTER 233 — TITLE TO REAL ESTATE NOT IN QUESTION.

Under Gen. Laws, chap. 233, § 5, the plaintiff cannot be allowed more costs than damages when the title to real estate is not in question and the damages recorded do not exceed \$13.33.

Trespass *qu. cl.* The title to real estate was not in question. Damages were assessed by the court at \$12. The defendant moved that the costs be limited to \$12, claiming it as matter of right. The court denied the motion, and the defendant excepted.

Burleigh & Kivel, for plaintiff. *Copeland & Edgerly*, for defendant.

BINGHAM, J. The costs should have been limited to the amount of the verdict or a less sum.

"In actions of trespass to real estate commenced in the supreme court, where the title to real estate is not in question, the court shall allow so much costs as they think just, not excluding the damages recovered in case they do not exceed \$13.33." Gen. Laws, chap. 233, § 5.

The construction given this statute is that when the damages in an action of trespass to real estate commenced in the supreme court are less than \$13.33, the court shall allow no more costs than damages. *Peavre v. Towne*, 57 N. H. 220; *Bachelor v. Green*, 38 id. 265; *Ward v. Bartlett*, 1 id. 14; *Brown v. Mathes*, 5 id. 229.

The title to real estate not being involved in this action, it comes within the statute.

Exceptions sustained.

ALLEN, J., did not sit; the others concurred.

CORLISS v. WORCESTER, NASHUA AND ROCHESTER RAILROAD.

June, 1885.

NEGLIGENCE—CAUSING DEATH—MEASURE OF DAMAGES.

The damages that an administrator can recover under chapter 35, section 1, Laws of 1879, are not necessarily nominal, and may be assessed by the jury.

The ordinary grounds of damage in such a case are the expense of board, nursing, medical aid, compensation for loss of time, physical and mental pain, including such sum as the jury think ought to be given for distress and anxiety of mind, in view of approaching death, while in imminent danger of the injury received, and to the close of life.

Case for causing the death of the plaintiff's intestate by carelessly running upon him with an engine and train of cars while crossing the defendant's track with a horse and wagon in the highway.

The court ruled that nominal damages only could be recovered, and the plaintiff excepted.

Henry B. Atherton, for plaintiff. *C. H. Burns* and *A. F. Stevens*, for defendant.

BINGHAM, J. The court ruled that only nominal damages could be recovered.

At common law the cause of action died with the decedent, but by chapter 35 of the Laws of 1879, it survives to his administratrix, and she may have damages assessed if the liability of the defendant is established. *Clark v. Manchester*, Hills, June term, 1883; *Needham v. Railroad*, 38 Vt. 294, 302.

The ordinary grounds of damages in such cases are the expense of board, nursing, medical aid, compensation for loss of time, physical and mental pain, including such sum as the jury think ought to be given on account of distress or anxiety of mind, experienced in view of approaching death, while in imminent danger of the injury received, and to the close of life.

Such damages are not necessarily nominal. What they should be depends upon the varying facts of each particular case, and are for the jury to assess, guided by the instructions of the court as to the law.

Exceptions sustained.

All concurred.

NOTE.—See *Moak's Underhill on Torts*, 79; *Digest Am. Rep.*, vol. 2, p. 218.

Damages for personal injury include every thing of which plaintiff has been deprived as a direct and natural consequence of the injury. *Huiega v. Outler, etc., Lumber Co.*, 51 Mich. 272.

The pecuniary loss which a party named in the statute is entitled to recover may consist of special damages, *i. e.*, of actual definite loss, and also of prospective general damages. The special damages being capable of proof and of measurement with approximate accuracy, to entitle plaintiff thereto, evidence must be given not only that the damages were sustained, but also showing their character and amount. As the prospective damages are incapable of accurate estimate the amount within the limit fixed by the statute is for the determination of the jury.

Such facts, however, as are naturally capable of proof, and which will give a basis for the judgment of the jury, *i. e.*, the age and sex, the general health and intelligence of the person killed, the situation and condition of the survivors and their relation to the deceased should be proved. *Houghtirk v. President, etc.*, 92 N. Y. 219.

It being the object of the law to fairly compensate the party injured for the entire loss directly caused by the injury, the pecuniary consequences resulting from his inability to give his business his attention will form a proper item of the remuneration to be made.

The extent of the recovery in an action for personal injuries occasioned by negligence cannot be measured by any precise rules, since it is to be awarded, to a great extent, for pain and suffering; and the amount is, therefore, committed to the determination of the jury. *Id.*

Where the evidence showed that the injuries sustained by the plaintiff through the negligence of the defendant were of an exceedingly painful, serious and permanent nature, some of the important effects of which would probably continue during his natural life, and might sensibly abridge it, and would measurably unfit him for his business; and the plaintiff was, in his early manhood, engaged in an extensive and lucrative practice of law, which was impaired by his inability to give it the attention which it required,—*Held*, that the court could not say that a verdict for \$20,000 was excessive. *Walker v. Erie Railway*, 63 Barb. 260.

Damages can be allowed, in an action for causing death by negligence, only upon proof of loss, and the recovery must be confined to the pecuniary loss sustained. *Mitchell v. N. Y. Cent. & H. R. R. Co.*, 2 Hun, 535.

In *Cornwall v. Mills*, 44 Super. 45, it was held that very slight evidence of pecuniary injury or loss is sufficient to warrant the submission of a case to the jury, who are thereupon to award "such damages as they shall deem a fair and just compensation therefor." If the jury is sat-

ified that pecuniary injury resulted from the death, they are at liberty (within the statutory limitation) to fix the compensation according to their sense of justice and right.

In an action against a wrong-doer, for an injury, the value of proper medical treatment, though the expense thereof be paid by another. If the expense of proper medical treatment be a part of the damages of the injured party, it can make no difference to the wrong-doer that some third person gratuitously paid the physician. *Klein v. Thompson*, 19 Ohio St. 569.

The rule is otherwise in case of an infant whose parent, or a wife whose husband, is bound to and does pay therefor, for the parent or husband may have a separate and independent action for the damages sustained by him, a portion of which would be such expenses. As the parent or the husband is entitled to recover them, if the child or the wife were allowed to do so they might be twice recovered. *Tuttle v. C. R., etc.*, 42 Iowa, 518; *Lindsey v. Danville*, 46 Vt. 144; *Hopkins v. Atlantic, etc.*, 36 N. H. 9; *Moody v. Osgood*, 50 Barb. 628; *Klein v. Jewett*, 26 N. J. Eq. 474; 27 id. 550.

In an action for damages resulting from personal injuries, a defendant is liable for the reasonable value of the medical attendance, care and nursing made necessary by the accident, though such services may, as between the plaintiff and the person rendering them, have been gratuitous. *Varnam v. City of Council Bluffs*, 52 Iowa, 698.

It has been held by the New York court of appeals that the expense of nursing, and of a physician, may be recovered by the party injured, but he can only recover so much as he paid, or was bound to pay, and that defendant may show plaintiff was doctored or nursed at a charity hospital at the public expense or gratuitously, in which case plaintiff could not recover for those items of damage. *Drinkwater v. Dinmore*, 80 N. Y. 390; S. C., 21 Alb. L. J. 453.

Where, in an action for negligence in causing death, the complaint averred "that the plaintiff was and will be compelled to pay \$100 for medical attendance, funeral and other expenses, caused by the death of his son,"—*Hild*, on a general demurrer, that the complaint did not state a cause of action; that a good cause of action for these expenses was stated in the above averment. If a party will be compelled to pay such expenses, it may be said that they have been incurred. *Roeder v. Ormsby*, 22 How. Pr. 270.

In an action against a railway company for personal injury to a passenger, the jury in assessing the damages may take into their consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he has sustained through his inability to continue a lucrative professional practice. *Philips v. London & S. W. Ry. Co.*, 30 Moak's Eng. Rep. 769; affirming S. C., 28 id. 844; 29 id. 177; *Secord v. St. Paul, etc., R. Co.*, 5 McCrary, 515; S. C., 18 Fed. Rep. 221; *Mackoy v. Missouri, etc., R. Co.*, id. 236; *Brignoli v. Chicago, etc., R. Co.*, 4 Daly, 182; *Metcalf v. Baker*, 57 N. Y. 662; *Matteson v. New York Cent.*, 62 Barb. 384; *Sheehan v. Edgar*, 58 N. Y. 631.

In an action for damages for personal injuries, plaintiff cannot recover for his own loss of time and capacity to labor, and in addition, what he has to pay another to supply that loss of labor. *Blackman v. Gardiner Bridge*, 75 Me. 214.

Plaintiff may testify as to the amount of his annual earnings for six or seven years prior to the accident. *Ehrgott v. Mayor, etc.*, 96 N. Y. 264, 276.

Funeral expenses are proper items to be considered in estimating damages. *Murphy v. New York, etc., R. Co.*, 88 N. Y. 445. The court said, p. 446: "Under a similar statute in England it has been held that funeral expenses cannot be recovered. *Dalton v. South East R. Co.*, 4 C. B. (N. S.) 298; *Boulter v. Webster*, 13 Weekly Rep. 289. But in this country, so far as I can discover, it has been uniformly held that the plaintiff can recover such expenses if the law imposes upon the relatives for whose benefit the suit is brought the obligation to bear them. *Penn. R. Co. v. Bantom*, 54 Penn. St. 495; *Owen v. Brockschmidt*, 54 Mo. 285; *Roeder v. Ormsby*, 22 How. Pr. 270."

STATE v. LEAVITT.

June, 1885.

CRIMINAL LAW — INDICTMENT — UNCERTAINTY.

An indictment which charges the sale of intoxicating liquor in language equally applicable to the offense discussed in General Laws, chapter 109, section 18, and that described in section 15 of the same chapter, is insufficient.

The indictment charged that the respondent, "not being the agent of any town, place or city for the purpose of selling intoxicating liquors, did sell one quart of intoxicating liquor to a certain person whose name is to the jurors aforesaid unknown."

The respondent moved to quash the indictment, because it does not sufficiently inform the respondent of the offense with which he is charged, and does not identify the offense so as to protect him from a subsequent prosecution for the same offense, or enable the court to render a proper judgment upon it.

Attorney-General and Leach, solicitor,* for State. A. F. L. Morris, Henry C. Robinson and Henry Gould, for defendant.

BINGHAM, J. General Laws, chapter 109, section 13, provides that if any person, not being an agent of a town for the purpose of selling spirits, sell or keep for sale any spirituous liquor, in any quantity, he shall be fined \$50, and for any subsequent offense he shall be fined \$100 or be imprisoned not exceeding ninety days or both."

Section 15 provides: "If any person, not being an agent of a town for the purpose of selling spirituous liquors, shall sell or keep on sale cider in less quantities than ten gallons, except when sold by the manufacturer at the press, or in an unfermented state, or lager beer or other malt liquors not included in the list of those already prohibited by law, in any quantity, such person shall be fined \$10, and for any subsequent offense \$50."

The crime and penalty of the thirteenth section are different from those in the fifteenth, and the indictment, not informing the respondent of which of the crimes he is charged, is bad for uncertainty. *State v. Messenger*, 58 N. H. 348. Neither does it show which of the two sections the respondent is accused of violating. *State v. Sherburne*, 58 N. H. 159; *State v. Naramore*, id. 278, 275; *State v. Adams*, 51 id. 568.

Indictment quashed.

SMITH, J., did not sit; the others concurred.

OSGOOD v. EATON.

June, 1885.

TRIAL — INSTRUCTION AS TO WHETHER TITLE PASSED — DELIVERY QUESTIONED.

When the question whether a deed was ever in fact delivered is pending it is not error for the court to decline to instruct the jury that the deed conveyed a title.

FRAUDULENT CONVEYANCE — EVIDENCE — VENDOR'S DECLARATION — GOOD FAITH.

When the vendor remained in possession of land conveyed, his declarations, showing under what claim he held possession, are admissible upon the good faith of the transaction.

WITNESS — LEADING QUESTION.

Whether facts exist upon which the law allows leading questions to be put to a witness by the party calling him, is a question of fact to be determined at the trial.

Writ of error. The plaintiff claimed the demanded premises under a deed from John B. Eaton to Elizabeth R. Eaton, dated January 2, 1878. The defendant claimed title under a deed from John B. Eaton to Abel E. Eaton, dated Sept. 10, 1877.

The conveyance from John B. to Elizabeth R. was made and accepted in part satisfaction of a decree for alimony entered in a proceeding for divorce by her against him in December, 1877, and at the time of its execution, he was in possession, claiming to be the owner of the land. There was no evidence that Abel E. Eaton ever entered or took possession of the land, or that the deed to him was ever delivered. At the time of its execution he lived in Oregon, and has ever since lived there, and he was not in New Hampshire at the time the deed was recorded. It was claimed by the plaintiff that this deed was a voluntary conveyance, invalid as against the grantees of Elizabeth R. Eaton, and also that the same was never delivered.

The defendant requested the court to charge the jury that the title of John B. Eaton to the premises passed to Abel E. Eaton, by the deed of Sept. 2, 1877. This request was refused, and the jury were instructed that if Abel E. Eaton, by the deed to him, took any title to the land, it did not pass by the deed of release to Elizabeth; if Abel E. Eaton took no title by his deed from John B. Eaton, by reason of no delivery, or because it was designed as a mere make-shift, the title was in John B. at the time of the deed of release, and passed by it to Elizabeth, and that among other evidence, the declarations of John B. Eaton at the time of the deed of release were evidence on the subject. The defendant excepted to the refusal of his request, and to that part of the instructions given making John B. Eaton's declarations evidence on the question of title in Abel E. from the deed of John B. to him.

In a deposition read by the plaintiff several interrogatories were objected to by the defendant as leading.

F. B. Osgood, Copeland & Edgerly, for plaintiff. — *Fife, E. A. Hubbard*, for defendant.

BINGHAM, J. The defendant requested the court to instruct the jury that the title of John B. Eaton to the premises passed to Abel E. Eaton in the deed to him, so John B. Eaton had no title January 2, 1878.

The plaintiff claimed, and the evidence tended to prove, that the deed to Abel E. was never delivered and that it was a make-shift of John B. to enable him to procure better terms from his wife, as to alimony, in her libel for divorce. These were questions of fact for the jury. The title did not pass if the deed was not delivered, and if made to defraud his wife, it might be void as to her, even if delivered. The request to charge was properly refused.

The court, subject to exception, charged the jury that the declarations of John B. Eaton, made at the time of the deed of release, were evidence on the question of fraud. The exception is, not that the question of fraud was submitted to the jury, nor that the defendant was an innocent purchaser, holding under Abel E. (this question does not appear to have been raised at the trial), but to the competency of the evidence on the issue on trial.

There was evidence that John B. was the equitable if not the legal owner of the land at the date of the release to his wife, and that he was in possession. The deed to Abel E. had been made, it is true, but John B. remained in possession and claimed to be in possession as owner. The question was whether the deed to Abel was without consideration, fraudulent and void as to the wife.

When a vendor remains in possession of the property after the conveyance, and it is claimed to be in fraud of creditors, his declarations as to the way he holds the possession are evidence on the trial of that issue. *Blake v. White*, 13 N. H. 267, 272, 273; *Merrill v. Gould*, 16 id. 347, 353, 354; *Babb v. Olemson*, 12 Serg. & Rawle, 328; *Eckert v. Wilson*, id. 398; *Wilbur v. Strickland*, 1 Rawle, 458; *Pomeroy v. Bailey*, 43 N. H. 125, 126.

The question whether the facts exist upon which the law allows leading questions to be put to a witness by the party calling him is a question of fact to be determined at the trial. *Hunt v. Haven*, 56 N. H. 88.

Judgment on the verdict.

ALLEN, J., did not sit; the others concurred.

ASHLAND SAVINGS BANK v. MEAD.

June, 1885.

ATTACHMENT — DOES NOT REACH LAND FRAUDULENTLY CONVEYED — INNOCENT PURCHASER — CONSTRUCTIVE NOTICE.

A general attachment of all a debtor's interest in real estate in a town does not hold land fraudulently conveyed by the debtor by a deed recorded before the attachment, and conveyed by his fraudulent grantee after the attachment, to an innocent purchaser for value.

Against the latter and subsequent purchasers from him such attachment is not constructive notice of a lien, or of *lis pendens*.

Writ of error to foreclose a mortgage. Facts agreed for the opinion of the court Aug. 22, 1876. David Blaisdell conveyed the premises to William G. Brown, and on the same day Brown conveyed them to Mary A. Blaisdell, the wife of David Blaisdell. The consideration named in each of these deeds was \$1,500, and they were duly recorded the day of their date. Apr. 26, 1880, Mary A. Blaisdell, for the consideration of \$2,500, by deed of warranty conveyed the premises to Sarah M. Perkins. This deed was recorded June 23, 1880. Mrs. Perkins purchased the premises in good faith, without knowledge of any adverse claims. July 23, 1881, the plaintiffs loaned Mrs. Perkins \$600, and took from her the mortgage in suit to secure the payment thereof, relying upon the records, which showed no defect in her title. Afterward, Mrs. Perkins conveyed her equity in the premises to the defendant Bond. At the time of the conveyance by David Blaisdell to Brown, Blaisdell was largely indebted to the defendant Mead, and Jan. 13, 1879, Mead caused an attachment of all his interest in real estate in Campton to be made, without describing any particular close or parcel, by leaving a copy of the writ

and return in the town clerk's office in the usual way. Judgment was obtained in this suit at the Oct. term, 1880, and Sept. 30, 1881, the demanded premises were set off on the execution taken out on that judgment. Mead claims title by virtue of that levy, on the ground that the conveyance of Blaisdell to his wife, through Brown, was fraudulent as to existing creditors.

Burleigh & Adams, for plaintiff. *Barnard & Barnard*, for defendants.

At a former term the court were inclined to the opinion that the plaintiffs were entitled to judgment, but the case was continued for further argument. The opinion drawn by Judge STANLEY was not announced till the present term.

STANLEY, J. Conceding that Mrs. Blaisdell's title was fraudulent, as against her husband's creditors, the plaintiffs, nevertheless, have a good title, unless the attachment under which Mead claims can be set up to defeat them. Mrs. Perkins, under whom they claim, was an innocent purchaser for value and took a good title, notwithstanding the fraudulent character of Mrs. Blaisdell's title, and the plaintiffs are innocent mortgagees, and they would have a good title even if the title of Mrs. Perkins was fraudulent. *Gordon v. Haywood*, 2 N. H. 402; *Fling v. Goodall*, 40 id. 208; *True v. Congdon*, 44 id. 48; *Piper v. Hilliard*, 52 id. 211; *Hoit v. Russell*, Ch., Aug., 1874, not reported; S. C., 56 N. H. 559, 564; *Fletcher v. Peck*, 6 Cranch, 87, 138; *Jackson v. Van Dalfsen*, 5 Johns. 48; *Jackson v. Henry*, 10 id. 185; *Jackson v. Terry*, 13 id. 471; *Jackson v. Walsh*, 14 id. 407; *Anderson v. Roberts*, 18 id. 515; *Ledyard v. Butler*, 9 Paige, 132; *Bump Fraud. Conv.* 496, 499; 1 Story Eq., §§ 409, 410; 4 Kent Com. 179.

But Mead claims that her title is superior to the plaintiffs', because it dates from an attachment made in 1879, before his wife's conveyance to Mrs. Perkins. The attachment was against David Blaisdell, the fraudulent grantor of his wife. David parted with his title August 26, 1876, on that day conveying it, so far as he could, to his wife through one Brown. These deeds were recorded on the day of their date. The attachment was general "of all David's interest in real estate in Campton," with no description of any particular parcel and nothing to indicate what real estate it was claimed David owned. The return suggested no attachment of this land or of the property of Mr. Blaisdell, in whom the record then showed the title of this land to be vested. The object of the statute requiring that, where real estate is attached, a copy of the writ and return shall be left with the town clerk, is the same as the statute requiring the registration of deeds to give notice to all of the true state of the title. If the record fails in this it fails to accomplish the object for which it is required to be made. To hold Mead's title superior to the plaintiffs' we must hold that when the attachment was attempted to be made, the title was in David, and that the leaving the copy of the writ with the town clerk was notice of an incumbrance upon the demanded premises. If David was to be regarded as the owner as between his attaching creditor and the fraudulent grantee, we come to the question whether leaving the copy of the writ with the return thereon created a valid lien upon the premises, as against subsequent innocent purchasers. If the premises had been particularly described, or described to such an extent, and in such a way, that an inspection of the return would have shown an intention to attach them, the question would be whether the plaintiffs could safely take the mortgage from an innocent purchaser for value without searching for attachments in suits against each one of the series of former owners in whom the record showed no real estate when the attachments were made.

If Mead prevails, it must be on the ground that the plaintiffs and Mrs. Perkins had constructive notice of Mead's attachment. When the attachment was made, David had no title of record to this land. He had parted with it long before, by a conveyance which, as to everybody but his creditors, was valid, and his grantee could convey it absolutely and effectually to an innocent purchaser. There was nothing in the record of attachments to indicate that the estate of which Mrs. Blaisdell held the title was attached, and nothing calling on the plaintiffs to make inquiry. The fact that David's interest in real estate was attached would not suggest the inquiry whether his wife's prior title was good, or her right to convey perfect; whether David was owing the debt which Mead's action was brought to recover, at the time when he conveyed to his wife, or whether the purpose of

that conveyance was fraudulent. If the plaintiffs were put upon this inquiry there would be no limit to which it might not be extended, certainly not within the period within which the statute of limitations would not be a bar. How can a record which raises no doubt and suggests no inquiry be considered evidence to put a party upon inquiry and charge him with constructive notice. Having no knowledge of the fraudulent character of David's conveyance, the grantee of his wife was only bound, as against the attachment, to find out whether upon the records the wife's title appeared to be valid, Mrs. Perkins and her grantees were not bound to look for a general attachment of all David's real estate in the town, made after the registry showed this land had ceased to be his.

These views do not conflict with the rule that a general attachment of all the debtor's real estate in a town, without other description, is sufficient against some persons, and that such an attachment is good against a fraudulent grantee of the debtor, because the conveyance is not valid against the attaching creditor. Cases like *Howard v. Daniels*, 2 N. H. 137; *Moore v. Kidder*, 55 id. 488; *Taylor v. Minter*, 11 Pick. 341; *Crosby v. Allyn*, 5 Me. 453, and *Pratt v. Wheeler*, 6 Gray, 520, in which the land was attached by the creditor before it was conveyed by the debtor, or before the conveyance was recorded, or in which the contention was between two attaching creditors of the same debtor, or in which an attachment and levy were set up against the fraudulent grantee, or one having no more than his defeasible estate, are not in point. As against the fraudulent and voidable title of Mrs. Blaisdell, and of any one standing in her position, Mead could take the land on execution without an attachment. But the attachment of David's estate, either alone or in connection with the registry of deeds, did not give Mrs. Perkins or the plaintiffs notice of a lien on land which was shown not to be David's by the record on which Mrs. Perkins and the plaintiffs had a right to rely. A fraudulent grantee, holding only a voidable title, may convey an indefeasible estate to an innocent purchaser. While the record of the attachment was security for the creditor against a subsequent conveyance by the debtor, the record of the prior conveyance to the fraudulent purchaser, whose title appeared to be good, was security for Mrs. Perkins, the innocent purchaser, acquiring title through that deed. *Gillig v. Maas*, 28 N. Y. 191, 209; *Westbrook v. Gleason*, 79 id. 23, 31; *Tarbell v. West*, 86 id. 280, 288; *Tiedman Real Property*, § 817.

Mrs. Perkins and the plaintiff having no notice, actual or constructive, of an attachment, or of any defect in Mrs. Blaisdell's title, cannot be defrauded by the creditor's omission to reinforce the attachment by an injunction against Mrs. Blaisdell's exercising the power vested in her by the record evidence of the prior deed of conveying a good title to an innocent purchaser.

The land was not the subject-matter of Mead's suit; and the records were not constructive notice to Mrs. Perkins or the plaintiffs of *lis pendens*.

Judgment for the plaintiffs.

BLODGETT, J., did not sit; the others concurred.

MURPHY v. BANCK.

July 21, 1885.

MORTGAGE — FORECLOSURE — TIME GIVEN FOR REDEMPTION.

In a decree from the plaintiff on a bill for the redemption of land from a mortgage, a year from the date of the decree is the time ordinarily given for redemption.

Bill in equity to redeem land from a mortgage.

A. F. L. Norris and Brigham & Mitchell, for plaintiff. S. C. Eastman, for defendant.

ALLEN, J. By agreement of the parties there is to be a decree for the plaintiff, and the question is, what shall be the time of redemption, at the expiration of which, without payment of the debt, the mortgage will be foreclosed. 4 Kent Com. 136; Jones Mort. 1108, 1563, 1564, 1566; *Perine v. Dunn*, 4 Johns. Ch. 140; *Stevens v. Miner*, 110 Mass. 57. By the rule in the English chancery court, six months are allowed — *Clark v. Reyburn*, 8 Wall. 318, 323, 324; and generally, in

the absence of a statute upon the subject, a reasonable time, according to the circumstances and justice of the case, is given. *Clark v. Ryeburn, supra*; *McKinstry v. Mervin*, 3 Johns. Ch. 466; *Perine v. Dunn, supra*; *Jones Mort.*, § 1563.

By the statutes of this State—Gen. Laws, chap. 136—the mortgage is decreed to be discharged on a petition brought within a year after performance of the condition and the payment or tender of damages and costs and refused by the mortgagee—§§ 4, 5, 12—and the amount due upon the mortgage is determined and redemption decreed upon petition brought within a year after demand upon the mortgagee for an account and his unreasonable refusal and neglect to make and deliver the same. §§ 8, 9, 10, 13. By section 14 of the same chapter, the mortgagee in possession, by publishing notice that from a day named he will hold possession for the purpose of foreclosing the right to redeem, and by retaining the actual peaceable possession for a year from the day named, holds the estate barred against the right of redemption. Although the statute gives the right of petition for an accounting, redemption, and a decree of discharge after payment or tender, the equity jurisdiction of the court in matters relating to the foreclosure and redemption of mortgages remains, and questions touching these subjects can be determined by bill in chancery. *Wendell v. New Hampshire Bank*, 9 N. H. 404, 415; *Bellows v. Stone*, 14 id. 175, 199. If demand for an accounting be made within the year of possession and be not reasonably complied with; or if payment or tender be made and the mortgagee refuses to discharge the mortgage and yield the possession, the mortgagor or person having his right to redeem will be given his time in which to bring his petition or bill for that purpose. *Wendell v. N. H. Bank, supra*. The defendant being in possession as mortgagee at the date of the decree for redemption, the reasons for a time certain in which the plaintiff may redeem or be forever foreclosed, may be the same as those in the case of a mortgagee's published declaration that he holds possession from a day named for the purpose of foreclosure, in which case redemption may be made within a year. In the case of the incumbrance of land by statutory liens in various ways, as in case of land sold for taxes, or taken upon execution, a year from the date of enforcing the lien is given for redemption. The legislature, having in so many ways recognized a year as a reasonable time for the redemption of land from sale or seizure made to satisfy an incumbrance, have established a rule that may be properly applied in other ordinary and analogous cases of redemption, and a year from the date of the decree is given in which the plaintiff may redeem the land from the mortgage.

Case discharged.

BINGHAM, J., did not sit; the others concurred.

JUDGE OF PROBATE v. ELLIS.

June, 1885.

STATUTE OF LIMITATIONS—PROMISE BY ADMINISTRATOR TO PAY CLAIM—GEN. LAWS, CHAP. 198, § 5.

A promise by an administrator to pay a claim against the estate does not bind either the estate or the sureties on his bond so as to take the case out of the limitation contained in Gen. Laws, chap. 198, § 5.

Debt on a probate bond brought at the request of the New Hampshire Savings Bank. Facts found by the court. The writ is dated July 15, 1884. The defendant Ellis was appointed administratrix of the estate of Joseph B. Ellis, March 27, 1878. The other defendants are sureties on her bond. The estate was not settled in the insolvent course. The note sought to be recovered by means of this suit was dated July 8, 1877, and signed by Joseph B. Ellis as surety for one John Ellis. The bank presented the note to the administratrix, who acknowledged it as a valid claim against the estate, and has since made a number of payments on it, the last being \$100.73, October 15, 1884. The other defendants had no knowledge of those payments. They pleaded performance of the condition of the bond. The plaintiff replied alleging non-payment of the above note as a breach, to which the defendants rejoined that the note was barred by Gen. Laws, chap. 198, § 5.

S. C. Eastman, for plaintiff. *Chase & Streeter*, for defendants.

ALLEN, J. The bond was required and given to secure the administratrix's performance of her duty; and her duty was not in conflict with the three years' statute of limitations, which was designed to secure the speedy settlement of estates. Her promise bound neither the estate nor her sureties. *Company v. Barnes*, 48 N. H. 55; *Hall v. Woodman*, 49 id. 295, 804; *Brewster v. Brewster*, 52 id. 52, 60; *Clough v. McDaniel*, 58 id. 201, 202; *Robinson v. Hodge*, 117 Mass. 224, and cited cases. The observations in *Judge of Probate v. Couch*, 59 N. H. 506, and other cases on which the plaintiff relies, relate, not to a waiver of the statute by such a promise, but to a certain distinction between the solvent and the insolvent courses of settlement. While in the latter the administrator is not authorized to pay claims not judicially established, in the former, having sufficient funds to pay all the debts, he should admit those that are indisputable, and pay them without useless expense or delay, instead of forcing creditors through the idle ceremony of suit and judgment. The duty of rapidly and economically executing his trust, by making such admission and payment promptly, is not a duty or a power of procrastinating by waiving the statute of limitations.

Judgment for the defendants.

BINGHAM, J., did not sit; the others concurred.

EASTMAN v. DEARBORN.

July 31, 1885.

JUDGMENT — NON-RESIDENT — SERVICE BY PUBLICATION — EFFECT OF.

A judgment by default against one not an inhabitant of this State, where there is no service of the writ except by publication, is not a judgment *in personam*, and can be given no force or effect beyond an appropriation of the property attached on the writ.

In an action on such a judgment the validity of an attachment of the defendant's property on the original writ cannot be questioned.

Kendrick v. Kimball, 38 N. H. 482, qualified.

Debt on a judgment. Facts found by the courts. July 3, 1877, the plaintiff commenced a suit against the defendant, and a horse of the defendant, attached upon the writ, was sold by the officer, July 9, for \$48.15. The officer's return stated that he made no service of the writ upon the defendant for the reason that he was not an inhabitant of the State. The defendant left the State in June, 1877, and did not return till some time in 1878, and during that time was not an inhabitant of the State. The suit was entered at the October term, 1877, and continued to the next term, with an order of notice to the defendant by publication, which was complied with. At the April term, 1878, judgment was recovered against the defendant upon default for \$88.08 damages and \$14.75 costs, and execution issued, upon which the money remaining in the hands of the officers was applied in part satisfaction. This suit is brought to recover the balance of the judgment. The defendant offered to show that the horse attached was his only horse, and exempt from attachment; also, that he did not know of the bringing of the suit or of the pendency thereof until long after the judgment was recovered. The plaintiff offered to show that defendant did know of the bringing of the suit and of the attachment soon after the attachment was made. The court ruled that the evidence offered was immaterial, and rejected, and the parties respectively excepted. The court also ruled that the judgment obtained by the plaintiff was valid only as against the property of the defendant attached, and ordered judgment for the defendant, and the plaintiff excepted.

George R. Stone, for plaintiff, cited *Currier v. Sutherland*, 54 N. H. 475; *Hall v. Williams*, 6 Pick. 240; *Currier v. Gilman*, 55 N. H. 365; *Packard v. Matthews*, 9 Gray, 311; *Johnson v. Thaxter*, 12 id. 198; *Kendrick v. Kimball*, 38 N. H. 482; *Ward v. Cole*, 32 id. 452; *Ward v. Howe*, 38 id. 40, 41; *Ellsworth v. Learned*, 21 Vt. 535; *Lapham v. Briggs*, 27 id. 26; *Stevens v. Fisher*, 30 id. 200; *Morrison v. Underwood*, 5 Cush. 54; *Thatcher v. Gamman*, 12 Mass. 268, 269; *Flint v. Sheldon*, 13 Mass. 448; *Morris v. Boomer*, 16 Wis. 547; *Story Conf. Laws*, §§ 21, 43, 46, 49, 50, 56, 589; *Picquet v. Swan*, 5 Mass. 48; *Pennyroy v. Neff*, 95 U. S. 740.

Shirley & Stone, for defendant.

ALLEN, J. In the former suit the defendant's property was attached and sold and the proceeds applied in part satisfaction of the judgment then obtained. The validity of that attachment or its sufficiency to enable the plaintiff to enter the action and give the defendant notice of the suit by publication according to the statutes — Gen. Laws, chap. 223, § 9; chap. 226, §§ 3, 4 — cannot be questioned in this suit. If the proceedings by which the property was appropriated were irregular because the property was exempt from attachment, advantage of the irregularity cannot be taken in a suit to enforce the collection of the unsatisfied balance of the judgment.

The judgment which is attempted to be made the foundation of this action of debt was rendered upon default, without other notice of the suit to the defendant, who was a non-resident, than that given by publication. At common law a judgment is void unless rendered upon personal notice to the defendant or his appearance to the action, and this rule, as a part of the body of the common law, prevails in this State. *Wilbur v. Abbott*, 60 N. H. 40, and cases cited. No court has jurisdiction beyond the State which created it and cannot effectively send its process for execution beyond the limits of the State, and an order of notice by publication made within the State cannot be more effective than a summons or other process sent out of the State. The natural and just right universally recognized, which every person has of appearing and answering to an action, before he shall, by a judgment, be deprived of liberty or property, is not met or sustained by process sent abroad for service, nor by a newspaper notice, which may or may not reach the party, and no jurisdiction of the person is acquired by notice of that kind. Judgments may be valid for some purposes and void for other purposes. That a judgment be valid against all parties and for all purposes, the court in which it is rendered must have jurisdiction of the subject-matter of the suit, and of the person or persons against whom it is rendered. *State v. Richmond*, 26 N. H. 232. By the attachment of the defendant's property within the State in the former suit, jurisdiction of the property was acquired, and the judgment rendered, without other notice to the defendant than the statutory one by publication and without his appearance to the action, was valid for the purpose of appropriating the attached property to the payment of the debt and for no other purpose. No jurisdiction of the defendant's person having been acquired by the proceedings, the judgment is void as a personal one against the defendant beyond its effect upon the property taken, and cannot be made the foundation of another suit to collect the unsatisfied part. *Boswell's Lessee v. Otis*, 9 How. 386; *Cooper v. Reynolds*, 10 Wall. 308; *Pennoyer v. Neff*, 95 U. S. 714; *Brooklyn v. Insurance Co.*, 99 id. 362; *St. Clair v. Cox*, 106 id. 350; *Pana v. Bowler*, 107 id. 529; *National Bank v. Peabody*, 55 Vt. 492. The principle is recognized and adopted in the fourteenth amendment to the Constitution of the United States which declares that "no State shall deprive any person of life, liberty or property without due process of law." Notice of a suit to a non-resident debtor by publication as a substitute for personal service within the State cannot be due process of law, and a judgment rendered upon such notice, without appearance of the defendant in a suit brought to determine the private rights and obligations of the parties, can have no validity. The case of *Kendrick v. Kimball*, 33 N. H. 485, to the extent that it decides that a judgment rendered without personal service of process upon the defendant, or without his appearance in the suit, is valid as a personal judgment upon which an action of debt can be maintained, cannot be sustained.

Exception overruled.

SMITH, J., did not sit; the others concurred.

[See 24 Eng. Rep. 522, *note*.]

STEVENS v. MANCHESTER.

July 31, 1885.

INJUNCTION—CEMETERY WITHIN TWENTY RODS OF DWELLING-HOUSE.

Under Gen. Laws, chap. 49, § 2, a public cemetery cannot be laid out within twenty rods of a dwelling-house without consent of the owner, although the land to be so used had been procured by voluntary purchase.

Bill in equity for an injunction to restrain the city of Manchester and the other defendants, who are trustees of the Amoskeag Cemetery under a city ordinance, from using land for the burial of the dead within twenty rods from the plaintiff's dwelling-house. The bill showed that the land in question was bought of one Hanscom by the city in 1883, and run out into burial lots, and that it comes within four rods of the plaintiff's dwelling-house. The defendants demurred to the bill.

C. R. Morrison and *Wm. Little*, for plaintiff. *Geo. W. Prescott*, city solicitor, and *A. C. Osgood*, for defendants.

ALLEN, J. The statute authorizing cities and towns to take land, when it cannot be obtained by purchase at a reasonable price, for the establishment and enlargement of public cemeteries, provides that no cemetery shall be laid out within twenty rods of any dwelling-house without consent of the owner. Gen. Laws, chap. 49, § 2. The cemetery may be established by the purchase of land for that purpose as well as by taking it by the exercise of the right of eminent domain. The mischief sought to be restrained by the limitation in the statute to a distance of twenty rods from a dwelling-house affects all public cemeteries alike, whether established by voluntary or compulsory purchase of land. It is the public right of purchasing or taking land for a public purpose that is restrained by the limitation in the statute, and not the exercise of the private right of purchasing land for a private cemetery or any other private purpose. *Carter v. Moulton*, 58 N. H. 64.

Demurrer overruled.

BINGHAM, J., did not sit; the others concurred.

COURT OF APPEALS OF NEW YORK.

THOMPSON v. WHITMARSH.*

October 6, 1885.

CONTRACT—EXECUTOR AND ADMINISTRATOR—PARTY IN INTEREST—CODE CIV. PROC., §§ 449, 1814.

Upon new contracts made by an executor or administrator, and never existing in favor of the decedent, but growing out of the contracts and dealing of the former alone, the action is properly brought in the name of the individual, and a debt against the decedent cannot be made the subject of a counter-claim. It must be paid in the ordinary course of administration, and can gain no preference, as it is entitled to none. Plaintiff, as executrix of her husband, sold upon credit to defendant property which defendant had sold to her husband, and for which he held his note. In an action against defendant to recover the purchase-price, *held*, that he could not use his demand on the unpaid note as an offset.

Appeal from judgment of General Term, third department, affirming a judgment for plaintiff entered on report of referee.

A. P. Smith, for appellant. *Franklin Pierce*, for respondent.

FINCH, J. It is not denied in this case that, irrespective of sections 449 and 1814 of the Code, and before its enactment, an executor or administrator, seeking to enforce a contract made by himself and not by the decedent, could sue in his own name; and that in such action a demand against the decedent belonging to the defendant could not be used as a counter-claim to diminish or extinguish the recovery. It is insisted, however, that the effect of these sections is to change

* Affirming S. C., 16 Week. Dig. 283.

the law, and compel the executor or administrator to sue in his representative capacity where his recovery will be assets, and is for the benefit of the estate. Under section 449 every action must be brought by the real party in interest, and where the recovery is wholly for the benefit of the estate, it is said such real party in interest is the executor or administrator, and not the individual who happens to be charged with the trust duties. And this contention is claimed to be strengthened by the language of section 1814, that "an action or special proceeding hereafter commenced by an executor or administrator upon a cause of action belonging to him in his representative capacity . . . must be brought by . . . him in his representative capacity." Here the plaintiff is executrix, and sold upon credit, property of the estate to the defendant, who holds an unpaid note of the decedent. The estate is insolvent, and if the defendant can use his demand as a counter-claim, he alone of all the creditors can secure a preference out of the assets, and be paid in full at the expense of others equally entitled to payment. The result would overturn the whole system of distribution to creditors, and compel executors and administrators never to sell on credit at public auction where creditors of the deceased could by, or in some unexplained way exclude them from the list of purchasers. No such construction of the Code is permissible.

Where an executor or administrator sells on credit the property of the estate, and sues to recover the debt, he, as an individual, is the real party in interest, for the contract is made with him, and the promise to pay runs to him, and he is personally accountable for the assets which he has sold. For the same reason the debt does not belong to him in his representative capacity within the intent and meaning of the section of the Code referred to. That phrase relates to debts which belonged to the testator or intestate, and came to the executor or administrator through his representation of the deceased rather than as the result of his own action. The effect of the section, and the change produced by it, is upon the class of cases in which the action could have been maintained in either form; as where, upon a contract made with the testator, the cause of action accrued after his death; or where, upon a debt or obligation due to the deceased, the executor or administrator has taken a new security or evidence of debt. In these cases, before the Code, the action might be in the individual or representative name, but now must be in the latter. Upon new contracts made by the executor or administrator, and never existing in favor of the decedent, but growing out of the contracts and dealing of the former alone, the action is properly brought in the name of the individual, and a debt against the decedent cannot be made the subject of a counter-claim. It must be paid in the ordinary course of administration, and can gain no preference, as it is entitled to none.

This particular ground of objection appears not to have been taken at the General Term, and so was not considered in the opinion there rendered, which sufficiently answered the other grounds urged in support of the appeal.

The judgment should be affirmed, with costs.

All concur.

SCHLEY v. FRYER.

October 8, 1885.

MORTGAGE — "ASSUMES" IMPOSES PERSONAL LIABILITY.

A covenant by the grantee in a deed to "assume" a mortgage, for the payment of which the grantor is personally liable, binds the grantee to pay the mortgage debt.

Appeal by defendant from a judgment of the general term, third department, affirming a judgment for plaintiff entered upon a decision of the court upon a trial without a jury.

The action was brought upon a covenant contained in a deed to defendant, assuming a mortgage for \$4,000, a lien upon the premises conveyed at the time of conveyance.

The material facts proved upon the trial are, briefly these: On Dec. 27, 1870, one George Canaday, by a warranty deed, conveyed to one Maria Roberts certain premises in the city of Albany, subject to a mortgage for \$4,000, then a lien

thereon. To secure a part of the purchase-money upon such conveyance, said Maria Roberts at the same time executed and delivered to said Canaday her bond for \$4,000 and a mortgage upon said premises as collateral thereto.

This bond and mortgage was, on January 23, 1871, assigned by said Canaday and one William J. Fryer (the father of the defendant) to one Albert I. Slingerland, and the payment thereof guaranteed by them.

On August 7, 1871, said Maria Roberts conveyed said premises to one Hugh Tunney by warranty deed, expressly subject to said two mortgages of \$4,000 each, the payment of which said grantee, Hugh Tunney, assumed in the following terms: "This conveyance is made subject to two certain mortgages of \$4,000 each, which the party of the second part assumes, with interest from the 22d day of Aug., 1871."

On Aug. 17, 1871, said Tunney conveyed said premises by a warranty deed to the defendant, Robert L. Fryer, which deed contained the following covenant, "subject to two certain mortgages for \$4,000 each, which the party of the second part assumes, with interest from the date hereof."

On Sept. 18, 1871, the defendant, Robert L. Fryer, conveyed said premises by a warranty deed to one Don Albert French, for the consideration of \$10,000.

On June 12, 1873, said Don Albert French conveyed said premises to one Jos. M. Lasher by a deed with covenants against the grantor, and subject to said two mortgages, but without a covenant assuming the payment thereof. On Feb. 10, 1874, Albert I. Slingerland, to whom the bond and mortgage in question had been assigned, assigned the same to George Canaday and William J. Fryer, by an assignment dated and acknowledged February 10, 1874, and recorded February 11, 1874, at 11 o'clock, A. M.

By an instrument undated, but acknowledged on the same 10th day of February, 1874, and recorded on the 11th day of February, 1874, at 11 o'clock, A. M., said George Canaday and William J. Fryer assigned said bond and mortgage to one Geo. A. Lasher. And thereafter by several mesne assignments said bond and mortgage was assigned to plaintiff.

At the time the assignment of the bond and mortgage in question was made by Slingerland to Canaday and Fryer (to-wit, the 10th day of February, 1874), and the assignment thereof simultaneously made by them as above set forth to Geo. A. Lasher, Jos. M. Lasher, the brother of Geo. A., and who had become the owner of the premises covered by said mortgage, was being threatened with a foreclosure thereof, thereupon Canaday offered to Jos. M. Lasher that if he would get his brother, Geo. A. Lasher, to indorse his note, he, Canaday, would negotiate the note and raise the money thereon, and therewith pay Slingerland the money due him on the bond and mortgage and take up the bond and mortgage and assign it to Geo. A. Lasher as security for his indorsement of said note; such note was thereupon made by Jos. M. Lasher and indorsed by Geo. A. Lasher, and delivered to Canaday, and negotiated by him and the money raised thereon paid Slingerland as the consideration of the transfer by him of the bond and mortgage in question to Canaday and Fryer, by the assignment of February 10, 1874.

There was no evidence that either of the Lashers authorized the assignment of the bond and mortgage in question by Slingerland to Canaday and Fryer, in making the transfer thereof to Geo. A. Lasher; on the contrary, the agent who negotiated the transfer testifies that he knew of no such authority.

On said 10th day of February, 1874, said Geo. Canaday and William J. Fryer executed a release, dated that day, whereby they assumed to release the defendant, Robert L. Fryer, from all liability by reason of his covenant assuming the payment of the bond and mortgage in question, but this pretended release was unknown to the defendant, and was not delivered to him, but remained in the possession of his father, one of the parties thereto, until long after the assignment of the bond and mortgage in question to Geo. A. Lasher, and until about the time of the commencement of this action, nor did the defendant give any consideration for such release.

The defendant had no actual knowledge, at the time the conveyance was made to him containing the covenant assuming the payment of the bond and mortgage in question, that such covenant was contained therein, and never took possession

of the premises therein described, and never expressly authorized the taking of a conveyance with such a covenant. But the evidence shows that between 1868 and 1876, William J. Fryer, the father of the defendant, procured a large number of conveyances of real estate to be made and recorded in the name of the defendant, as grantee, and the defendant, at the request of his father, executed conveyances of all of the said premises to various parties, generally with warranty; two of these conveyances to the defendant, besides the one in question, contained covenants assuming payment of mortgages, to-wit: the one from Tunney to defendant, dated August 17, 1871, and the one from Smead and wife to defendant, dated August 15, 1872. During all this time the defendant resided with his father and took his meals at his table. The evidence of the defendant himself showed expressly that William J. Fryer was the agent for the defendant, his son, in these transactions, as also does the evidence of William J. Fryer.

In September, 1875, the first mortgage upon the premises covered by the mortgage in question, and which the defendant assumed, was foreclosed; all the parties then interested in said last-mentioned mortgage were made parties to such foreclosure, and the lien of said last-mentioned mortgage thereby cut off, and the sale thereunder only brought sufficient to pay the first mortgage, leaving nothing to apply upon the mortgage assumed by the defendant.

There were three issues made by the answer and litigated upon the trial.

1st. That the covenant assuming the mortgage was not equivalent to a covenant to pay it.

2d. That the defendant was not bound by the covenant in said deed from Tunney to himself assuming the mortgage in question, for the reason that such conveyance was never made to or accepted by him, and that he never authorized such conveyance or the insertion therein of the covenant assuming said mortgage.

3d. That the release hereinbefore referred to, executed by William J. Fryer and Canaday, discharged him from all liability upon the covenant assuming said mortgage.

G. L. Stedman, for appellant. *Isaac Lawson*, for respondent.

EARL, J. This action is based upon a clause in a deed of Hugh Tunney to the defendant which reads as follows: "This conveyance is made subject to two certain mortgages for \$4,000 each, and which said party of the second part assumes with interest from the date hereof."

The defendant claims that the word "assumes" is not broad enough to impose a personal liability upon him to pay the mortgage in question. If it had been intended simply to provide that he should take the land subject to the two mortgages, the further language in this clause, in which the word "assumes" appears, would not have been necessary. Unless that word was used to impose a personal liability upon the defendant to pay, it was wholly unnecessary and serves no purpose and adds nothing to the force of the language used. A rule of construction requires us to give force and effect, if possible, to all the language used. That word is frequently used in deeds to impose a liability to pay upon the grantee, and we believe it is generally understood among conveyancers to impose such liability. Such effect has been given to the word when so used in several well-considered cases in other States. *Braman v. Dowse*, 12 Cush. 227; *Dewey v. Fremont Imp. Co.*, 13 Allen, 168; *Locke v. Homer*, 181 Mass. 93; S. C., 41 Am. Rep. 199; *Strait v. Folger*, 34 Iowa, 71; *Sparkman v. Gove*, 44 N. J. Law, 252; S. C., 47 Am. Rep. 473, *note*. The word must, therefore, have the same meaning which it would have if the word "to pay" followed it. If not, what does it mean?

It is also claimed on the part of the defendant that as he assumed the mortgage merely which contains no covenant to pay, he did not become liable to pay the bond, and therefore incurred no personal liability. This construction of the language used would also render the latter portion of the clause quoted entirely useless. In that event the defendant simply took the land subject to the mortgages and assumed nothing. In cases of this kind where the grantee has been made personally liable by an assumption of a mortgage upon the granted premises, the liability has generally been imposed by an agreement or covenant to assume or pay the mortgage with no special reference to or designation of the mortgage debt or the bond to which the mortgage was collateral. Force must be given to

the language used, and we think that it was the clear intention of the parties that the grantee should assume the payment of the mortgage debt, and not merely take the real estate subject to the mortgage. If the language does not mean that, what was its purpose and why was it used?

We think, upon the evidence, that the defendant was bound by the clause in the deed quoted as if he had consciously and intentionally assented thereto. It is undoubtedly true that he did not know that the clause was in the deed, and that he never especially authorized its assertion therein. And it may be true that he never intended to be bound by such a clause. But it appears that his father had general authority to deal in real estate in his name. He could purchase real estate cumbered or uncumbered; he could take titles affected with conditions and contingencies, perfect or imperfect, and with covenants running therewith, which might bind the grantee; he could take deeds with or without covenants; he could purchase upon credit or pay cash; he could pay after deducting incumbrances which were permitted to remain. It is quite common for the grantee of land to arrange a portion of the purchase-money by assuming an incumbrance, for which the grantor is liable. Such an assumption binds the grantee to pay no more than the purchase-price.

The defendant in this case is bound, just as he would have been if the dealing in real estate had been for his benefit instead of his father. The business was done in his name; he was the ostensible principal, and it matters not that he permitted his father to reap the benefits thereof. It cannot be presumed that a principal would object that his agent, having general authority to purchase real estate for him, should, as part of the purchase-price, assume the payment of mortgages upon such real estate. It cannot be said, therefore, by the defendant that this clause of assumption was unauthorized by him, as he was bound by what his authorized agent did.

Upon the facts found at the special term we do not think that the defendant was effectually discharged or released from his liability under the clause referred to.

The agreement of assumption, therefore, contained in the deed was binding and effectual against the defendant, and the judgment should be affirmed.

All concur, except RAPALLO, J., dissenting, and DANFORTH, J., not voting.

FARGO v. MILBURN.

October 6, 1885.

BILLS OF LADING—CHARTER-PARTY—RATIFICATION BY OWNERS OF VESSELS OF THROUGH BILLS OF LADING—DIVISION OF OCEAN AND INLAND FREIGHT.

Plaintiffs shipped a quantity of goods from Chicago to Antwerp, to go from New York by steamship *Fernwood*, and issued through bills of lading for the same. Plaintiffs' New York agent had previously arranged with the charterers of the *Fernwood*, who had a contract with the owners of the vessel to furnish her cargo, for transportation by that vessel, and they agreed upon a division of the inland and ocean freight. But before the goods were delivered to the vessel the agent refused to deal with the charterers and notified the captain of that fact, whereupon the captain agreed to give his draft, in accordance with custom, for the inland freight and the goods were delivered to the vessel, the mate giving his receipt, which was afterward exchanged for that of the captain. The goods were delivered to the consignees and the whole amount of the freight collected by the defendants, the owners of the vessel. They refused to account to the plaintiffs for the inland freight, claiming that they had received the goods from the charterers with whom they had an unliquidated account. In an action brought by the plaintiffs against the owners of the vessel for the inland freight, *held*, that they were entitled to recover; that notwithstanding the captain had issued no bills of lading for this specific part of the cargo, he should be deemed to have ratified those which were issued by the plaintiffs at Chicago covering the entire transportation.

Appeal from a judgment of the general term, affirming a judgment of the special term, entered upon a verdict, directed by the court, in favor of the plaintiffs. The head-note states the facts.

Wm. Allen Butler, for appellant. Hamilton Cole, for respondent.

FINCH, J. This case was disposed of by the court; each party asking that a verdict be ordered in his own favor, and neither requesting that any issue of fact

be submitted to the jury. The sole question, therefore, is whether upon some reasonable view of the facts the judgment for the plaintiff can be sustained; for which purpose, where the evidence is contradictory, we must assume as having been found, where that could fairly have happened, the version which leads to an affirmance.

That the inland freight was earned and belonged to the plaintiff; that its amount was fixed and known; that the owners of the vessel collected it upon through bills of lading drawn by the plaintiff, assuming to act as agent for the ship, and upon which the property was delivered to the consignees; that the captain promised in accordance with custom to give his draft for such inland freight before the sailing of the vessel, and was notified that the plaintiff would not deal with Dill & Radman, the charterers; that the property was delivered taking the mate's receipt, which was afterward exchanged for the captain's receipt; all these are facts, either uncontradicted or supported by the preponderance of proof, and which justify the judgment rendered. The effort of the owners is to shift their liability to the charterers, and to ignore any contract with or duty to other persons. In doing so they rely largely upon the fact that the captain issued no bills of lading for this specific part of the cargo. Assuredly he ratified those which were issued. They were drawn at Chicago, and covered the entire transportation from that city to Antwerp, specifying the *Fernwood* as the ocean carrier, signed by Warrack as agent, "severally and not jointly," and so claiming to represent and bind the plaintiff as to the inland transportation, and the ship as to the remainder. These bills of lading we must assume from the proof were shown to the captain before he sailed with their statement of the separate amounts of the inland and ocean freight; who in no manner repudiated the authority or declined the shipment under it, but commented only upon the amounts; and who, on arriving at Antwerp, delivered the goods to the parties holding the bills signed by Warrack and not upon any order or authority of Dill & Radman; who collected the freight according to their terms, and so recognized the shipment as made under the Chicago bills of lading. Warrack's agency was thus ratified instead of repudiated. It is true that the captain claimed in his evidence to have shipped his whole cargo for Dill & Radman issuing the bills of lading when and as presented by Dill & Radman, and yet he is forced to admit that when at sea he found he had cargo for which he had issued no bills of lading, which, therefore, was not shipped by the charterers, and which was represented first by the mate's receipt given "subject to charges," and then by his own given in exchange; and so it is easy to put confidence in the plaintiff's proof which harmonizes and explains the known facts in the case. It may very well be that Dill & Radman assented to this shipment as part of the cargo, but nothing in the case indicates that the property in question was delivered to them, or upon their responsibility for the inland freight, but every thing points to a shipment by the plaintiff and upon the responsibility of the vessel as it respected such freight. We can see no just ground upon which the money of the plaintiffs, collected upon the bills of lading which they issued, received for them and known to be due to them, could be diverted from their ownership and paid over to Dill & Radman, or involved in the ship's account with that firm. On the 21st of February, 1878, the agents of the owners were notified in writing, formally and precisely, of the plaintiff's claim, and forbidden to pay any of the inland freight to Dill & Radman; and it appears that no remittance for anybody in New York, on account of such freight, was made until March of that year, when a balance of about \$1,000, lessened by a claim against Dill & Radman for four days' demurrage at £50 a day, which they disputed and have never allowed, was sent to the owners' agents in New York and appears to be still held by them. If by the terms of the charter-party demurrage was a lien upon the cargo, it was only so upon the goods shipped under it by Dill & Radman, and we are satisfied that the shipment in question was not of that character, but under the plaintiff's bill of lading, ratified and adopted on behalf of the vessel.

The judgment should be affirmed, with costs.

All concur.

WYERHAUSER v. DUN.*

October 6, 1885.

NEGOTIABLE INSTRUMENT — INDORSEMENT IN BLANK — LIABILITY OF INDORSER FOR UNAUTHORIZED INSERTION — COLLECTION AGENCY — LIABILITY FOR NEGLIGENCE OF ITS ATTORNEYS — QUESTION OF FACT FOR JURY.

One who signs and delivers a note in blank will be deemed to have authorized the party to whom it is delivered to fill in the blanks in respects essential to the completeness of the note as a note. Thus the date, the amount, the name of the payee and the place of payment may be inserted in their proper blanks. But this does not authorize the holder to crowd into the body of the note a stipulation in no manner essential or necessary to the note as a completed instrument, as that from and after its maturity it shall bear a greater rate of interest than the normal rate allowed by law; and an accommodation indorser would be released from liability on a note by such an unauthorized insertion.

An agency holding itself out as a professional expert in the collection of claims, and undertaking to make collections in all parts of the country through local agents and attorneys, is responsible for the negligence of its attorneys to whom it intrusts such claims. Where there is evidence both ways as to the negligence or want of proper skill and diligence on the part of such attorney in securing a claim intrusted to him through the agency, a question of fact is raised which the defendant is entitled to have submitted to the jury.

Appeal from a judgment of the general term, affirming a judgment entered upon the verdict of a jury directed by the court for the plaintiff.

The action was brought to recover damages for the conversion of a promissory note belonging to the plaintiffs. They, on June 7, 1875, were the owners of a promissory note for the sum of \$4,139.51, executed to them by the Indianapolis, Bloomington and Western Railroad Company, dated December 22, 1874, at four months, payable to the order of the plaintiffs, and indorsed by Benjamin E. Smith and C. R. Griggs, and on the 7th day of June, 1875, placed the same in the hands of the defendants, who were a collecting agency, for collection, for which the defendants executed to the plaintiffs a receipt in which they agreed to pay the proceeds over to the plaintiffs when received by them. The defendants placed the note in the hands of their own attorney, who arranged with the makers, with the consent of the plaintiffs, for a renewal of the note for four months, with the same indorsers, adding accumulated interest in the new note. On August 16th, a new note at four months, to the order of A. P. Lewis, secretary and treasurer, purporting to be made by the railroad company and indorsed by the payee, and also by the indorsers of the old note for the sum of \$4,413.56, with interest at ten per cent, after maturity, was delivered to Campbell. It further appears that, for some time prior to this, notes of the company, executed in blank, and indorsed by Griggs and Smith, were in the possession of Lewis with authority to issue as occasion required, and among them was the new note. By the laws of Indiana the legal rate of interest was six per cent, but ten per cent might be recovered if agreed upon in writing. The new note was filled up by Lewis "with interest at ten per cent, after maturity." It does not appear in the case that Lewis had any authority from one of the indorsers to make a special agreement for a high rate of interest, or that he had any knowledge of such agreement, or that he had used the notes of the company, indorsed by them in blank, on prior occasions, containing such an agreement. Upon receiving the new note, Campbell surrendered to Lewis the old note, for the conversion of which this action is brought.

The judge at the circuit directed a verdict for the plaintiffs for the whole amount of the original note. It is claimed in behalf of the plaintiffs, that the renewal note containing the agreement for interest at ten per cent after maturity was void as against the indorser because not authorized by him, and that for such reason the plaintiffs were not bound to accept it in place of the old note.

W. S. B. Milliken, for appellants. *Walter Edwards*, for respondents.

FINCH, J. A possible view of the facts in this case is that the defendants were authorized by the plaintiffs to surrender the note, for the conversion of which they are sued upon, receiving in exchange the renewal note of the railroad com-

* Reversing 16 Week. Dig. 412.

pany, drawing ten per cent interest, and with the same indorsers. The note which the agents of the defendants took was a printed form, indorsed by Smith and Griggs, while blanks for the date, the amount and the payees were left unfilled, and was one of a number placed by them in the hands of Lewis, the secretary and treasurer of the railroad company, for use in that company's business. One of the indorsers, Smith, was president of the company, and so far as he is concerned, there was sufficient evidence in the case to have made possible a finding by the jury that he had authorized the insertion of the special clause making the note draw ten per cent interest after maturity. The law of Indiana, while fixing the normal rate of interest at six per cent, permitted special agreements for a higher rate, not exceeding ten per cent, and the debt of which the last note was an attempted renewal had drawn ten per cent interest from its origin. Smith must be presumed to have known and understood the fact, and Lewis swears that the president expressly authorized the final note to be given, while further proof indicates a ratification by Smith, who offered to settle the note by turning out bonds. But there are no such facts as to Griggs. The case does not show that he was in any manner connected with the company; that he knew the terms or amounts of the renewals; that he in any form recognized or ratified the note, or consented to the special agreement for interest. So far as he is concerned he stands simply as an accommodation indorser, delivering the note in blank to Lewis, and conferring upon the latter no other authority than that which the law implies from such delivery.

The first question, therefore, presented by the appeal is whether the delivery of the note in blank authorized Lewis to add to it the clause fixing a rate of ten per cent interest after maturity. The general doctrine appears to be that one who signs and delivers a note in blank, to be used as a security, authorizes the holder to fill the blanks in respects essential to the completeness of the note as a note. The transaction implies that the indorser meant to become liable as such upon a completed and perfected note, and so far as the same is, at the time of his signature, an incomplete and imperfect instrument, he must be held to have authorized the filling of such blanks by the agent intrusted with the note for use. The date, the amount, the name of the payee, and place of payment may be inserted in their appropriate blanks. *Paige v. Morrell*, 3 Keyes, 117; *Vanduser v. Howe*, 21 N. Y. 531; *Kitchen v. Place*, 41 Barb. 465; *Angle v. N. W. Ins. Co.*, 92 U. S. 339. But in all the cases cited there was a blank so left in the body of the note as to indicate to the eye of the indorser, when it left his hand, that something needed to be supplied which was necessary to be inserted to make the instrument operate as the note for which it was intended. The form of the note in question as signed by the indorsers gave no indication that it was to draw interest at all, and left no blank for that purpose. At its commencement, in the place usually occupied by a date, a blank was left between the word "Indianapolis" and the figures "1875," which the indorser would expect, and so authorize to be filled by completing the imperfect date. Another blank existed at the beginning of the note before the words "after date." The length of time the note should run before maturity was here indicated and properly filled by inserting the words "four months." The printed form ran on in the usual way until a remaining blank was left between the words "to the order of," and the word "dollars," which ended the body of the note. The words "to the order of" indicated and so authorized the insertion of the name of the payee, and the word "dollars" permitted the prefix in the blank of the principal sum to be paid. In that blank, and between those printed words, nothing else was indicated or authorized. Nothing else can be said to have been within the intention or expectation of Griggs, or within his authority, he standing as a mere accommodation indorser, and ignorant of the particular purpose or precise debt to which the completed note was to be applied. To go further than that would be to break down prudent barriers and reach beyond any reasonable inference to be derived from the presence of the blanks. In this case, matter wholly foreign to the indicated words of completion, and needless for such completion was inserted and crowded in for want of sufficient room. Such matter consisted of a special agreement that the note from and after its maturity should draw ten per cent interest. That was a

material alteration of the note from its terms as authorized by the indorsement and delivery of Griggs. It was a stipulation in no manner essential or necessary to the note as a completed instrument. It altered the legal rule as to damages for a breach; looked to a new liability beyond the maturity of the contract, and imposed upon the indorser an added risk and burden which nothing in the record shows that he ever contemplated or deemed possible. We think the courts below were right in saying that the alteration was material, and discharged the indorser not authorizing or ratifying it.

It follows that the defendants ought not to have accepted the new note and surrendered the old one, and that in so doing they did not, in truth, obey their instructions. But it was not a conscious deviation. Acting in perfect good faith, they took what appeared to be, and what they believed to be, the note which they were authorized to take, and which only proved to be not such by reason of the defective authority of a third person upon whom they relied. Where there is thus entire good faith, and an apparent and supposed obedience to instructions, are they liable to the principal for an unknown and concealed defect which thwarts and vitiates their action? We think that question depends upon the further inquiry whether the defect which existed was one which might have been discovered by the diligent exercise of that professional skill which they were bound to possess and exert. They were not insurers, but they were, and held themselves out to be, professional experts in the business which they assumed to do. They undertook to make collections at all points in the country through local agents and attorneys whom they employed and represented as skillful and reliable. They took this note for collection, and so became responsible for the negligence of the attorney whom they employed upon terms known only to themselves. *Bradstreet v. Emerson*, 72 Penn. St. 124. Was, then, Campbell negligent? Did he employ the professional diligence and skill due to his employers, and did the injury happen without his fault? The question may take another form. Could the defendants, through Campbell, their agent, by due diligence and the exercise of the skill of good practitioners — Wharton, § 596 — have obtained a new note with the valid indorsement of both the old indorsers; and did the injury result from that want of skill or diligence, or both? It is quite plain that here we have a question of fact. Very much may be said on both sides. Campbell sent to Lewis a new note to be signed and indorsed. Lewis sent back the printed note with the blanks filled. This fact, coupled with the known residence of both indorsers out of the State, would naturally suggest to a very moderate professional skill that the indorsers had signed before the blanks were filled, and that Lewis had inserted the special agreement in the absence of Smith and Griggs. Two cases in his own State might have suggested to Campbell the very doubtful result of Lewis' act — *Holland v. Hatch*, 11 Ind. 497; *Spiller v. James*, 32 id. 202; and an inference from these facts might be drawn unfavorably to the attorney's skill or diligence. On the other hand, there is evidence that the plaintiffs through their banker, Robinson, put Davies, and through him Campbell, into communication with Lewis as the person representing both the company and the indorsers; that the bulk of the correspondence was shown to Robinson, and especially the letter from Lewis which inclosed the new note, and in which he writes: "I have drawn note, with interest at ten per cent after maturity," and that the precedent forbearance had been at the same rate.

From these facts it is argued that the plaintiffs taught Campbell to rely on the authority of Lewis and trust to his action, and did so themselves. On both sides there were contradictions; and the facts above stated were involved in more or less of controversy. We cannot, therefore, say as matter of law that the defect in the indorsement of Griggs, growing out of the special agreement, should have been discovered by Campbell, and proves his want of skill or his negligence. It was a question which could not be taken from the jury without the assent of the defendants. The latter first took the note for collection. That did not bind them absolutely to collect. It did bind them to make the effort with good professional skill and with faithful diligence. When, with the plaintiff's consent, if indeed that was given, they undertook to get a new note with the same indorsers, it did not bind them absolutely to secure that result. It did not bind them to use

competent skill and due diligence in the effort, but if, notwithstanding that, the result was not reached from any cause not within their control, they incurred no liability, and cannot be held to have converted the old note which they delivered up. If it be said that in either event—that of failure to collect or to obtain the requisite note—a duty of the defendants yet remained to return the old note on demand, it seems to us a just answer that such return became impossible through the surrender of the note to Lewis, and the only debatable question is whether that impossibility arose out of the want of due professional skill or of proper diligence on the part of defendants and their agents. That question is not without difficulty, but it is one of fact upon which we express no opinion, but which must be left to the judgment of a jury. The case, therefore, was improperly treated as involving only a question of law. The defendants excepted to that ruling, and while they did not ask to go to the jury, they did not concede that none but questions of law were involved by themselves asking judgments in their favor at the hands of the court.

The judgment should be reversed and a new trial granted, costs to abide the event.

MILLER, EARL and DANFORTH, JJ., concur; RUGER, Ch. J., and RAPALLO, J., concur in result; ANDREWS, J., not voting.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

LAMB v. OLD COLONY RAILROAD CO.

September 3, 1885.

NEGLIGENCE—DUTY OF RAILROAD COMPANY TO TRAVELERS ON HIGHWAY ADJOINING RAILROAD.

A railroad company has the right to run trains on its road adjoining a highway, and is not responsible to travelers on the highway for the consequences of noise or smoke caused by the prudent running of its trains. The right to fire up a locomotive, the natural consequence of which is to cause it to emit a dense volume of smoke and coal dust, at any place along the road, depends upon the character of the place and not whether there happens to be a person near at the time. An engineer is under no obligations to watch for travelers on a highway running for a considerable distance parallel with, and adjoining the railroad.

Tort to recover for personal injuries alleged to have been occasioned by the negligence of the defendant.

At the trial in the superior court the plaintiff claimed that, while he was traveling over a highway in Quincy, extending for less than one-half a mile side by side and adjoining to the defendant's railway, and in full view therefrom, and from five to ten feet lower than the railway, he met a train of cars drawn by a locomotive, and as his horse's head reached a point opposite the engine the fireman fired up—that is, put on fresh coal—which immediately caused a very large and dense volume of black smoke and coal dust to be emitted from the engine and fall upon the horse's head, which frightened him so that he became beyond control and ran to the opposite side of the street, where the sleigh was thrown against a tree or some other obstruction, and the plaintiff was thrown out, by which his leg was broken and other injuries inflicted upon him. The location of the defendant's road was admitted, as also that the train of cars in question was under the charge of the defendant's servants.

The plaintiff introduced evidence which he claimed tended to prove that firing up an engine always causes a large amount of dense, black smoke and coal dust to be driven from the smoke-stack, which descends to the ground as soon as the force which expels it is expended; that this smoke and coal dust so emitted is necessarily calculated to frighten horses and render them unmanageable. He also introduced evidence which he claimed tended to prove that the highway extended about twenty-three or twenty-four hundred feet beside the railway and adjoining it and in full view therefrom, the railway being from five to ten feet

higher than the highway, and that the highway was very much used by travelers with horses and carriages; that on the occasion of the accident, while traveling on that part of the highway, the plaintiff met an engine attached to a train of cars; that as his horse's head arrived at a point opposite the engine the fireman fired up, and the engine emitted dense, black smoke and coal dust, which came directly upon his horse's head, by which his horse was frightened, and in consequence ran, throwing the plaintiff from the sleigh and breaking his leg.

The plaintiff also offered evidence which he claimed tended to prove that the road by which he approached and met the train was, for at least one-third of a mile before the place of meeting, in full view of any person upon the engine, and that to have seen the plaintiff as he approached would not have obliged the engineer or fireman to turn his eyes from the railway track — that is, that both highway and railway were within the scope of the vision of any one looking directly ahead. The plaintiff also offered evidence which he claimed tended to prove that an engine drawing a train of cars could be run from one-half a mile to a mile without firing up, and that if any space of one-half or three-quarters of a mile was known in advance where it was not desirable to fire up it was entirely feasible and within the power of the engineer or fireman so to arrange his firing as not to make it necessary to fire up on such a space, and to make such arrangement without interfering with the working of the engine, and that a quarter of a minute or a few seconds difference in the time of firing up would make no material difference in the running of the engine. The plaintiff also introduced evidence which he claimed tended to show that at the time of the injury he was driving a safe and manageable horse, and was in the exercise of reasonable and proper care, and that the injury was occasioned by the negligence of the servants of the defendant.

Upon the conclusion of the plaintiff's testimony the defendant asked the court to rule that there was no evidence to go to the jury, and to order a verdict for the defendant. The court thereupon did rule and instruct the jury that there was no evidence for the jury, and instructed them to return a verdict for the defendant, which was done. To this ruling the plaintiff excepted.

J. G. Abbott and G. A. Sawyer, for plaintiff. J. H. Benton, Jr., for defendant.

W. ALLEN, J. As the plaintiff was driving his horse along the highway, parallel to and adjoining the defendant's railroad, his horse was frightened by the smoke from the engine of a train passing on the railroad, in a direction opposite to that in which the plaintiff was going, and the plaintiff was injured in consequence. After the plaintiff's evidence was all in, the court ruled that there was no evidence for the jury, and the plaintiff excepted to the ruling. The evidence is not stated in the exceptions, but a full report of it is annexed to them. It does not appear upon what ground the ruling was placed, or what questions of law were intended to be presented. Near the whole of the bill of exceptions is taken up with statements of what the plaintiff claimed the evidence tended to prove. No ruling was asked or given in relation to this. The ruling was that upon the whole evidence the plaintiff could not recover. We think that the ruling was right, because the evidence was not sufficient to prove that the defendant was negligent. The defendant had a right to run its trains on its railroad adjoining the highway, and was not responsible to travelers on the highway for the consequences of noise, vibration, or smoke, caused by the prudent running of its trains. *Farbor v. Boston & Lowell Railroad Company*, 114 Mass. 850. The smoke which frightened the plaintiff's horse was occasioned by "firing up" the engine — that is, mending the fire, or adding coal to it. The plaintiff contended that there was evidence that it was practicable to run the train for the whole distance, where the railroad adjoined the highway, without firing up, and that the act of firing up on the switch of railroad, adjoining the highway, was unnecessary for the ordinary running of trains, and exposed travelers to an unnecessary danger, and was, therefore, negligent, or might be found such by a jury. Without considering the proposition of law involved, we think the court below might properly have ruled that there was no evidence to sustain the proposition of fact. The evidence showed that the frequent firing up was necessary for the practicable running of trains. The exceptions state that "the plaintiff also offered evidence, which he claimed

tended to prove that an engine, drawing a train of cars, could be run from one-half of a mile to a mile without firing up, and that, if any space of one-half or three-quarters of a mile was known in advance where it was not desirable to fire up, it was entirely feasible and within the power of the engineer or fireman so to arrange his firings as not to make it necessary to fire up, in such a space, and to make such arrangements without interfering with the working of the engine, and that a quarter of a minute or a few seconds difference in the time of firing up would make no material difference in the running of the engine." The evidence was uncontradicted that the railroad and highway were adjoining each other for more than a mile, and that it would not be practicable to fire up immediately before entering upon that space, and that it would be necessary, in the ordinary running of trains, to fire up somewhere upon that space under such circumstances. The firing up was near the highway, and the smoke occasioned by it was an ordinary incident of running the train, as much so as the smoke, when not firing, or the noise and vibration caused by the cars, and was not of itself evidence of negligence.

The plaintiff argues that even if it was necessary to fire up when running near the highway, it was not necessary to do so at the particular point where he was, and that the defendant was negligent in not observing him and avoiding firing up when it would endanger him. There was no evidence that they would have seen him if they had been on the lookout for travelers on that part of the highway. If it was their duty to be on the watch for persons on the highway and to avoid firing up when near them, there was evidence of negligence. The act of firing up, like that of sounding the whistle, or blowing off steam, is one necessarily incident to the running of trains, not continuous, but occasional, and so, to some extent, capable of being regulated in its use, and it may be negligent to do it in places where there are likely to be persons who may be endangered by it, and where its use can be avoided, as at stations and highway crossings, and, in short, portions of the railroad near a highway. But we think that the right to fire up an engine, at any particular place, must depend upon the character of the place and not upon whether there happens to be a person near at the moment. If the defendant had a right to fire up its engine somewhere within the space where its road adjoins the highway, the firing up there is one of the ordinary and necessary incidents of running the train, against which travelers on the highway must guard themselves.

The lawfulness of the act cannot depend upon whether a traveler happens to be at such a distance from the engine that he will not be endangered by the smoke caused by it, or in such a position that he cannot be seen by the fireman or engineer. If it is their duty to see one traveler outside the location of the railroad, it is their duty to see how many travelers are there and to observe the position, direction and speed of each, the speed of the engine, the state of the atmosphere, the direction and force of the wind, the character of the coal used, and other circumstances which may determine whether all travelers are and will continue to be, until the smoke shall be dissipated, in such positions that their horses will not be affrighted by it. Being under no obligation to watch for travelers on the highway, the defendant could not have been guilty of negligence in not seeing and avoiding the plaintiff.

Exceptions overruled.

BOSTON AND ALBANY RAILROAD CO. v. CITY OF BOSTON.

September 4, 1885.

EMINENT DOMAIN — HIGHWAY — AUTHORITY OF STREET COMMISSIONERS TO LAY OUT FOOT-WAY ACROSS A RAILROAD.

The distinction between the words "highway" and "town-way" as sometimes used in the statutes, does not apply to the city of Boston, as its board of street commissioners is the only tribunal authorized to lay out ways in that city, and the statute prescribes a uniform manner in which they shall be laid out.

Highways and railroads are both established by the legislative exercise of the right of eminent domain, delegated in one case to public officers and in the other to private persons. Both are franchises, and the legislature has authority to amend either so as to interfere with a previous grant to the other, providing for compensation when private rights are impaired.

The appropriation of land to the public use of a railroad is not inconsistent with its public use as a highway crossing, and may be subsequently appropriated for that purpose. The street commissioners of Boston have authority to lay out foot-ways across a railroad track in that city.

Petition for a writ of *certiorari*, to quash the proceedings of the board of street commissioners of the city of Boston, in laying out a foot-way over the petitioner's railroad. The case was heard by a single justice and reserved upon petition, answer and agreed facts for the consideration of the full court.

A. L. Soule, for petitioner. A. J. Bailey, for respondent.

W. ALLEN, J. This is a petition for a writ of *certiorari*, by which the plaintiff seeks to quash the proceedings of the board of street commissioners of the city of Boston, in laying out a foot-way over the petitioner's railroad. Several objections to the proceedings of the commissioners are stated in the petition, but the only one which has been argued, and which it is necessary to discuss, is in these words: "Because no town, or city, or board of street commissioners is authorized by law to lay out a foot-way over or across a railroad." Pub. Stat., chap. 112, § 125, provides that "A highway or town-way may be laid out across a railroad, previously constructed, when the county commissioners adjudge the public convenience and necessity so require." The petitioner contends that the only authority, by which a public way can be laid out across a railroad is derived from, not merely restricted and regulated by this statute; and that a foot-way is neither a highway nor a town-way, within the meaning of the provision. We think that neither proposition can be sustained; but the former is material only as bearing upon the latter. By the common law, a public foot-way is a highway, and the town highway includes a foot-way. *Tyler v. Sturdy*, 108 Mass. 196, and authorities cited; Bacon's Abridgment, Highway, A. Town-ways are within the common-law definition of a highway, and the word "highway" is sometimes used in the statute to include town-ways. *Jones v. Andover*, 6 Pick. 59. The difference in the meaning of the words, when used distinctively, in the statutes is, that highway designates a public way, original jurisdiction to lay out which is in the county commissioners, and town-way a highway, laid out on proceedings in which a town or city has original jurisdiction. *Inhabitants of Blackstone v. County Commissioners*, 108 Mass. 68; *Valentine v. Boston*, 22 Pick. 75; *Butchers' Slaughtering & Melting Association v. Boston*, 138 Mass. ; *Denham v. County Commissioners*, 108 id. 202. This distinction does not exist in the city of Boston, as its board of street commissioners is the only tribunal authorized to lay out ways, and the statutes prescribe a uniform manner in which all ways shall be laid out. Pub. Stat., chap. 49, § 84; *Commonwealth v. Boston*, 16 Pick 442.

We do not regard Stat. 1874, chap. 299, as an enabling act authorizing highways and town-ways to be laid out across railroads but as recognizing and regulating an existing right. Highways and railroads are both established by the legislative exercise of the right of eminent domain, delegated in one case to public officers, and in the other to private persons. Both are franchises. The legislature have authority to grant either, so as to interfere with a previous grant of the other providing for compensation when private rights are impaired. When both are granted under general laws, as well as where one is under a special act, the question whether one will be controlled or limited by the prior exercise or grant of the other must depend upon the intention of the legislature, and the question we are considering is, whether the appropriation of the land to the public use of a railroad is so inconsistent with its public use as a highway crossing as to prohibit its subsequent appropriation for that purpose. We think it is very clear that it is not. In the language of SHAW, Ch. J., in 23 Pick. 397: "Both uses may well stand together with some interference of the later with the earlier, which may be compensated for in damages." It is sufficient to refer to the cases of *Wellington, Pet'r*, 16 Pick. 87, and *Boston Water-Power Company v. Boston & Worcester Railroad Corporation*, 23 id. 361. The charters under which the petitioner claims its exclusive right — Stat. 1831, chap. 72; Stat. 1833, chap. 116 — contain no references to the laying out of highways over the railroads, and there was no general act upon the subject when the charters were granted. The legislature surely did not intend, by authorizing the taking of land for a railroad,

to divide the State from its western boundary to the sea by a strip of land five rods wide, over which no public way could be laid. There is nothing in the nature or relation of the two public uses to indicate such an intention; and the first legislative utterance on the subject assumes the right to lay out public ways across railroads and regulates it. Rev. Stat., chap. 89, § 69, is: "If, after the laying out and making of any railroad already granted, or which may be hereafter granted, any turnpike road or other way shall be so laid out as to cross said railroad, the said turnpike road or way may be so made as to pass under or over said railroad, and said turnpike or way shall, in all cases, be so made as not to obstruct or injure said railroad." This was the only statute upon the subject for twenty years. Stat. 1857, chap. 287, was the first act which made full regulations for laying out ways across railroads. We think this statute was a legislative recognition and restriction and regulation of the right of the county commissioners and towns and cities to lay out public ways across railroads. This statute is substantially re-enacted in Gen. Stats., chap. 63, §§ 57-60, and in the revision of the railroad acts in Stat. 1874, chap. 373, § 92. In the latter the words "a highway or town-way" are substituted for the words "a turnpike road or other way" in the earlier statutes, and so in Pub. Stat., chap. 112, § 125. From a consideration of the subject-matter, and an examination of the statutes referred to, it seems that, prior to the Revised Statutes, there was authority to lay out public ways across railroads. The Revised Statutes authorized ways, laid out across railroads, to pass over or under the railroad, and provided that they should be so made as not to obstruct or injure the railroad. Stat. 1857, chap. 287, required that the crossing should be with the consent of and in the manner prescribed by the county commissioners. The re-enactment of this in Gen. Stats., chap. 63, §§ 57, 59, providing for the manner in which "a turnpike road or other way" should be laid out across a railroad was in force when Stat. 1874, chap. 229, authorizing towns and cities to lay out foot-ways in the manner provided for laying out town-ways took effect, and under it foot-ways came, even if they were not before, within the designation of "a turnpike road or other way." Certainly, after the enactment of that statute until Stat. 1874, chap. 372, took effect, there was authority for laying out a foot-way across a railroad, and there is no ground for the argument that the change in the latter statute was intended, or can operate to take away that authority. The change was made in separating the provision in regard to "turnpike" from that in regard to "other ways." This involved a change in phraseology, not only by omitting the word "turnpike," but by some synonym for "other ways." The "other ways," in the earlier statutes, included every public way, whether laid out by the county commissioners or by towns or cities, or whether a carriage-way or a foot-way, and the words "highway or town-way" in the revision have the same meaning. A foot-way, laid out by a town or city under Stat. of 1874, chap. 279, comes within the strict definition of a town-way. There can be no doubt of the authority of the street commissioners of Boston to lay out a foot-way, and whether the authority was given by Stat. 1874, chap. 299, or was vested in them in common with the county commissioners and towns and cities by earlier general authority to lay out ways, or is derived from special provisions relating to the town and city of Boston — See *Gould v. Boston*, 120 Mass. 800 — is immaterial. The authority, however derived, must be exercised in the manner prescribed by the statutes relating to the laying out of ways in Boston. A way so laid out, whether a foot or a carriage-way, may be a highway, within the meaning of that word in the statute, rather than a town-way. Every public way, laid out by the county commissioners or by a city or town, or by a board of commissioners of streets of the city of Boston, must be either a highway or a town-way within the meaning of those words in Pub. Stat., chap. 112, § 125, and the authority to lay it out across a railroad is recognized and regulated by, if not derived from, the statute.

Petition dismissed.

MORSE v. CURTIS.

September 7, 1885.

RECORDING ACT — MORTGAGE — INNOCENT PURCHASER — PRIORITY OF TITLE.

The recording of conveyances under the registry laws was intended to take the place of the act of livery of seizin; and although by the first deed the title passes out of the grantor as against himself, yet he can, if such deed is not recorded, subsequently convey a good title to an innocent purchaser who receives and records his deed.

If a purchaser upon examining the records finds a conveyance from the original owner to his grantor which gives him a perfect record title, completed by what the law regards as equivalent to a livery of seizin at the time it is recorded, he is entitled to rely upon such record title and is not obliged to search the records afterward made, to see if there has been no earlier unrecorded deed of the original owners.

Writ of entry to recover a parcel of land situated in Natick. At the trial in the superior court the jury were directed to return a verdict for the demandant, and the case was reported for the consideration of the supreme judicial court.

P. H. Cooney, for demandant. *E. S. Mansfield*, for tenant.

MORTON, Ch. J. This is a writ of entry. Both parties claim their title from one Hall. Hall mortgaged the land to the demandant August 8, 1872. On September 7, 1875, Hall mortgaged the land to one Clark, who had notice of the earlier mortgage. The mortgage to Clark was recorded January 31, 1876. The mortgage to the demandant was recorded September 8, 1876. On October 4, 1881, Clark assigned his mortgage to the tenant who had no notice of the mortgage to the demandant. The question is, which of these titles has priority? The same question was directly raised and adjudicated in the two cases of *Connecticut v. Bradish*, 14 Mass. 296, and *Trull v. Bigelow*, 16 id. 406. It is true that in the later case of *Flynt v. Arnold*, 2 Metc. 619, Chief Justice SHAW expresses his individual opinion against the soundness of these decisions, but in that case the decision of the court was distinctively put upon another ground, and his remarks can be only considered in the light of dicta and not as overruling the earlier adjudications. Upon careful consideration the reasons upon which the earlier cases were decided seem to us the more satisfactory, because they best follow the spirit of our registry laws and the practice of the profession under them. Stat. 1783, chap. 37, § 4. Under this statute the court, at an early period, held that the recording was designed to take the place of the notorious act of livery of seizin, and that though by the first deed the title passed out of the grantor as against himself, yet he could, if such deed was not recorded, convey a good title to an innocent purchaser, who received and recorded the deed. But the court also held that a prior unrecorded deed would be valid against a second purchaser who took his deed with a knowledge of the prior deed, thus engrafting an exception upon the statute. *Reading of Judge Trowbridge*, 3 Mass. 575; *Marshall v. Fisk*, 6 id. 24. This exception was adopted on the ground that it was a fraud in the second grantee to take a deed if he had knowledge of the prior deed. *Lawrence v. Stratton*, 6 Cush. 163. This exception by judicial exposition was afterward grafted upon the statutes and somewhat extended by the legislature. Rev. Stat., chap. 59, § 28; Gen. Stat., chap. 89, § 8; Pub. Stat., chap. 120, § 4. In the case before us it is found as a fact that the tenant had no actual knowledge of the prior mortgage to the demandant at the time he took his assignment from Clark, but it is contended that he had constructive notice, because the demandant's mortgage was recorded before such assignment.

The laws not only provide that deeds must be recorded, but they also prescribe the method in which the records shall be kept, and indexes are provided for public inspection and examination. Pub. Stat., chap. 24, §§ 14-26. There are indexes of grantors and grantees, so that in searching a title, the examiner is obliged to run down the list of grantors and run backward through the list of grantees. If he can start with one owner, who is known to have a good title, as in the case

at bar, he could start with Hall, he is obliged to run through the index of grantors until he finds a conveyance by the owner of the land in question. After such conveyance, the owner becomes a stranger to the title and the examiner must follow down the name of the new owner to see if he has conveyed the land, and so on. It would be a hardship to require an examiner to follow in the indexes of grantors, the names of every person who, at any time, through perhaps a long chain of title, was the owner of the land. We do not think this is the practical construction which lawyers and conveyancers have given to our registry laws. The better rule seems to be, that if a purchaser, upon examining the registry, finds a conveyance from the owner of the land to his grantor, which gives him a perfect record title, completed by what the law regards as equivalent to a livery of seizin at the time it is recorded, he is entitled to rely upon such record title and is not obliged to search the records, afterward made, to see if there has been any prior unrecorded deed of the original owners. This rule of property, established by the early case of *Connecticut v. Bradish*, ought not to be departed from, unless conclusive reasons therefor can be shown.

We are, therefore, of opinion that in the case at bar the tenant has the better title.

Verdict set aside.

GODDARD v. WHITNEY.

September 4, 1885.

WILL — CONSTRUCTION OF — TRUST ESTATE — DISTRIBUTION OF.

The testator by his will provided, after certain specific bequests, that the remainder of his estate should remain invested as he should leave it at his death, for the space of five years; that all the income accruing from the estate during that time should be divided equally among his wife and four children; that in case of the death of any of the children during that time, without issue, their share should be divided equally among the surviving children, except as to the share of his daughter, Louisa Whitney, and as to her share he provided that in case of her death her share should be divided between her two children, Anna Louisa Field and Eleanor G. Whitney (afterward Mrs. Allen); but should either or both of her said children die without issue, then the income bequeathed to such child or children should be divided equally among his immediate children. The testator further provided that at the expiration of the five years after his death the principal of all the property should be divided into five equal portions, one portion to be invested and the income thereof paid to his wife, and one portion to be invested and the income thereof paid to his daughter Louisa Whitney, and at her death the same to be divided between her two children; but should either of her children die without issue then her share of the income was to go to his immediate children. He also gave one of said portions to each of his other three children, "to have and to hold and to dispose of the same; but if either of them should die intestate and without legal issue, it is my will that all of his or her portion of my estate shall be equally divided among their surviving brothers and sisters." He also provided that if either of his children should die without legal issue during the space of five years after the testator's death, "then all of that portion of the principal of my estate bequeathed to such child or children, shall be added in equal shares to the portions of such of my immediate children who may be living at the expiration of the five years aforesaid." William D. Goddard, one of the children, died intestate and without issue, after the will was made and during the life-time of the testator, and one-third of the portion of the estate, which would otherwise have belonged to him, was paid to the petitioner as trustee for the portion of Louisa Whitney. He managed it for her for several years when she died leaving a husband and two children surviving, Mrs. Field and Mrs. Allen. Mrs. Allen subsequently died leaving a husband and issue surviving. In an action brought for the construction of the will the question arose in regard to the trust estate whether one-third of the portion given William D. Goddard by the will, and held in trust by the petitioner as aforesaid, was to be held in trust and subject to the provisions which applied to the other portions of the estate given in trust, or whether at the expiration of the period of five years, after the decease of the testator, it became the absolute property of Louisa Whitney discharged of all trust; also whether the said trust was terminated in whole or in part by the decease of Mrs. Allen leaving lawful issue, and if so who was entitled to the property.

Held, that it was the intention of the testator that the division should be made by addition to the portions elsewhere given to such surviving children, and upon the same terms as those upon which such portions were given. When a testator, in the entire structure of his will, has revealed an intention, the language of individual clauses is always to be construed with reference to that intention, even if in another instance or another connection it might properly receive a different construction. That the rights of Mrs. Field and Mrs. Allen were derived directly from the will and that they took thereunder as pur-

chasers. *Held, also*, that the devise over, in case either of the grand-daughters died without legal issue, necessarily implied that if she died leaving issue an estate of inheritance was devised to her; that the fact that Mrs. Allen's share was to be kept in trust during her life-time, was not inconsistent with the fact that she was equitably the owner of the property; that after her decease the property was to be treated as her intestate property and the personalty would pass to her administrator, and by the law which prevailed at the time of her decease, the husband would be entitled to the whole thereof after payment of debts and expenses and in the real estate he was entitled to his tenancy by the curtesy.

Petition of Maurice Goddard, trustee under the will of Samuel Goddard, praying for instructions as to the construction of the will. The case was reserved by a single justice, upon the petition, the claims and answers of the respondents for the consideration of the full court. It appeared that Samuel Goddard made a will in 1865, by the first clause of which he gave to his wife his estate in Brookline, consisting of house, land and furniture, for her life, and "at her death, said estate shall be divided equally among her immediate surviving children, according to the provisions hereinafter named, with regard to their portions of the rest of my estate." By the second clause, he gave his son Maurice Goddard, personal property purchased with his money, but standing in the name of the testator. By the third clause, he gave his grand-daughter, Eleanor G. May, certain personal property, and provided that "if the said Eleanor G. May shall die before the age of twenty-one without legal issue, then her said portion of my estate shall revert in equal shares to my immediate children, who may be living at the time of her death." The fourth, fifth and sixth clauses of the will are as follows:

Fourth. It is my will that all of my estate, real and personal, that may remain after the devise of my said estate in Brookline and the transfer of the personal property above specified to my wife, my son Maurice and my grand-daughter Eleanor G. May, shall remain invested as I may leave it at my death for the space of five years, unless during that time it should be considered necessary in the judgments of two of the three gentlemen here named, viz., Benjamin E. Bates and Josiah Bardwell, both of Boston, in the county of Suffolk, and William Dwight of Brookline, in the county of Norfolk, to change the investments of the whole or any portion thereof, in which case my executors shall act in accordance with such decision by them made; and it is my will that all the income accruing from said estate during said time shall be divided into five equal shares, and paid, as such income shall become due, according to my following directions to the persons hereinafter named, to-wit:—

One of the said shares to my wife, Mehitable May, to be accepted by her instead of her right of dower, and in case of her death, her said share to be equally divided among her immediate surviving children. Also, one of the said shares to my daughter, Louisa Whitney, and in case of her death it is my will that her said share, together with all other income that may have accrued to her under the provisions of this will, shall be equally divided between her two children, Annie Louisa Field and Eleanor G. Whitney; but should either or both of her said children decease without legal issue, then the said income bequeathed to such child or children shall be equally divided among my immediate surviving children. Also, one of the said shares to my son, William D. Goddard, and in case of his death without legal issue, his said share, together with all other income that may have accrued to him under the provisions of this will, shall be equally divided among the immediate surviving brother and sisters. Also, one of said shares to my daughter, Julia Goddard, and in case of her death without legal issue, her said share, together with all other income that may have accrued to her under the provisions of this will, shall be equally divided among her immediate surviving brothers and sister. Also, one of said portions to my son, Maurice Goddard, and in case of his death without legal issue, his said portion or share, together with all other income that may have accrued to him under the provisions of this will, shall be equally divided among his immediate surviving brother and sisters.

Fifth. And it is my will that, at the expiration of five years after my death, the principal of all that part of my estate specified in article fourth of this instrument shall be divided as it then stands into five equal portions, each portion to contain a fifth part of each of the investments in which my estate may then be

comprised, said portions to be then given according to my following directions to the persons hereinafter specified, viz.: One of said portions to my wife, Mehitable May, to have and to hold the same during her life, and at her death her said portion shall be equally divided among her immediate surviving children. Also, I give and bequeath one of said portions to Josiah Bardwell, of Boston, in the county of Suffolk, and Commonwealth of Massachusetts, to have and to hold the same to him, his heirs, executors, administrators and assigns, but to hold the same in trust, nevertheless, for the following purposes and uses, viz., to receive and collect all the income that shall accrue from the said portion of my estate, and pay the same to my daughter, Louisa Whitney, during her life, in semi-annual payments. And it is my will that the investments of the said portion of my estate shall not be changed unless it shall be considered necessary, in the judgment of two of the three gentlemen here specified, viz., Benjamin E. Bates and Josiah Bardwell, both of Boston, in the county of Suffolk, and William Dwight, of Brookline, in the county of Norfolk, to change any or all of the said investments, in which case the said Josiah Bardwell shall act in accordance with such decision by them at any time made. And it is my will that at the death of my daughter Louisa, this her said portion of my estate shall be equally divided between her two children, Annie Louise Field and Eleanor G. Whitney, the same to be held in trust for them by the said Josiah Bardwell, and the income thereof to be paid them semi-annually during their life; and should either or both of the said children decease without legal issue, then it is my will that the said portion of my estate above bequeathed to such child or children shall be divided in equal shares among my immediate surviving children.

Also, one of the said portions shall be given to my son, William D. Goddard, to have and to hold, and to dispose of the same, together with all other property that may accrue to him under the provisions of this will, but if he should die intestate and without legal issue, it is my will that his said portion of my estate shall be equally divided among his immediate surviving brother and sisters.

Also, one of said portions shall be given to my daughter, Julia Goddard, to have, to hold, and to dispose of the same, together with all other property that may accrue to her under the provisions of this will; but if she should die intestate, and without legal issue, then it is my will that all of her said portion of my estate shall be equally divided among her immediate surviving brothers and sister.

Also, one of the said portions shall be given to my son, Maurice Goddard, to have, to hold and to dispose of the same, together with all other property that may accrue to him under the provisions of this will, but if he should die intestate and without legal issue, it is my will that all of his said portion of my estate shall be equally divided among his immediate surviving brother and sisters.

Sixth. It is my will that if either or any of my children above specified, viz., Louisa Whitney, William D. Goddard, Julia Goddard, and Maurice Goddard, should decease without legal issue during the space of five years after my death, then all that portion of the principal of my estate bequeathed to such child or children shall be added in equal shares to the portions of such of my immediate children who may be living at the expiration of the five years aforesaid.

The testator died in 1871. The petitioner was appointed trustee under the will, in place of Josiah Bardwell, who declined the trust, and as such trustee received and still holds the portion or distributive share of the estate given in trust to Louisa Whitney and her children, as provided in said will. William D. Goddard, named in said will, having deceased, intestate, and without issue, after the same was made and during the life-time of the testator, the portion of the estate, which would otherwise have belonged to him, was divided and distributed, in accordance with the decision of this court, made in the case of *Goddard v. May*, 109 Mass. 468, and one-third of the same was paid to the petitioner as trustee in conjunction with the other portion of the estate, given to said Bardwell, in trust under the fifth clause of the will. The petitioner managed the trust for the benefit of said Louisa Whitney for five years after the death of the testator, and thereafter until May 18, 1882, when the said Louisa Whitney died, leaving a husband, Josiah D. Whitney, and the two daughters named in said fifth clause of the will, one of them, Annie Louise Field, being the wife of Henry L.

Field, and having lawful issue. The other daughter, Eleanor G. Whitney, married Thomas Allen, and died May 14, 1882, leaving a husband, the said Thomas Allen, and a child born April 18, 1882. The questions arising in regard to said trust estate were whether the one-third of the portion, given William D. Goddard by said will and paid and delivered to said Maurice Goddard under the decree of this court, in the case above referred to, was to be held in trust and subject to the provisions which applied to the other portion of the estate, given to said Bardwell in trust under the fifth clause, or whether, at the expiration of the period of five years, after the decease of the testator, it became the absolute property of Louisa Whitney, discharged of all trust. It was also a subject of controversy, whether the said trust was terminated, in whole or in part, by the decease of said Eleanor G. Allen, leaving lawful issue, and if so, who was entitled to have the property and how the same is to be held and administered, or to whom it is to be distributed and paid, if to any one.

A. A. Ranney, for petitioner. *N. Morse* and *H. G. Allen*, *J. F. Colby*, *W. E. L. Dillaway*, *C. W. Turner* and *H. S. Dewey*, for different respondents.

DEVENS, J. The will, concerning which instructions are asked, has been once before this court for interpretation. *Goddard v. May*, 109 Mass. 468. William D. Goddard, having died during the life-time of his father, it was necessary then to determine whether the legacies of principal and income of the share directed to be set apart for W. D. Goddard had lapsed by his death without issue and intestate in the life-time of the testator, there being, in that event, an unconditional gift over. It was there decided that the words "his share" and "his portion" found in the will referred to his share of the estate set apart for him, but did not show any intent to make the vesting of an interest in W. D. Goddard a condition of the gift over; that the sixth clause was not inserted with a view to the limitation over, and that the share of W. D. Goddard should be retained undivided, except for the purpose of distributing the income to the surviving brothers and sisters until the expiration of five years from the testator's death, during which time the principal of the estate was to remain undivided. It was further said that, when the distribution shall take place, one-third of this share shall be added to each of the shares of the brothers and sisters. When this decision was made the five years had not expired, and it was not decided whether the portion of the estate coming to Mrs. Whitney, by reason of the death of her brother, should be taken by her absolutely, or whether it should be added to the trust estate, created on her behalf and that of her children, and thus held and administered. The fourth clause, which relates to the disposition of the income, provides that Mrs. Whitney's share, in case of her death, together with all that may have accrued, is to be paid to her daughters, whom it names. The fifth clause places her share of the principal in trust, and provides for the division of it between her daughters at her decease, the income being paid to them during life. The sixth clause directs that if either child shall decease during the five years, that portion of his estate bequeathed to each child "shall be added, in equal shares, to the portions of such of my immediate children who may be living at the expiration of five years aforesaid." The fourth and fifth clauses show fully an intention that the husband shall not participate in the income or principal of the estate which Mrs. Whitney received. When the testator, in the fifth clause, referring to the portion of W. D. Goddard, and to the contingency of his dying intestate and without issue, provides "that his said portion of my estate shall be equally divided among his immediate surviving brothers and sisters," the intention of the testator revealed throughout the will compels us to hold that this division is to be made by addition to the portions elsewhere given to such surviving children, and upon the same terms as those upon which such portions are given. When the testator in the entire structure of his will, has revealed an intention, the language of individual clauses is always to be construed with reference to that intention, even if, in another instance or another connection, it might properly receive a different construction. *Weston v. Weston*, 125 Mass. 268; *Metcalf v. Framingham Parish*, 128 id. 370-374; *Bradlee v. Andrews*, 137 id. 56.

Assuming that the property derived from the share of W. D. Goddard is to be

added to and form a part of the share of Mrs. Whitney, we are to consider what disposition is now to be made of it and who is entitled thereto, Mrs. Whitney having deceased after the expiration of the five years, and her daughter, Mrs. Allen — spoken of in the will as Eleanor G. Whitney — having deceased subsequently to the decease of her mother, Mrs. Whitney, herself leaving a daughter, Eleanor G. Allen. Mrs. Allen's husband, Thomas Allen, was also at her decease and is still living. The part of the fifth clause, relating to the final disposition of the trust property held for the benefit of Mrs. Whitney during her life, and of which she was to have the income, provides that at her death "her said portion of my estate shall be equally divided between her two children, Annie Louise Field and Eleanor G. Whitney" (who afterward became Mrs. Allen), "the same to be held in trust for them by the said Josiah Bardwell, and the income thereof to be paid them semi-annually during their life; and should either or both of the said children decease without legal issue, then it is my will that the said portion of my estate, above bequeathed to such child or children, shall be divided in equal shares among my immediate surviving children."

The final vesting of personal property — and Mrs. Whitney's portion consisted of both personal and real estate — may, by means of an express trust, be postponed as in executory devises of real estate, and there can be no objection if the ultimate disposition of the property is not postponed, in any contingency, for a period beyond heirs in being and twenty-one years thereafter. *Sears v. Russell*, 8 Gray, 86; *Fordick v. Fordick*, 6 Allen, 41; *Loring v. Blake*, 98 Mass. 253; *Otis v. McLellan*, 18 Allen, 339; *Hooper v. Bradbury*, 133 Mass. 303. Mrs. Whitney had only an equitable estate for life, and those who were then to take were distinctly named. Had there been, at the time the will became operative, other children, or had there been such subsequently born, they would have had no benefit under this clause. The rights of Mrs. Field and Mrs. Allen are directly derived from the will, and they take thereunder as purchasers.

The remaining questions raised by the bill for instructions will be determined by considering what was the character of the estate taken by the two daughters of Mrs. Whitney respectively. Did they have equitable estates for life only in the trust property, or such estates in inheritance therein, that, when Eleanor C. Whitney — Mrs. Allen — deceased, leaving lawful issue, the trust was terminated as to one-half of the property, and is such portion now to be treated as her intestate property, to be disposed of according to the rules of descent and distribution?

Although a contingency existed on the occurrence of which there was a devise over of the property, the expressions, which show that the two grand-daughters are to take more than equitable estates for life in the trust property, are very strong. The rule of the common law, that in a deed or conveyance *inter vivos* the omission of the words "heirs or assigns" indicated an intention to convey only a life estate does not ordinarily apply to devises. Our statute also has provided that "every devise shall be construed to convey all the estate which the testator can lawfully devise in the lands mentioned," unless it clearly appears by the will that he intended to convey a less estate. Pub. Stat., chap. 127, § 24; *Gleason v. Fayerweather*, 4 Gray, 348.

While in terms the testator provides for the death of his grand-daughters without issue, by the bequest of their portion in such case to his immediate surviving children, he does not expressly provide for the contingency which has occurred, the death of one of them, leaving issue. But that which the testator gave, is not to be construed as less than an estate of inheritance, because in a certain contingency it might be determined. The devise over in case either of the grand-daughters dies without legal issue, necessarily implies, that, if she dies leaving issue, an estate of inheritance is devised to her. If the clause, by which it was ordered that the estate should be equally divided between the two grand-daughters, the income being paid to each for life, could otherwise be construed as giving only an estate for life, the effect of the limitation over to her legal issue, would be to enlarge it. *Haywood v. Howe*, 12 Gray, 49; *Parker v. Parker*, 8 Metc. 134.

It is contended that the manifest purpose of the testator was not merely to prevent the husband of Mrs. Whitney, but also the husbands of either of her daughters, from any participation in his estate, and to keep it in his immediate

family. If so, he has certainly failed to express such purpose, as it is only in case of "decease without issue," that he has shown any intention that the share bequeathed to either of his grand-daughters named shall be disposed of by a devise over to his then surviving children.

Mrs. Allen's share was indeed to be kept in trust during her life-time, but this is not inconsistent with holding that she was equitably the owner of the property. Whatever would be deemed the rule of law if it was a legal estate, is applied in equity to a trust estate. *Burgess v. Wheat*, 1 Wm. Black, 160; *Loring v. Eliot*, 16 Gray, 568; *Heyward v. Howe*, *ubi supra*.

We do not perceive that the case, as now presented, requires us to determine whether the words "decease without issue" refer to a definite or indefinite failure of issue. If they are construed as meaning a definite failure of issue, while the ultimate limitation was a valid devise at the decease of Mrs. Allen, the contingency upon which it depends has not occurred and cannot occur. *Hooper v. Bradbury*, 133 Mass. 308. The property is to be treated as her intestate property. The personalty will pass to her administrator, and by the law which prevailed at the time of the decease of Mrs. Allen, the husband will be entitled to the whole thereof, after payment of debts and expenses. Gen. Stat., chap. 95, § 16, cl. 4. In the real estate he will be entitled to his tenancy by the curtesy.

If the words "decease without issue" are construed as meaning an indefinite failure of issue, the ultimate limitation over would be void; as to the personalty, Mrs. Allen would take a complete equitable title thereto, and it would now pass to her administrator. In the realty, she would take an equitable estate tail, of which her daughter would now be the tenant, and the devise over would be a remainder after all estate tail. *Allen v. Trustees Ashley School Fund*, 102 Mass. 262; *Hall v. Priest*, 6 Gray, 18; *Albee v. Carpenter*, 12 Cush. 882. But an estate tail being one of inheritance, and the wife having been seized, the husband is entitled to his curtesy therein. Pub. Stat., chap. 124, § 1; Co. Litt. 30 a.; 2 Bl. Com. 126; *Loring v. Eliot*, 16 Gray, 578.

Decree for instructions accordingly.

SUPREME COURT OF VERMONT.

MATTER OF SOWLES.

January, 1885.

PRACTICE — INSOLVENCY — EXCEPTION TO JUDGMENT OF COUNTY COURT.

An order of the court of insolvency dismissing a petition brought to have one adjudged an insolvent debtor on appeal to county court was affirmed. *Held*, that the judgment of the county court was conclusive and exceptions thereto not allowable.

Appeal from the court of insolvency. Heard September term, 1884, ROYCE, Ch. J., presiding. The order of the court below dismissing the petition was *pro forma* affirmed. Two petitions had been presented to the court of insolvency, praying that said Sowles be adjudged an insolvent debtor, and his property distributed, etc. The court of insolvency decided: "The court finds that certain acts of insolvency alleged in said petition were true; but that the petitioner, George W. Foster, did not have such a claim against said Albert Sowles as would entitle him to bring said petition; and therefore dismisses the said petition." The appellee filed a motion in the county court to dismiss, which was overruled; and the cause was heard on the testimony of witnesses, and matters in copies of appeal, which were not controverted. The motion in the supreme court was "to dismiss the exceptions . . . taken to the decision and judgment of the Franklin county court in said cause, for that by law no such exceptions were allowable in such case, and this court has no jurisdiction upon such exceptions to revise the judgment of," etc.

Farrington & Post, for petitioner. *D. Roberts*, for petitionee.

TAFT, J. A petition for the adjudication of Albert Sowles as an insolvent was filed in court and dismissed. An appeal was taken to the county court under the last clause of section 1870, Rev. Laws. The cause was heard in the county court, and the order of the court of insolvency affirmed *pro forma*; to this judgment an exception was allowed the petitioner. In this court the alleged insolvent moved to dismiss the exceptions on the ground that none were allowable. Shall this motion be sustained? The statute giving the right of appeal from an adjudication of insolvency provides that it shall be allowed as provided in chapter 93, Rev. Laws, for appeals from the finding of the judge to the county court. The only appeal from the finding of the judge to the county court mentioned in the chapter is under sections 1810-11 and 12. But these sections give no right to exceptions to the supreme court. The latter section expressly prohibits them by the clause reading: "The final judgment of the county court shall be *conclusive*." Exceptions being forbidden by the statute under which the proceedings are instituted, they cannot be granted under the general statute — § 1385, Rev. Laws — providing for exceptions in ordinary cases. The appeal mentioned in sections 1862-3 and 4, in which exceptions are allowed, is not from the finding of the judge. Those sections, therefore, have no application to the case at bar. That exceptions were not contemplated by the framers of the statute is evident from the clause requiring that "the judgment of the county court shall be certified by the clerk thereof to the court of insolvency," while, in all those cases where exceptions to the supreme court are permitted, the provision in regard to the certification is, that the final decision and judgment shall be certified by the county or supreme court, depending of course upon the fact of, in which court was final judgment rendered. As the exceptions are to be dismissed, it is not proper for us to discuss any of the other questions in the case. The ruling below having been *pro forma*, the cause should be remanded to that court for a final disposition.

Exceptions dismissed and cause remanded.

REYNOLDS v. ROBERTS.

February, 1885.

SALE — BREACH OF WARRANTY OF TITLE — INCUMBERED WITH A CHATTEL MORTGAGE.

If a conditional vendee fails to pay according to the terms of the sale, he cannot maintain an action for deceit and breach of warranty of title, although the property was incumbered with a chattel mortgage, and had been taken under the statute by the owner of the mortgage, in case the mortgagee was present and acquiesced in the sale; because if the vendee had fulfilled, the mortgagee would have been estopped from enforcing his claim.

When one sells personal property in his possession, actual or constructive, he sells it with an implied warranty of title; thus, when mortgaged personalty on premises occupied by both the mortgagor and mortgagee is sold by the latter, his possession is sufficient to raise an implied warranty of title.

ESTOPPEL — AGENT EXCEEDING AUTHORITY.

Defendant owning a chattel mortgage assigned a certain interest in it to a foreign corporation, who had an "agent and representative" in this State, who was present and acquiesced in the conditional sale by the defendant to the plaintiff of the mortgaged property. *Held*, in the absence of proof that the agent exceeded his authority, that his acts were binding on his principal, and that it would have been estopped from foreclosing its mortgage, if the plaintiff had fulfilled his contract of purchase.

Case for deceit and breach of warranty of title in the sale of personal property. Plea, general issue. Trial by jury, June term, 1884, VEAZEY, J., presiding. After the facts were in, the court *pro forma* ordered a verdict for the plaintiff.

It appeared that the defendant, in 1882, at Winhall, in this State, had been engaged in the manufacture of charcoal, under a contract with the Barnum Richardson Co., a corporation existing under the laws of Connecticut; that one Tobin had a contract under the defendant for cutting and drawing wood upon the same work; that Tobin had in his possession teams, wagons, sleds, etc., used in the business, among which was the property specified in the plaintiff's declaration;

that Tobin's creditors pressing him for pay, the defendant advanced the money to pay them and took a chattel mortgage of said property to secure him; that of this money said Barnum Richardson Co. advanced some \$1,200, and the mortgage was "taken for the joint benefit of the defendant and said" company; and that, in July, 1882, "the defendant made an assignment upon the back of said mortgage of an interest in said mortgage to said Barnum Richardson Co., equal to \$1,250." The exceptions stated in part: "All the property included in said mortgage remained in the hands of said Tobin until the 5th day of August, 1882, when it was thought desirable to dispose of some of the property included in said mortgage which was not needed upon said works; and to accomplish that, the said Tobin, the defendant, and one John A. McArthur, who was the agent and representative of the Barnum Richardson Co., in this State, agreed to put up said property for sale at auction; and that such of it as should be bid off, at prices satisfactory to the parties, should be sold, and the receipts therefor be credited to the said Tobin, upon the debt owed by him secured by said mortgage; and that such of the property for which no satisfactory bids were received should be bid in by some of the parties to said contract, and should come back into the hands of said Tobin and be held the same as it would have been if it had not been so put up at auction. All the property in question in this suit was so bid in and remained the same as before any auction had taken place, and was kept on the premises occupied by the defendant and by Tobin. The proceeds of all property actually sold at said auction were credited by the defendant and said Barnum Richardson Co. upon the debt secured by said mortgage. On the same day as said auction the plaintiff made a contract for the purchase of certain of the property aforesaid, and the plaintiff, the defendant, said Tobin, and said McArthur went to the office of an attorney to have the said contract reduced to writing; and the same was reduced to writing there in the presence, and with the concurrence, of said Tobin, McArthur, the plaintiff, and defendant."

"On the 17th day of March, 1883, the said McArthur and the defendant put the said chattel mortgage into the hands of F. D. Giddings, sheriff, and directed him to take said property and sell the same as required by the statutes in such case made and provided; and said sheriff took said property upon said chattel mortgage, advertised it for sale, and sold the same. All the property purchased by the plaintiff was taken and sold; and upon said sale there was not enough received to pay what there was due upon said chattel mortgage; and there was not enough received from the sale of the property sold to the plaintiff to pay the balance remaining due from the plaintiff upon his said purchase."

The contract between the plaintiff and defendant as to the sale of the property contained this condition:

"And all of said property is to be and remain the property of the said Charles L. Roberts or bearer, and at all times and places subject to his control until said sum is paid in full as aforesaid with use."

The plaintiff had no actual notice of the incumbrance.

Burton & Munson and *J. C. Baker*, for defendant. *J. K. Batchelder* and *J. G. Martin*, for plaintiff.

ROYCE, Ch. J. This is an action on the case for deceit and breach of warranty of title in the sale of personal property. The property in question was sold in three parcels, to the plaintiff and to two other parties, to whose rights under the sale the plaintiff succeeded conditionally, to be paid for in installments within a certain limited time, and to remain the property of the vendor until paid for. At the time of sale the property was incumbered to the amount of about \$2,400 by a chattel mortgage duly recorded. Said mortgage was running to the defendant; but previous to the sale an interest in it to the amount of \$1,250 had been assigned by the defendant to the Barnum Richardson Co., which assignment was also recorded. The plaintiff had no actual notice of this incumbrance. After the expiration of the time within which, by the terms of the contract, payment of the full purchase-price was to be made, and after the plaintiff had made partial payment, the property was seized and sold by the Barnum Richardson Co. by proceedings under the statute for the foreclosure of chattel mortgages; and the pro-

ceeds applied to the payment of their claim, the costs, and expenses of the proceeding, and the balance paid over to certain attaching creditors of the defendant.

The sale to the plaintiff, when made, was acquiesced and participated in by the defendant, the mortgagor, Tobin, and one McArthur, who, the case shows, was "the agent and representative in this State" of the Barnum Richardson Co.; and the case further shows that said property when sold was kept on premises occupied by the defendant and said Tobin.

The law must be regarded as well settled in this State, and in the United States generally, that in the absence of any notice to the contrary, a person who sells personal property in his possession sells it with an implied warranty of title. *Patee v. Pelton*, 48 Vt. 182; *Benj. Sales*, § 641, and note *i*. And it is held that the word "possession" in this connection is to receive a broad construction, so as to include constructive as well as actual possession. Thus it is held that possession by a bailee or agent or a tenant in common of the vendor is sufficient; and that to constitute the exception, it must appear that the goods were in the adverse possession of a third person, or else that the vendor had either no interest in them, or a mere naked interest, without either actual or constructive possession. *Shattuck v. Green*, 104 Mass. 42.

From what appears in this case, therefore, we think the defendant must be treated as having been in possession of the property at the time of the sale in such a sense, at least, as to raise an implied warranty of title,

While the doctrine of the courts in different States is not entirely uniform as to the exact state of circumstances under which a vendee may assert the breach of an implied warranty, it may safely be said that he must show a lawful eviction, or at least a legal right to the possession of the property in a third person. *Benj. Sales*, § 627, and note *i*. The plaintiff having shown the property taken out of his hands by means of the foreclosure sale upon the Barnum Richardson Co.'s claim under the mortgage, it is replied that had the plaintiff fulfilled the terms of his contract of purchase he could not have been dispossessed in that way; because by their participation and acquiescence in the sale to him, both the defendant and the Barnum Richardson Co. would have been estopped from setting up any claim under the mortgage against him. That the defendant and the mortgagor would have been so estopped by their acts in connection with the sale seems to admit of no question. *Pom. Eq. Jur.*, § 801 *et seq.*; *Miller v. Bingham*, 29 Vt. 82. Whether the Barnum Richardson Co. stand in the same position, depends simply upon the authority of McArthur to act for them in doing what the case shows he did do upon the occasion of the sale. With regard to this, the case shows, that he was "the agent and representative of the Barnum Richardson Co. in this State," and also shows certain acts of his in relation to the sale at auction of certain of the mortgaged property, which was thus disposed of before the sale to the plaintiff, and which do not appear to have been questioned by his principals. In the absence of any thing to show that McArthur's authority as agent was a special or limited one, or that what was done by him was beyond the scope of his authority, we think this is enough to make his acts in this connection binding upon his principals. Had the plaintiff fulfilled the terms of his contract of purchase by paying the full amount therein stipulated to be paid before eviction, he could not lawfully have been deprived of possession by the Barnum Richardson Co. by foreclosure of their mortgage.

It is contended, that by receiving payments from the plaintiff after the expiration of the time limited in the contract of sale, the defendant extended the time of payment, and so could not lawfully retake the property without previous demand of payment. This may be true; but it does not appear that the plaintiff's possession was disturbed, or attempted to be, by the defendant. The property was taken and sold by the Barnum Richardson Co. by virtue of their right, acquired previous to the sale to plaintiff, under the assignment to them of an interest in the mortgage by the defendant. Nothing appears by which any extension of the time of payment or other waiver of the terms of the sale to plaintiff, by the defendant, could affect their rights; nor is it shown that they knew of any such.

As the plaintiff, by fulfilling the terms of his contract, would have acquired a good title, not subject to be defeated or disturbed in the manner of which he

complains, he cannot maintain this action; and the judgment of the county court must be reversed and judgment rendered for the defendant to recover his costs.

HOTT v. WILKINSON.

February, 1885.

INFANT—AVOIDANCE OF CONTRACT.

The defendant, while an infant, executed the note in suit for a horse; and *before he attained his majority* rescinded the contract, tendered the horse to the payee,—which was refused,—and demanded the note. *Held*, in an action on the note, that the defendant could avoid his contract *while under age*; and that the avoidance and tender annulled it on both sides *ab initio*.

Assumpsit on a note. Heard on demurrer to the defendant's rejoinder, June term, 1884, VEAZEY, J., presiding. Demurrer overruled, and judgment for the defendant. Pleas, general issue, statute of limitations, and infancy.

Replication, in part:

"And the said plaintiff further saith, that the said defendant did not, within a reasonable time *after* he became twenty-one years of age as aforesaid, nor at any time since he so became twenty-one years of age, and before the commencement of this suit, disaffirm the several promises and undertakings in said declaration mentioned, or either of them," and that the defendant was out of the State, etc.

Rejoinder, in part:

"Yet for rejoinder in this behalf the said defendant says that said promissory note in the first count of the said declaration mentioned was made and delivered by said defendant to one John B. Covey, the original payee of said note, in respect of a contract of purchase of a certain horse by said defendant of said John B. Covey, and in payment of said horse, on the 15th day of December, A. D. 1853, at Sandgate, aforesaid; and afterward, and before the said promissory note became due, and while the said John B. Covey held and owned said promissory note, and before the said defendant had attained the age of twenty-one years, to-wit: on the 1st day of February, 1854, at Sandgate aforesaid, the said defendant did rescind and disaffirm said contract of purchase of said horse, and then and there did tender and offer to said John B. Covey the said horse so purchased of him as aforesaid, and then and there requested and demanded of said John B. Covey that he surrender and give up to said defendant the said promissory note. And that said John B. Covey then and there did refuse to receive said horse so offered and tendered as aforesaid, and did refuse to surrender and give up to said defendant the said promissory note so demanded as aforesaid."

It did not appear, except by inference from the above pleadings, what became of the horse.

Burton & Munson and J. K. Batchelder, for plaintiff. H. K. Fowler, for defendant.

ROWELL, J. An infant may avoid his contracts relating to personal property while under age and immediately. 1 Am. Lead. Cas. 258; *Price v. Furman*, 27 Vt. 268; *Willis v. Twambly*, 13 Mass. 204; *Stafford v. Roof*, 9 Cow. 626; *Bool v. Mix*, 17 Wend. 119, 132. The *dictum* to the contrary in *Farr v. Sumner*, 12 Vt. 31, is not sound, although not without some support in the authorities.

But what was the effect of the avoidance and tender here rejoined? It was, as between the parties, nothing else appearing, in the language of Chief Justice SHAW in *Boyden v. Boyden*, 9 Metc. 519, to "annul the contract on both sides *ab initio*," and to divest the plaintiff of title to the note, and reinvest him with title to the horse. *Willis v. Twambly*; *Badger v. Pinney*, 15 Mass. 359; 1 Am. Lead. Cas. 258, 259. *Willis v. Twambly* is exactly in point. There the plaintiff, a minor, had a non-negotiable note payable to himself, which he exchanged with Cook for a worthless watch. The next day, under the direction of his father, he disaffirmed the contract by tendering back the watch to Cook and demanding the note, which Cook refused to deliver, and also to take the watch.

Subsequently the maker of the note, on being informed of the transaction and receiving a discharge from plaintiff's father, gave a new note in lieu of the old one, after which Cook passed the old note to B., assuring him it would be paid, and B. brought suit thereon against the maker in the plaintiff's name; and it was held that the note ceased to be the property of Cook from the time the plaintiff disaffirmed the contract, and that the settlement made by the defendant when he gave the new note discharged him from liability on the old note. The case does not disclose what was done with the watch after it was tendered back, and no point was made of that by either court or counsel.

Price v. Furman is also much in point. There the minor tendered back the horse and demanded the property he had given in exchange for it, and on defendant's refusal to receive the horse or to re-deliver the property, the minor turned the horse loose into the highway and left it; but the court laid no stress on that fact, but said that when the contract was rescinded it could not be enforced, and that, on general principles, the minor could recover, as there had been an offer to return the horse, which was in his possession and under his control.

This is very analogous to the tender of specific articles in payment of a note or other contract, where a tender of the articles according to the contract vests the property in the promisee and discharges the debt; and the promisor is not bound to keep the property, nor to plead *uncore prist*. *Burney v. Bliss*, 1 D. Chip. 899.

Plaintiff contends that it is fairly inferable from the rejoinder that the defendant continued to keep the horse for such a length of time and in such a manner as to amount to a waiver of his avoidance, and affirmation of the contract. But no such inference can fairly be drawn from the pleading. If plaintiff thought that point a good one, and desired to raise it, he should have sur-rejoined.

We find no error in the judgment below; but at plaintiff's request, the same is reversed *pro forma*, and the cause remanded, with leave to plaintiff to re-plead on the usual terms.

BARBER v. RICHARDSON.

February, 1885.

SALE — VENDEE WITH NOTICE BUYING OF BONA FIDE PURCHASER.

A purchaser with notice may protect himself by showing that he derived title from a *bona fide* purchaser, or one without notice.

TENANTS IN COMMON — ONE CANNOT MAINTAIN REPLEVIN AGAINST OTHER.

Plaintiff and B. were tenants in common of a horse kept by B. on plaintiff's farm. Plaintiff sold his half to B., and took a lien on the horse as security, which lien was seasonably recorded. B. subsequently sold the horse to H., who purchased without notice; and H. sold to the defendant, who purchased with notice of plaintiff's lien. *Held*, that any notice, which the defendant had, did not affect his rights, as he derived his title from a *bona fide* purchaser; and that plaintiff could not maintain replevin, as he and the defendant were tenants in common.

Replevin for a horse. Plea, general issue. Trial by jury, June term, 1884, VEAZEY, J., presiding. Judgment ordered for the defendant. The exceptions stated that the horse was kept and used by Nichols in his work and for driving purposes, and kept by him in the barns and upon the farm of the plaintiff. The plaintiff, whose testimony was not controverted, testified that the defendant told him, on the day he got the horse, that he had heard that he, plaintiff, had a lien on the horse.

J. K. Batchelder, for plaintiff. Burton & Munson and J. C. Baker, for defendant.

TAFT, J. Barber, the plaintiff, and one Nichols owned a horse as tenants in common. Barber sold his interest to Nichols by conditional sale, reserving the title, which was evidenced by writing, and seasonably recorded. It is now in force, the debt unpaid, so that Barber is still the owner of an undivided half of the horse. The lien reserved covered in terms the whole horse. It was in effect as to the half originally owned by Nichols a bill of sale of such half as security. Nichols retained the horse in his possession, and afterward sold it to Reuben Hurd, and Hurd sold it to the defendant, from whom it was taken on the writ of replevin in

this case. The horse having been left by the plaintiff in Nichols' possession, was sold by the latter to Reuben Hurd; and the half originally owned by Nichols could be held by Hurd in case he was a *bona fide* purchaser.

Hurd having bought the horse of Nichols, obtained a good title to Nichols' undivided half, unless he had notice of the prior bill of sale to the plaintiff; and to defeat that title it was incumbent upon the plaintiff to show that Hurd had such notice; and if there was any evidence in the case tending to show that Hurd did have such notice, the plaintiff had the right to have the question submitted to the jury. From an examination of the evidence we are satisfied that there was no testimony tending to show notice. Only two questions of the plaintiff's examination relate to the subject, viz.:

"Q. 34. Do you know whether Mr. Hurd knew that you had a claim on the horse?"

"A. I don't, any more than what he told me.

"Q. 35. What did he tell you?"

"A. He said he didn't know that there was a claim on the horse."

Hurd, therefore, could stand upon his rights acquired by his purchase from Nichols; and the defendant having purchased from Hurd was not affected by any notice he himself may have had. A purchaser *with* notice may protect himself by showing that he derived title from a *bona fide* purchaser, or one *without* notice.

The parties, therefore, are tenants in common of the horse, and as the plaintiff cannot maintain replevin against his co-tenant, the judgment is affirmed.

BELLOWS v. SOWLES.

February, 1885.

WILL — LEGACY — COMPELLING PAYMENT — JOINDER OF PARTIES.

When the probate court has decreed the payment of a legacy, a court of equity has jurisdiction to compel the executor to pay it.

And when a legatee brings a bill to enforce the payment of a legacy, it appearing that no other legatee or creditor is interested, they need not be joined as parties.

Bill in chancery. Heard on demurrer to the bill, September term, 1884, ROYCE, Chancellor. Demurrer overruled.

The bill alleged, that one Hiram Bellows bequeathed to the "surviving children of James F. Bellows \$2,000 each," etc.; that the orator "is a son of the said James F. Bellows named in the will of the said testator, and one of the legatees named in said will"; that the probate court had decreed that the defendant should pay to each of the legatees named in the will the sum bequeathed to him. The bill prayed that an account might be taken, and that the defendant be decreed to pay what was due on the legacy.

E. A. Sowles, for defendant. *Wilson & Hall*, for orator.

Taft, J. The only substantial objection urged by the defendant to a decree is, that chancery has no jurisdiction. It is true, as he insists, that the jurisdiction of the settlement of estates is vested in the probate court, but it is equally true that "in the case of unpaid legacies the court of chancery has always exercised a kind of general concurrent jurisdiction, as in matters of account." *Adams v. Adams*, 22 Vt. 50. This interference is in aid of the powers of the probate court. When the latter court ordered the payment of the legacies named in the will of Hiram Bellows, it is probable that it had exhausted all its power to enforce their payment; its functions were inadequate to that purpose; it could not give full redress; hence a court of equity retains its ancillary jurisdiction in the matter.

We think it is sufficiently alleged in the bill that the orator is one of the legatees under the will; and as no other legatee or creditor is interested in the legacy to the orator, there is no necessity of making any of them parties.

The decree of the court of chancery is affirmed and cause remanded with leave to the chancellor to permit the defendant to answer.

CROCKER v. CHASE.

February, 1885.

WILL — TESTAMENTARY CAPACITY — DECLARATIONS OF TESTATOR.

The declarations of a testatrix, made subsequently to the execution of the will, and at a time when she was of a sound mind, are not admissible for the purpose of showing her mental condition when the will was executed.

SAME — UNDUE INFLUENCE — DECLARATIONS OF LEGATEE.

The issues were, whether the testatrix was of unsound mind, and whether undue influence had been exerted to procure the will. The declarations of a legatee, tending to show that she exercised undue influence upon the testatrix, are admissible.

But such legatee, being a married woman and wife of one of the parties to the suit, is not a competent witness.

Evidence tending to show the pecuniary condition of the relatives of the testatrix, and their relation to her, is admissible.

Appeal from the decree of the probate court, admitting to probate the alleged last will and testament of Margaret C. Chase, deceased. Pleas, that the will was not duly executed, in that the testatrix was of unsound mind; and that it was executed through the undue influence of George Crocker and his wife, Jane Crocker. Trial by jury, May term, 1883, TAFT, J., presiding. Judgment for the defendant.

The will in question was executed April 22, 1879. Evidence was given upon all the material issues. Judge Porter was offered as a witness by the contestants, and allowed to testify to declarations of the testatrix made in February, 1882. Mrs. Badger was allowed to testify that in May, 1883, the testatrix declared to her that her will was wrong and not according to her husband's request; that it all went to Mrs. Crocker; and that she signed it because she was sick. This evidence, the proponent objecting, was admitted "for the sole purpose of showing the state and weakness of her [testatrix's] mind at the time the instrument was executed."

Judge Porter testified: "Well, Mrs. Chase wanted to know my opinion, whether an instrument, executed in the way and manner that was, would be probated, admitted. As I held the office of judge of probate she asked me. She then stated the way and manner it was brought about; that she was very weak and knew but little what was going on; and did not know that Mr. Denison was sent for until he came there; knew nothing of his coming there to execute any paper until he came. And during the conversation she would sometimes say it was the Crockers' will, and sometimes Mr. Crocker's — changed it in that way; that it was not her will, that it was the Crockers' will, or Mr. Crocker's will. And I inquired of her for the purpose of eliciting the facts, as near as I could, whether she did not know what was written in the instrument. She said she did understand that it was giving all her property to Mrs. Crocker. I asked her then why she signed it. Her reply was this: 'Mr. Porter, I was so sick I didn't care any thing about my property.' I think those are the exact words. She remarked like this upon my suggestion to her and asking her why she had not had another will drawn, if she did not want the property to go that way — she replied to me that she did not suppose that instrument was good for any thing; and that she had been told that it was not; that people had told her it was not; that she did not suppose it was good, and people told her it was not good; gave that as a reason for not changing it; and said during the conversation that it was all wrong, that it was not right; that she had some considerable property — I believe she stated somewhat the amount of it — and it was not right to give all to Mrs. Crocker; . . . that the matter was talked up between her and her husband during his last sickness that the property should go equally to their nieces and nephews together," etc.

The testimony of Lucy D. Head was as to declarations of the testatrix made subsequently to the execution of the will. She testified that Mrs. Chase told her that she was sick when the will was made; "that they thought she was going to die;" that "they got up a writing;" that "most that she knew about it was when they brought it to her bedside and raised her up to sign it," etc.

The testimony of the proponent tended to show that the testatrix was of sound mind and understood the contents and nature of the instrument she was signing

when the alleged will was executed; and no question was raised but that she was of sound mind when she had the conversations testified to by Judge Porter, Mrs. Head and Mrs. Badger.

It was claimed by the contestant, and the evidence tended to show, that the testatrix had a sister Harriet who died in April, 1858, leaving property which was taken by the testatrix. Harriet's heirs were the testatrix and the children of a deceased sister, the mother of the contestant and his four sisters; and the contestant claimed that the property left by said Harriet remained in the hands of the testatrix by the consent of himself and sisters, and offered evidence of such facts for the purpose of showing the relations existing between the contestants and their aunt Chase. This evidence was admitted against the objection of the proponent. The testimony tended to show that the testatrix recognized the claim of the Brockway children — the contestant and his sisters — to a share of their aunt Harriet's estate.

J. K. Cogswell, in favor of contestant, was allowed to testify to declarations of Mrs. Crocker, made in the winter of 1878-9; as that, "I am after the money now," speaking of Mrs. Chase. Evidence was admitted to prove that Mrs. Crocker proposed to the contestant, that she should go for the property of the testatrix and get it, and that he should get that of their father; also how much the Crockers were worth; also the responsibility of the father of the contestants, his ability to aid them, etc. Mrs. Crocker—the wife of said George Crocker—was offered by the proponent as a witness, but excluded.

Denison & Son and N. L. Boyden, for plaintiff. *J. J. Wilson and William E. Johnson*, for defendant.

POWERS, J. The inquiry presented for consideration is, whether the declarations of the testatrix, made subsequent to the execution of her will, and at a time when she was confessedly of sound mind, and tending to impeach her will, are admissible. The will in question was executed April 22, 1879, and the declarations offered in evidence were made in February and May, 1882. These declarations were admitted "for the sole purpose of showing the state and weakness of her (the testatrix's) mind at the time the instrument was executed." It is settled on authority that such subsequent declarations cannot be received to establish any fact embodied in the declarations. Wills in writing cannot be impeached by parol statement any more than other written instruments. They cannot be revoked except in the manner pointed out in the statute. But it is allowable to show that they were not duly executed in fact, by reason of fraud, imposition, or undue influence, or want of testamentary capacity. The issue of undue influence made in this case covers not only the overt act of others, brought to bear upon the testatrix, but also her mental capacity to resist the influence of such acts. However unduly interested parties may have exerted upon the testatrix such influence as they had, still if her mind had sufficient vigor to resist such influence, and did in fact resist it, and the will was the expression of her own choice, it is not impeachable. Language is an index of the mind. Mental disturbance is as surely detected by declarations as by conduct. Hence the declarations of persons charged with abnormal mental conditions are admissible in evidence to show the existence of such conditions.

But here, as in other cases, there must be some logical relation existing between the fact to be proved and the evidence offered to prove it. There is no such logical relation between a declaration made to-day and a mental condition existing three years ago. The declaration made to-day may show a mental condition to-day, but cannot do more. Its probative effect is exhausted when it elucidates the contemporaneous mental condition of the declarant. If the declaration shows mental unsoundness when it is made, such mental unsoundness may in certain cases be a *datum*, whereby an earlier like unsoundness of mind may be inferred. If an unsoundness of mind be once shown to exist, and this unsoundness is of a fixed, permanent character, it is presumed to continue until the contrary be shown. So, too, it is both logical and lawful to reason backward, and conclude that a permanent condition of mental unsoundness, which customarily is the product of progressive development, must have required some antecedent lapse of time for

its growth; and, therefore, if its later development be once shown, its earlier existence may be inferred. The strength of this inference is manifestly dependent upon the character of the unsoundness and the length of time that has elapsed between the fact that is known, and the fact to be proved, which is unknown. Subsequent declarations, therefore, are admissible in behalf of the contestants in support of the issue of incapacity or undue influence, provided they tend to show incapacity *at the time when they are made*. But if they have no tendency to prove such contemporaneous incapacity, they are not admissible against the will. In answer to declarations thus found admissible in behalf of the contestants, it would doubtless be competent for the proponents to introduce counter declarations tending to show an opposite condition of mind at or about the same time. This, we believe, is the true ground on which the admissibility of this class of evidence rests. Many cases can be found in which the rule has been more liberally expressed; but, if carefully sifted, it is believed that they have generally been anchored upon this ground.

In the leading case of *Robinson v. Hutchinson*, 26 Vt. 38, expressions may be found in the earlier part of the opinion apparently less restricted than the propositions here advanced. But in the concluding portion of the opinion the whole matter is set to rights. Says ISHAM, J.: "Weakness of mind arising from advanced age, in connection with causes suggested in this case, is progressive and permanent in character. It exists in the mind itself; and, *therefore*, it is, that weakness of mind at the time of making the will may be inferred from weakness subsequent, as much so as imbecility of mind under similar circumstances."

It is evident that the *fact* of subsequent weakness of mind in that case, was the premise which led to the conclusion of weakness of mind at the earlier date when the will was made. The case is imperfectly reported. The declarations offered do not on their face import mental unsoundness. But this fact doubtless appeared in the case; otherwise it is difficult to see how the declarations tended to show weakness of mind at any time.

The general doctrine is discussed in Red. Wills, pt. I, 548 *et seq.*; *Shailer v. Bumstead*, 99 Mass. 112; *Smith v. Fenner*, 1 Gall. 70. The declarations testified to by Judge Porter, Mrs. Badger, and Lucy D. Head, were therefore inadmissible.

We think the declarations of Mrs. Crocker, tending to show the exercise of undue influence by her upon the testatrix, were admissible. She was interested to have this will sustained. It was attacked on the ground that she had improperly secured an advantage by its execution. Her sayings, therefore, indicating her purpose to obtain such advantage, are evidence supporting the issue of undue influence.

But Mrs. Crocker, being the wife of the executor, who is the *party* to this cause, cannot be admitted as a witness, notwithstanding the apparent injustice of proving her sayings against her by living witnesses.

Husbands and wives cannot be witnesses for or against each other, except in the instances named in R. L., § 1005; and this case cannot be brought within section 1003. *Cram v. Cram*, 33 Vt. 15.

Evidence tending to show the relation of a testator to the natural objects of his bounty, and their pecuniary condition, is admissible in cases of this kind. The natural claims of kinship are usually recognized by testators in meting out their bounty. If such claims are ignored, it is a circumstance that bears upon the issue of undue influence as well as of incapacity.

Judgment reversed and new trial granted.

BLOOD v. SPAULDING.

February, 1885.

FENCE — ADJOINING LAND-OWNERS — LANDLORD AND TENANT — REPAIRS.

It is the duty of a farm tenant by force of law to make all needed current repairs on the fences; and if they are not kept in lawful condition, it is his fault, and not the landlord's; and an action cannot be maintained against the landlord by an adjoining land owner, whose colt escaped through an insufficient division fence, and strayed on to the railroad

track, and was there injured. And this is so although the fence was in the same condition at the time of the accident as when the tenant went into possession.*

Adjoining land-owners may make a parol agreement as to a division fence that is binding on themselves until repudiated; and on their grantees, if recognized and acquiesced in by them.

Case to recover for injuries to the plaintiff's colt. Heard on a referee's report, December term, 1884, TAFT, J., presiding. Judgment for the plaintiff. It appeared from the report, that for many years the plaintiff and defendant had owned adjoining pastures, between which was a division fence; that there had been no written agreement relating to the fence, but there had been, eighteen years before, a parol agreement of a division between the plaintiff and one Wetherbee, of whom the defendant purchased his pasture; that the plaintiff told and pointed out to the defendant how the fence had been divided, and that they had maintained the same in accordance with that division since. It further appeared, that, in March, 1883, the defendant let his farm by written lease to two Fillio brothers for one year for \$300, and at the end of that year they took it at the halves; that it was understood between the defendant and the Fillios that the latter were to keep in repair the same fences that the defendant had; that whatever repairs were made, were made by the lessees, but "that nothing was expressly stated in the written lease about the fences;" that on the 11th day of May, 1883, the plaintiff's colt strayed from his pasture into the defendant's, through that portion of the fence which the defendant had formerly repaired, by reason of the insufficiency of the same; and from this pasture it went into the highway, and thence on the railroad track, where it was injured by a train of cars; "that at the time the defendant leased to the Fillios, the fence where the colt got out was insufficient and out of repair; and continued in the same state until after said May 11th, no repairs being made there until after the accident." No express agreement as to the fence was shown between the plaintiff and the defendant. The lease was not produced on trial before the referee; and one of the lessees testified as to the understanding in regard to the fences.

William E. Johnson, for defendant. French & Southgate, for plaintiff.

POWERS, J. It has been repeatedly held in this State that adjoining land-owners may by parol make agreements for the division of fences that will be binding upon them until repudiated. *Scott v. Grover*, 56 Vt. 499; S. C., 48 Am. Rep. 814; *Hitchcock v. Touer*, 55 Vt. 60. The division agreed upon between the plaintiff and Wetherbee, eighteen years before the defendant bought of Wetherbee, was recognized by the defendant when he succeeded Wetherbee; and he has ever since maintained his part of the fence in accordance with that division. This long acquiescence in that division has all the force of an agreement as between the plaintiff and the defendant.

When the defendant leased his farm to Fillio it was understood between them, that Fillio was to maintain and keep in repair the same fences that the defendant had hitherto maintained. Under the lease Fillio assumed the duty as to plaintiff that his landlord was under by force of his agreement with the plaintiff respecting the division of this fence.

Without any contract in the lease from the defendant to Fillio respecting the maintenance of fences, we understand that the law, in the case of the ordinary letting of a farm at halves, is that the tenant assumes the duty of making all needed current repairs. In *Pouley v. Walker*, 5 T. R. 373, it was held that the mere relation of landlord and tenant of a farm was a sufficient consideration for the tenant's promise to manage the farm in a husbandmanlike manner.

In the case of buildings, a tenant by the year is bound to keep them wind and water-tight in the absence of any agreement to repair. *Auworth v. Johnson*, 5 C.

* But that a landlord is liable for a nuisance which was on the premises when leased, see *Ingersen v. Rankin*, N. J. Sup. Ct. Reporter, April 8, 1885, p. 441, citing *Ld. Raym.* 713; *Todd v. Flight*, 9 C. B. N. S. 877; *Gandy v. Jubber*, 5 B. & S. 87; *Fish v. Dodge*, 4 Den. 311; *Rez v. Peilly*, 1 Ad. & El. 822; *House v. Metcalf*, 27 Conn. 631; *Woodf. L. & T.* 639; *Nelson v. Liverpool Brewery Co.*, 2 C. P. Div. 811; S. C., 21 Moak's Eng. Rep. 808, 810, note; *Saltonstall v. Banker*, 8 Gray, 195; *Swords v. Edgar*, 59 N. Y. 28; S. C., 17 Am. Rep. 295 — EDWIN F. PALMER, Vermont Rep.

& P. 239; *Leach v. Thomas*, 7 id. 327. A farm leased by the year cannot be carried on under the rules of good husbandry unless division fences are kept in repair to prevent trespasses upon the land.

By force then of the implied duty of the tenant growing out of his occupancy of the land, to keep the fence in question in repair, the fault complained of was his and not the defendant's. *Cheetham v. Hampson*, 4 T. R. 318; 1 Ad. Torts, 214; *Moulton v. Moore*, 56 Vt. 700; Tyl. Bound.; Tay. L. & T., §§ 183, 343, 344.

Judgment reversed, and judgment on report for the defendant.

MEAD v. WATSON.

February, 1885.

STATUTE OF FRAUDS — PROSPECTIVE GUARANTY.

The guaranty of a future liability is within the statute of frauds; thus, C., a son-in-law of the defendant, was about to erect a house, and wished to purchase doors, windows, etc., for the same. For this purpose the two went to the plaintiffs' place of business, had a conversation with them, and the result was, the articles were delivered from time to time to C., on his order, and charged to him. The referee found that the plaintiffs understood "that whatever C. ordered, the defendant would guarantee the payment of," and would not have sold except for such understanding. But later on in the report, it was found that the "plaintiffs understood that they were to collect the same of C., if possible, and that the defendant was only liable to pay the same in case" it could not be collected of C. Held, that the defendant's contract was collateral to that of C. and, therefore, within the statute of frauds, although prospective.

Assumpsit. Heard on a referee's report, December term, 1884, TAFT, J., presiding. Judgment for the plaintiffs. The referee found that the plaintiffs were dealers in doors, windows, and materials for house furnishing; that the defendant, who was known to be responsible, introduced Cameron to the plaintiffs; that the house for which the articles were purchased, was situated on the defendant's land; that the understanding was, that when the house was completed, it was to be deeded to Cameron's wife; that Cameron abandoned the house before it was completed, and it was finished by the defendant, who returned the title; that the defendant's contract with the plaintiffs was by parol. The other facts are sufficiently stated in the opinion.

S. M. Pingree, for plaintiffs. *T. O. Seaver*, for defendant.

POWERS, J. The referee says the plaintiffs understood "that whatever Cameron ordered for said house of the plaintiffs the defendant would guarantee the payment of," and the plaintiffs "would not have sold said articles to Cameron except for this understanding that the payment was guaranteed by the defendant." Later on he says, "those articles were all charged to Cameron on plaintiffs' books; and plaintiffs understood that they were to collect the same of said Cameron, if possible, and that the defendant was only liable to pay the same in case the plaintiffs were unable to make collections of Cameron."

The contract of the defendant, therefore, was collateral to the contract of Cameron.

It is true that no debt existed against Cameron when the defendant's promise was made. But the defendant only promised to be responsible for a future debt. His promise could only attach to the principal obligation of Cameron, when that obligation came into force. The defendant did not promise to pay primarily, but only in case the plaintiff failed to collect of Cameron.

If the future primary liability of a principal is contemplated as the basis of the promise of a guarantor, such promise is within the statute of frauds, precisely as it would be if the liability existed when the promise was made. Brandt Sur., § 61; Browne St. Fr., § 162; *Matson v. Wharam*, 2 T. R. 80.

Judgment reversed, and judgment on the report for the defendant.

BILLINGS v. KNEEN.

February, 1885.

WITNESS — REV. LAWS, § 1002 — AGENT — OVERSEER OF POOR — INSANE PERSON — REV. LAWS, § 7.

An overseer of the poor, in contracting with one for the support or labor of an insane pauper, is not a party to the contract, but an agent of the town; and, after the death of the overseer, in an action by the pauper to recover pay for his labor, his employer, under the statute, is a witness in his own behalf to prove a settlement with the overseer. Rev. Laws, §§ 1001-2.

An overseer of the poor having power to make a valid contract as to a pauper's support or labor, has power to make a valid settlement binding on the pauper.

The overseer made a parol contract with the defendant as to the support and labor of the pauper, but did not bind him out; therefore, § 2831, Rev. Laws, requiring certain contracts to be in writing, does not affect the case.

General *assumpsit*. Plea, general issue. Heard by the court on the report of referees, December term, 1884, TAFT, J., presiding. Judgment for the plaintiff.

William B. Johnson, for defendant. *Norman Paul*, for plaintiff.

ROYCE, Ch. J. It appears that the plaintiff was thirteen years old in 1857, and was then and ever since has been a pauper and chargeable to the town of Woodstock; that he was a person of weak and feeble intellect and wholly incapable of making contracts, or attending to his own business. Mr. Wood was overseer of the poor for the town of Woodstock in 1857, and continued to hold that office down to the time of his death in 1875. In 1857 Mr. Wood as such overseer made a contract with defendant to care for, support, and clothe the plaintiff, for one year; and like contracts were made yearly thereafter during the life-time of Mr. Wood, except for the years 1860, '61, and '62. When Mr. Wood died the plaintiff then contracted with defendant to continue in his service, and did continue in it down to December 1, 1883. Mr. Wood paid the defendant for the years '57, '58, and '59 \$30 a year for supporting and clothing the plaintiff. From 1863 to 1868 the defendant boarded and clothed the plaintiff for his labor; in 1869 he commenced paying at the rate of \$30 a year, besides his board and clothes, for his labor; and he agreed to pay a like sum yearly during the life-time of Mr. Wood.

None of said contracts were in writing. The only controversy is as to the claim for compensation, made on account of the services rendered by the plaintiff in the years '72, '73, and '74. It is found that said services were reasonably worth the sum of \$107.90. The defendant was examined as a witness, and the referees found upon his testimony that all accounts prior to December 1, 1874, were settled and adjusted. The defendant's testimony was taken subject to the objection and exception of the plaintiff.

The plaintiff comes within the definition of an insane person — § 7, chap. 1, R. L.; and it is claimed that under § 1002, chap. 60, the defendant could not be admitted to testify.

There can be no doubt but what the cause of action in issue and on trial was the subject that the defendant was permitted to testify concerning. The controlling question is,—was Mr. Wood, when the contracts, settlements, and adjustments that the defendant testified about were made, a party, in the sense in which the word is used in the statute, and as it has been construed by the courts?

Mr. Wood, as overseer of the poor, was charged with the duty, by § 2815, R. L., of caring for poor and indigent persons, as long as they remained at the charge of the town, and of seeing that they were suitably relieved, supported, and employed at the charge of the town, either at the poor-house provided by the town, or in such other manner as the town directs, or otherwise at his discretion. The right was given by § 2830 to bind out to labor any such person. But inasmuch as the overseer made no attempt to bind out the plaintiff, there is no occasion to discuss that and the succeeding section, which require that contracts binding out to labor shall be in writing.

The question as to the competency of the defendant as a witness, to testify to what transpired between him and Mr. Wood, must be considered in view of the relations that Mr. Wood sustained to the subject-matter that the defendant testi-

fied about. Under the discretion that was vested in the overseer he made the contracts with the defendant under which the plaintiff entered into and continued in his service. They were strictly in the line of his duty; and in making them he acted as an officer of the town, and the contracts were the contracts of the town. Any advantage that might accrue from them was for the benefit of the town, and any liability imposed, would have to be borne by the town. So that Mr. Wood was not, in a legal sense, a party to the contracts. He was the agent of the town and authorized by law to make the contracts for the town. In *Cheney v. Pierce*, 38 Vt. 515, it was held that an agent through whom another negotiates a contract is no party to the contract; and in *Poquet v. North Hero*, 44 Vt. 91, that a selectman, in making a contract that he was authorized to make, was an agent of the town and not a party to the contract.

Mr. Wood not being a party, it was competent for the defendant to testify as to the arrangements he made with him, connected with the support and labor of the plaintiff.

It is now claimed that, admitting that Mr. Wood had the right to make the contracts, the plaintiff is not bound by them, or the settlement which he made with the defendant.

The unrestricted power to make a contract includes the right to settle and adjust all disputes that may arise concerning it; and, in the absence of fraud, a settlement, made between the party who had the right to make the contract and the other contracting party, is conclusive. The settlement found to have been made between Wood and the defendant was of that character, and the parties are concluded by it.

There was no error in the judgment, and it is affirmed.

HACKETT v. AMSDEN.

February, 1885.

EXECUTION EXTENTS NOT RETURNABLE—PAROL EVIDENCE—OFFICER MAY ADJOURN SALE—FIXTURES—DELINQUENT COLLECTOR.

An extent is not returnable; and when an officer sells the property of a delinquent tax collector on an extent, no return is required, and his doings under it—as that the sale was adjourned to another place than the one where it had been advertised—may be shown by parol. If he makes a return, and his proof is variant from it, it affects its credibility and not its admissibility.

Boards in a corn barn, used for a permanent floor, and stone posts, deposited upon the farm for the purpose and with the intention of building necessary fences, could not lawfully be sold as personalty by an officer on the extent.

Trespass *de bonis* is the proper form of action to recover for the boards and posts, as the claim was not for breaking and entering but for taking and carrying away.

Trespass *de bonis*. Plea, general issue, and notice of justification under extents. Heard by the court, December term, 1884, TAFT, J., presiding. Judgment for the plaintiff. Both parties excepted, the court holding the defendant only liable for the boards.

The defendant made a return on his warrants, which showed that the sale was advertised to be at the dwelling-house of Jerome Eastman. The court allowed the defendant, against the plaintiff's objection, on the ground that it contradicted the return, to prove by parol that the sale of the hay was adjourned from said Eastman's house to the premises of one Brown, a distance of half a mile or more; and that the sale of the stone posts was also adjourned from the house of one Bates to the plaintiff's dwelling-house, also a distance of half a mile.

Gilbert A. Davis, for defendant. French & Southgate, for plaintiff.

ROYCE, Ch. J. This was an action *de bonis asportatis* for taking and carrying away the property described in the declaration. The defendant justified, as an officer, under two extents issued by a justice of the peace against the plaintiff as a delinquent collector of taxes for the town of Hartland, and was allowed to show by his own evidence and the testimony of other witnesses that the sales of the property levied upon were adjourned by him from the places where it was advertised to be sold to the places where it was sold.

The question of the admissibility of that evidence depends upon whether extents of that kind are returnable. If returnable, it was the duty of the officer to make a full return of his doings thereon, and the return so made would be conclusive as between the officer and the party whose property he had levied upon and sold. If not returnable, the officer was under no legal obligation to make any return thereon, and if made it would not be evidence of the facts therein stated. *Hathaway v. Goodrich*, 5 Vt. 65.

The nature and definition of these extents were fully considered in *In re Hackett*, 53 Vt. 354, and in *Hackett v. Amuden*, 56 id. 201; and what was there said need not be here repeated. The right to issue them is created by statute, and the manner of their procurement and enforcement prescribed by statute. They have no analogy to proceedings *inter partes*, in which all that may be done in the settlement of conflicting rights and the compelling of compensation for ascertained wrongs is required to be made a matter of record. The object to be accomplished by them is the collection of revenue, and when it becomes necessary to coerce tax payers for that purpose, it is done by the use of warrants under which the tax payer's property may be levied upon and sold. In such cases the officer executing the warrant is not required to make a return of his doings thereon, and, if made, it is not evidence in his favor. *Hathaway v. Goodrich*, *supra*; *Spear v. Wilson*, 24 Vt. 420.

These extents are directed against the party who has collected the taxes from the tax payers and unlawfully detains them; and the purpose sought to be accomplished by them is to compel the restitution of the money to the town treasury. The officer, in executing them, is directed to proceed in the same manner as provided by law for the service of warrants against delinquent tax payers. As we have seen, an officer executing such warrants is not required to make a return, but in lieu of a return and to protect the tax payer against over-payment and extortion, he is required, when requested by the tax payer, to furnish him an account of such taxes and costs.

It is evident to us that the intention was to assimilate the proceedings in executing extents to those that are prescribed for executing tax warrants. We see no reason why a different rule should prevail, nor any necessity for requiring a return in one case more than in the other; and there is no statute requiring one. If the officer volunteers to make one, and his proof is variant from the return, it would affect the credibility of his proof. No return being required, it was allowable to show by parol what was done under the extents. See cases *supra*.

The objection to the legality of the sales made upon the extents was, that they were made at different places from those at which the property was advertised to be sold; but it has been too well settled that an officer has the right to adjourn the sale of property from the place where it is advertised to be sold to some other place, to be now regarded as an open question. *Jewett v. Guyer*, 38 Vt. 216; *Wood v. Doane*, 20 id. 612; *Drake v. Mooney*, 31 id. 617.

The sales having been legal, the only remaining question is, as to the right of the officer to levy upon and sell the property. It is not claimed but that the hay was attachable; so no recovery can be had for that. The right to recover for the floor boards depends upon the question whether their character had been so changed by the use to which they had been put, and for which they were permanently designed, as to convert them into fixtures. The chaotic state of the law renders it impossible to formulate any general rule upon the subject; each case has to be determined upon its own circumstances. The usual rule adopted for the ascertainment of what are fixtures, is to inquire if they are so attached to, or used in connection with the realty, that they would pass by a conveyance of it; and in determining that question it is allowable to consider their adaptability and necessity for the beneficial enjoyment of the estate conveyed. The boards in question had been in use as a permanent floor in the plaintiff's corn barn since 1878. They were necessary to a full enjoyment of the barn, and had been so placed and treated that they had become an adjunct of the barn, and would have passed by a conveyance of the land on which the barn stood. Hence they were not subject to attachment as personal property.

The decision in *Ripley v. Paige*, 12 Vt. 353, approved in *Noble v. Sylloester*, 42

id. 146, must control this so far as the stone posts are concerned. The only difference that we observe between those cases and this is, that in the former the court were treating of wooden material, and here it is stone, but equally well adapted to the purpose of building fence. Whatever the rule may be elsewhere, it seems to be settled in this State, that suitable materials, deposited upon a farm for the purpose and with the intention of building necessary fences with them thereon, pass by a conveyance of the land as a part of the realty; and being a part of the real estate — or, as they are sometimes called, chattels real,— they are not attachable as personal property.

It is objected, that the value of the boards and posts cannot be recovered in this form of action; that the appropriate action would be trespass *quare clausum*. If the plaintiff had sought a recovery for breaking and entering, and had thus made that the gist of the action, there would have been force in the objection. But this action was for the taking and carrying away of the boards and posts, and is like the case of *Chandler v. Spear*, 23 Vt. 388, in which the plaintiff in an action of trespass *de bonis asportatis* was allowed against an objection to the form of action, to recover the value of pine logs that had been unlawfully cut upon his land. The judgment should have included the value of the posts.

The judgment is reversed, and judgment for the plaintiff for \$18.61 and interest since the property was sold.

COURT OF APPEALS OF NEW YORK.

CANDA v. WICK.*

October 6, 1885.

DAMAGES — BREACH OF CONTRACT TO ACCEPT GOODS.

Plaintiffs sold defendant a quantity of brick to be delivered from time to time. Upon a cargo of brick being tendered defendant refused to accept the same, and, as the referee found, without any excuse for such refusal.

Held, that the tender and refusal constituted a breach of the contract by defendant; that after such breach it was not necessary for the plaintiffs to tender the whole quantity of brick called for by the contract before bringing this action; that the right of action having accrued it was not waived as matter of law by a subsequent offer on the part of the plaintiffs to furnish the brick, which was not accepted by defendant until an advance in the market had materially changed the situation.

On the question of damages, *held*, that the price which the plaintiffs received for the brick on a sale to other parties was immaterial in view of the facts that they were delivered on contracts made prior to the date of the breach of the contract with defendant, and that the plaintiffs had the ability to furnish all the brick required for all their contracts including that with the defendant.

Appeal from a judgment of the general term affirming a judgment entered upon the report of a referee in favor of the plaintiffs. The action was brought to recover for a balance due on goods sold and delivered, and for damages resulting from an alleged breach of contract on the part of the defendant in refusing to accept a quantity of brick which they had purchased of the plaintiffs at an agreed price. The answer alleged failure on the part of plaintiffs to deliver within the time agreed, inferior quality of the brick, and attempted to excuse non-acceptance of the cargo of brick tendered on the ground that there was no available space at the time to pile them.

John L. Lindsay, for appellant. *J. Woolsey Shepherd*, for respondents.

ANDREWS, J. The referee found upon sufficient evidence to justify the finding, that the reasons assigned by the defendant on the 21st of September, 1881, for refusing to receive the balance of the brick of the cargo of the schooner *Ellen*, were groundless. He further found that the brick were of the quality specified

* 49 Super. Ct., 497, affirmed.

in the contract, and that there was a sufficient available space for piling them. Upon the defendant's refusal to permit the plaintiffs' cartmen to continue the delivery, the plaintiffs offered to deliver the balance of the cargo, and stated to the defendant that if brick advanced in price, they could not be held responsible for the delivery on the contract. The defendant persisted in his refusal to receive any more brick from the cargo of the Ellen, assigning the reasons before stated, viz.: Defective quality and want of space. The plaintiffs had a right to make delivery on the contract on the 21st of September. The written memorandum is silent as to the time of delivery, but the evidence shows that prompt delivery and acceptance was contemplated, and that this was one of the conditions upon which the plaintiffs entered into the contract. The tender and refusal constituted, we think, a breach of the contract by the defendant. It was not necessary that the plaintiffs should tender the whole four hundred thousand brick in order to put the defendant in default. It was not contemplated that the entire number should be delivered in one mass, but it is evident from the situation of the parties and the surroundings, they were to be delivered from time to time, at the convenience of the plaintiffs, and without delaying the defendant in prosecuting the work in which they were to be used. When the defendant refused without adequate reason to accept the cargo of the Ellen, the plaintiffs were at liberty to treat the contract as broken, and were not bound to make an actual tender of the remainder of the brick before bringing the action. This would have been a useless ceremony. The warning given by the plaintiffs to the defendant, that his refusal would absolve them from any obligation on the contract, was not as is claimed equivalent to an assertion of a right on their part to regard the contract as still subsisting and executory, or as a reservation of a right to deliver the brick if they should so elect. The letter of October 4, 1881, shows that on several occasions after the 21st of September, the plaintiffs were willing to go on with the contract, but the defendant was not ready and only become ready when brick had greatly advanced in price.

The right of action having accrued from the transaction of September 21, it was not waived as matter of law by a subsequent offer on the part of the plaintiff to furnish the brick, which was not accepted by the defendant until the advance in the market had materially changed the situation. The price which the plaintiffs received for the brick on sale to other parties was immaterial in view of the facts that they were delivered on contracts made prior to September 21, and that the plaintiffs had the ability to furnish all the brick required for all their contracts, including that with the defendant.

The judgment should be affirmed.

All concur.

TEBO v. ROBINSON.*

October 6, 1885.

STATUTE OF LIMITATIONS — PROMISE TO PAY "WHEN ABLE" — BURDEN OF PROOF.

A cause of action founded upon a written promise to pay a debt "when able" accrues as soon as the defendant has the pecuniary ability to pay; but proof that the defendant at a particular time subsequent to making the promise, had property equal to and greater than the amount of the debt, would not conclusively show that he was able to pay the debt within the meaning of the promise, and thus give a right of action on the promise. Such a promise should be reasonably interpreted, and when a question is raised as to the promisor's ability to pay it should be left to the jury as a question of fact.†

Appeal from a judgment of the general term affirming a judgment of nonsuit. The defendant being indebted to the plaintiff in the sum of \$1,000 wrote him a letter on the 19th day of October, 1872, in which he inserted a promise to pay him when he was able; and this action, commenced November 15, 1881, was brought upon the new promise, the complaint alleging that defendant became able to pay the debt before the commencement of this action. The answer interposed the six years' statute of limitations and the plaintiff was nonsuited upon

* 29 Hun, 243, reversed.

See 49 Am. Rep. 344.

the ground that it was shown that the defendant was able to pay the debt prior to November, 1885, and therefore the action was barred by the statute of limitations.

J. T. Marean, for appellant. *M. L. Towns*, for respondent.

ANDREWS, J. The promise of the defendant contained in the letter of October 19, 1873, was conditional. It was to pay the debt "the moment he was able." The cause of action on this promise accrued as soon as the defendant had the pecuniary ability to pay his debt. Proof that the defendant at a particular time subsequent to October 19, 1873, had property equal to, or greater than the amount of the plaintiff's debt, would not conclusively show that he was able to pay the debt within the meaning of the promise so as to give a right of action. This fact might be consistent with utter insolvency on the part of the defendant, or the property might be of such a character that to deprive him of it would take away his means of livelihood as effectually as depriving a mechanic of his tools would deprive him of means of support. The meaning of a promise to pay when able is to be reasonably interpreted. On the one hand it does not imply ability to pay without embarrassment, or even without crippling the debtor's resources or business, while on the other hand ability to pay cannot be fairly implied while the debtor, although he may be in possession of property sufficient to pay the particular debt, is plainly insolvent, or when payment, if enforced, would strip him of his means of support. The creditor, or a promisee of this kind, reposes very much on the good faith of the promisor. He generally relies upon the debtor's making known any change in his pecuniary circumstances which enables him to pay the debt, although there is no duty of voluntary disclosure. It is not contemplated by the parties that the debtor will pay the debt out of earnings necessary for the support of himself or his family, or that he will pay the particular debt to the prejudice of other creditors whose debts are absolute and unconditional. The present action was commenced November 15, 1881. The only defense is the statute of limitations. The trial judge granted a nonsuit on the ground that it was shown that the defendant was able to pay the debt prior to November, 1881, and more than six years before the commencement of the action. We think the court erred, and that this question should have been submitted to the jury. It appeared from the bank account of the defendant that prior to November, 1881, the balance to his credit was sometimes more and sometimes less than the amount of the plaintiff's claim, and that at all times there was a balance of several hundred dollars in his favor. It was also shown that the defendant was a broker, and that from prior to 1873 he was a member of the stock exchange in the city of New York, and that his seat in the exchange was worth, in 1875, \$5,000. There was no proof that he had any other property, and whether he owed any debts other than the debt to the plaintiff was not disclosed. It may be assumed that the case made by the defendant *prima facie* established the fact of his ability to pay the plaintiff's debt prior to November, 1875. But the plaintiff testified that in October, 1875, at an interview between himself and the defendant, in which the payment of the debt was alluded to, the defendant said that he had not seen a time since he borrowed the money that he could pay it, and his wife needed a shawl and he was not able to buy her one, and added that the plaintiff could rest assured that he would pay the debt as soon as he was able to. We think it was a question for the jury upon this evidence whether, up to the time of this conversation, the defendant was able to pay the plaintiff. The bank account and the ownership of the seat in the stock exchange was not necessarily inconsistent with an inability to pay the plaintiff's debt prior to that time. The jury should have been permitted to pass upon the question. No change in the pecuniary circumstances of the defendant was shown to have occurred between the time of this conversation, in October, and the November following, and the jury would have been justified in assuming that no change had taken place. If the ability to pay the plaintiff's debt did not exist prior to November, 1875, the cause of action was not barred in November, 1881, when the action was commenced.

The judgment should be reversed and a new trial granted.

All concur.

BREUNICH v. WESELMANN.*

October 6, 1885.

USURY — FORECLOSURE OF MORTGAGE — TENDER — AMENDMENT OF PLEADINGS — EVIDENCE.

An offer to pay the amount due on a mortgage, either at the law day or thereafter before foreclosure, will extinguish the security, although the tender is not kept good and the money brought into court; but that rule does not apply where the affirmative relief of a cancellation of the security is sought and granted.

Where an answer contains two defenses inconsistent with each other, the defendant has the right to choose upon which of the defenses he will rely, and the court may order the pleadings to be so amended as to conform them to his choice, the plaintiff not being misled thereby.

The defense set up to a mortgage sought to be foreclosed was usury. On the trial the defendant testified, that before the action was commenced she tendered plaintiff the precise amount she had received from him together with the interest, but told him she would not pay the *bonus*, and plaintiff refused to accept it. *Held*, that this was not an admission on the part of the defendant of the debt as a valid, legal obligation.

Appeal from an order of the general term affirming a judgment of the trial court in favor of the defendant. This was an action brought to foreclose a mortgage for \$1,800. The defense was usury. The answer also alleged a tender of the amount claimed by defendant to have been advanced by plaintiff with interest; but this part of the answer was, upon defendant's election, not relied upon as a defense.

Lewis Sanders, for appellant. *P. Mitchell*, for respondent.

FINCH, J. The trial court has found as facts that the loan for which the bond and mortgage was given was made by the plaintiff through Pretzfelder acting in his behalf; that it was made upon a corrupt and usurious agreement; and that the selection of a nominal mortgagee and the purchase by plaintiff from him, and the affidavit procured from the defendant, were all mere covers for the usury, and devices to clothe with an appearance of validity what was in fact void. The evidence upon which these conclusions were founded, while not decisive, and open in some respects to criticism and doubt, was yet sufficient to put the facts in controversy and make the findings conclusive upon this appeal.

It was conceded that Pretzfelder was but the agent of the actual lender who was either the mortgagee named or the present plaintiff. The defendant swore that she was told that the money was coming from plaintiff and did not know that the mortgage ran to Rau; and that plaintiff admitted that the illegal "*bonus*" was paid in part to him, and said that he ought to have charged her more. She is corroborated as to these admissions by one or two other witnesses, but more strongly by the fact that Rau, the named mortgagee, appears to have been financially unable to make such a loan; that its actual advance by him is not proven; that he made no appearance on the trial as a witness, and the actual source of the loan was left to mere inference. There was much in the case to contradict the defendant's evidence and to sustain the plaintiff's theory that he was a purchaser of the mortgage only and not the real lender, but the conclusion of the trial court adversely to his claim had evidence to support it and is not open to our review.

So regarding the facts, the exceptions taken to the refusal of the court to allow the questions whether Wagner stated to plaintiff defendant's admission that the mortgage was all right; and whether plaintiff in buying the mortgage relied upon defendant's affidavit that it was valid and without existing defense become immaterial. The admissions themselves were not excluded, but their communication to plaintiff and his reliance upon them was of no consequence upon the theory that plaintiff was the real lender, for then he knew the existing truth. Upon that issue they have no bearing, since they could amount to no more than a repetition of what Brennick had already sworn, that he was simply a purchaser, and guarding himself as such. When the contrary was established they became mere links in the chain of artifice and deceit which is broken and made worthless by the discovery and establishment of the truth.

* S. C., 49 Super. Ct. Rep. 81, affirmed.

A more important question arises out of the pleadings and their amendment. In the original answer the defenses alleged, if there was more than one, were inconsistent. Usury was first averred; its details being that out of \$1,800 which the mortgage purported to secure, but \$1,435 was in fact advanced, and the balance was retained as an agreed premium over and above the lawful interest. This defense if true invalidated the whole security, and amounted to a plea that the defendant owed nothing. Then came an averment that in June, 1877, and so before the commencement of the foreclosure action the defendant had tendered and offered to pay the sum of \$1,435 "with the interest then due and unpaid, being the same sum for the payment of which the said bond and mortgage was given. It is doubtful whether this amounted to a plea of tender at all. It would certainly have been ineffectual as a defense at law to an action for the recovery of the debt since the money was not brought into court, and the fact averred in the answer." *Becker v. Boon*, 61 N. Y. 817. And besides no precise or definite sum was tendered, but only the principal accompanied by an offer to pay the accrued interest. The most that can by possibility be claimed for the averment is that it defended against the lien of the mortgage, though not against the debt. It has been held that an offer to pay the amount due on the mortgage either at the law day or thereafter before foreclosure will extinguish the security, although the tender is not kept good and the money brought into court. *Kortright v. Cady*, 21 N. Y. 354. But that rule does not apply where the affirmative relief of a cancellation of the security is sought and granted as was the case here. *Tuthill v. Morris*, 81 N. Y. 99. But if the plea amounted to a defense against the enforcement of the mortgage lien it gave no right of recovery for the amount tendered to the plaintiff, but on the contrary merely extinguished his equitable cause of action, and left him only a remedy at law upon the bond. And then the defense was inconsistent with the plea of usury. It necessarily assumed that there was no usurious agreement but a promise to lend \$1,800, fulfilled only to the extent of the tender and creating a debt for that amount and no more. There was much in the case upon which such a theory could have been very fairly predicated. But the two defenses were inconsistent. Both could not be true and it was impossible that they should stand together. The mortgage could not be wholly void and partly valid at one and the same time. It was the right of the defendant to choose upon which of the defenses she would rely, and having chosen, it was proper to conform the pleading to her choice. She chose to rely upon the usury. Nobody was misled as to that determination, and that question was made the sole issue. The amendment allowed merely struck from the pleading one of two inconsistent defenses. No right of the plaintiff depended upon its remaining. Its presence gave him no right to a judgment, and it could have no force for his benefit except as an admission tending to negative the defense of usury. Striking it from the pleading did not take away that admission since it was still available in the proofs. The amendment, therefore, was proper, and the order allowing it must be affirmed. The result is that only the amended answer is before us, and no question of tender arises on the record.

But it is claimed to have arisen on the proof, and the evidence relied on is the defendant's own statement "that in July, 1877, she tendered plaintiff \$1,435 with interest, and told him she would not pay the *bonus*, and plaintiff would not take it." It seems to us very clear that this was not an admission of the debt as valid and enforceable, for it in terms insists upon the fact of usury. In referring to the "*bonus*" it asserts the usury, and the offer cannot be construed as at the same time confessing its non-existence. The defendant did not mean a self-contradiction. What she did mean was a willingness to refund what she had received notwithstanding the usury, and notwithstanding that she was not liable at all. She does not admit that any thing is due, but while insisting upon the usurious character of the contract, she offers to waive that if the plaintiff will be content with the money loaned and its lawful interest. The offer rested upon a consciousness of an honorable and moral obligation, but did not confess a legal one. If it had been accepted there would have been no controversy. Having been refused, the defendant had still the legal right to insist upon the usury and defend against the entire claim. For these reasons we think the general term

committed no error in affirming the judgment. In doing so they held that the effect of a tender applies only to the case of a lawful contract, and not to the case of one made void by statute. We do not adopt that doctrine, nor yet assume to condemn it since its consideration is unnecessary in the view which we have taken of the questions involved.

The judgment should be affirmed, with costs.

All concur.

DAY v. NASON.

October 6, 1885.

DAMAGES — CONTRACT TO EXCHANGE LANDS — MUTUAL MISTAKE — NO WARRANTY OR FRAUD.

Both parties to a written contract for the exchange of lands were mistaken as to the location and description of the lands which one of the parties assumed to own. There was no warranty of ownership contained in the contract. *Held*, that the party who had mistakenly assumed to own land as described was not liable to the other party for trouble and expense he had incurred in ascertaining the facts in regard to defendant's land.

Appeal from a judgment of the general term of the court of common pleas reversing a judgment entered at a trial term of that court in favor of the plaintiff.

This action was brought to recover damages alleged to have been sustained by plaintiff for breach of contract to exchange lands. By the terms of the contract the plaintiff agreed to convey certain lands in Brooklyn to defendant in exchange for lands of defendant in Texas. The contract provided that the lands should be held *in escrow* for a certain time to allow plaintiff time to examine the Texas land, and if approved by him or his agent the deeds to be delivered upon demand. Plaintiff's agent visited the county where defendant's lands were alleged to have been situated and ascertained that there were no such lands in that county.

Gilbert O. Hulse, for appellant. *James L. Bishop*, for respondents.

ANDREWS, J. By the terms of the written contract the plaintiff was not to be bound, unless the exchange was approved by the plaintiff's agent, after inspection of the Texas lands described in the contract. There were no lands owned by the defendants, answering the description in the contract. It must be assumed that the defendants entered into the contract under a mistake as to the location and description of the Texas lands. The plaintiff on the trial disclaimed any fraud on the part of the defendants, or that he was entitled to any relief on the ground of deceit. It is inferable from the evidence that the defendants had a paper title, at least, to lands in Texas, but they were not located as described in the contract, or in the same county with the lands therein mentioned.

The plaintiff's right to recover the expenses incurred by him must rest upon one of two grounds — fraud or warranty. Fraud is not claimed. There is no warranty in terms that the defendants owned the lands described in the contract, and none we think can be implied. Doubtless both parties acted upon the belief and supposition that the defendants owned land in Texas, as described. In this they were mistaken. In consequence of this mistake the plaintiff has been subjected to trouble and expense. But this alone gives no ground of action. The subject to which the contract related had no existence, but it must be assumed upon the case as presented, that the defendants were innocently mistaken in respect to it. There was no wrong intended, and no legal wrong suffered by the plaintiff.

We think the order should be affirmed and judgment absolute ordered for the defendants on the stipulation, with costs.

All concur.

ZOELLER v. RILEY.

October 6, 1885.

ESTOPPEL — WHEN JUDGMENT NOT EFFECTUAL AS.

A former judgment cannot be made effectual as an estoppel where it does not clearly appear from such judgment and the proceedings in the action wherein it was rendered, that the jury found the facts relied upon as a defense, or that they may have reached their conclusion without deciding such facts. Neither is one not a party to the former action, and who obtained his title to the property in question before the verdict and judgment in that action, concluded by it, notwithstanding he obtained his title from one of the parties to that action.

FRAUDULENT CONVEYANCE — BONA FIDE PURCHASER FROM DEBTOR — TITLE.

A debtor who disposes of his property with the intention of defrauding his creditors may, nevertheless, give a good title to one who pays value, and has no knowledge of, and does not participate in the fraud.

Appeal from a judgment of the general term affirming a judgment of nonsuit against the plaintiff.

The facts appear in the opinion.

James D. Bell, for appellant. *Thomas E. Pearsall*, for respondent.

EARL, J. On the 26th day of September, 1878, James Cavanaugh, being the owner of some carriages, horses and other chattels used in a livery-stable kept by him in the city of Brooklyn, mortgaged them to Joseph H. Strauss, to secure the payment to him of \$1,000 and interest on demand. Strauss took possession of the property under his mortgage January 21, 1879, and on that day caused it to be sold by auction, at which he purchased it for \$1,000. On the same day he sold it to Joseph Cavanaugh, a son of James, for \$1,000, and took from him a mortgage thereon to secure the whole purchase-price payable on demand. On the 19th day of May, 1880, Strauss sold and assigned the mortgage to the plaintiff for the sum of \$750, paid to him, and he took possession of the property mortgaged. Thereafter Thomas M. Riley, as sheriff of Kings county, the defendant's intestate, seized and took from plaintiff's possession one of the carriages under an execution issued upon a judgment recovered against James Cavanaugh by James M. Quinby and others, and then this action was commenced to recover for the conversion of the carriage. The sheriff in his answer alleged that the carriage was the property of James Cavanaugh, and justified the taking under the judgment and execution named. Upon the trial the plaintiff's title and the taking were proved as alleged. The sheriff did not give formal proof of the judgment and execution. But they seem to have been assumed upon the trial, without dispute, and we will assume them for the purposes of this appeal. At the close of the plaintiff's proofs the defendant put in evidence the proceedings had and judgment recovered in an action brought by Quinby and others against Joseph H. Strauss, Baldwin F. Strauss and James Cavanaugh to recover damages for a conspiracy to defraud them in the collection of the same judgment against James Cavanaugh, upon which the execution above mentioned was issued, and another judgment, and claimed that by that judgment it was conclusively established that the mortgage executed by James Cavanaugh to Joseph F. Strauss, above mentioned, was fraudulent and void, and that the plaintiff was estopped (by that judgment, and the trial judge so held), and nonsuited the plaintiff. The sole matter for our determination is the effect of that adjudication upon the rights of the plaintiff in this action. In the conspiracy action the plaintiffs alleged the recovery by them of two judgments against James Cavanaugh, one for \$223.43, March 26, 1877, and another for \$498.51, April, 1877, and that the defendants had conspired and fraudulently done various things to defeat them in the collection of their judgments, and among other things they alleged that Cavanaugh had placed a mortgage of \$1,500 upon his living property to Croghan and Haley, which was fraudulent and without consideration; that the defendants held out and pretended that Louis Baer, a relative of the defendants, Strauss, owned the property, and that Cavanaugh also gave the mortgage hereinbefore mentioned of \$1,000 to Joseph H. Strauss, which sum was not then due or owing to him. Upon the trial of that action evidence was given by the plaintiffs therein to establish the various acts of conspiracy and fraud alleged against the defendants, and the defendants gave

evidence tending to show that the mortgages, and particularly the mortgage for \$1,000, were given for full consideration. The judge presiding at the trial of that action charged the jury that if the defendants were guilty of the wrongs alleged, the plaintiffs were entitled to a verdict for the damages sustained by them, which verdict should include the amount of the two judgments and interest and other damages caused to the plaintiffs. The jury rendered a verdict for \$1,300 against James Cavanaugh and Joseph H. Strauss, and found no cause of action against the other Strauss. Joseph H. Strauss appealed from the judgment entered against him to the general term and from affirmance there to this court, and here the judgment was affirmed. 90 N. Y. 664. We are of opinion that that judgment did not conclusively establish, as against the plaintiff, that the mortgage assigned to him was inoperative and void, and thus did not give him a valid lien upon or title to the carriage taken by the sheriff. (1.) It is not clear that the jury found in the conspiracy action that the mortgage for \$1,000 was fraudulent and without consideration. There was abundant evidence from which they could have found that that mortgage was based upon a full consideration, and that it was given to secure Joseph H. Strauss for an honest debt. The proof was very strong, if not conclusive, that Cavanaugh owed Croghan and Haley only about \$400, and that he gave the mortgage for \$1,500, for the express purpose of defrauding Quinby & Co. from collecting their debts, and the giving of that mortgage and other wrongful acts may have induced the verdict, while the jury found the other mortgage valid and free from fraud. It is sufficient to say that we cannot be certain that there was in that action any adjudication condemning that mortgage, and the burden was upon the defendant to establish that fact. *Clemens v. Clemens*, 37 N. Y. 59; *Russell v. Place*, 94 U. S. 606. (2.) Neither the plaintiff nor Joseph Cavanaugh was a party to that action, and therefore they were not bound by the adjudication therein. That action was originally commenced against the defendants Strauss alone November 9, 1878. Subsequently James Cavanaugh was added as a party, and the amended summons and complaint were served upon him November 14, 1879. The action was tried and verdict therein rendered March 25, 1880, and the judgment was entered May 27, 1880. The livery property was sold to Joseph Cavanaugh June 21, 1879, on which day he took possession thereof and executed the mortgage under which the plaintiff claims, and that mortgage was assigned to the plaintiff May 19, 1880. It is thus seen that long before the conspiracy action was commenced against James Cavanaugh, Joseph Cavanaugh had obtained his title to the property through a sale made under a power given by James. It matters not that he took his title immediately from Joseph H. Strauss, who was a party to that action, as the title came to him before verdict and judgment in that action. Therefore no adjudication made in that action subsequently to his purchase could bind him. *Freeman Judgments*, § 201; *Adams v. Barnes*, 17 Mass. 365; *Campbell v. Hall*, 16 N. Y. 575. There was no adjudication upon the plaintiff's mortgage or title in that action, and he has all the right and title which Joseph Cavanaugh had, and he holds under him. (3.) But there is a still more radical answer to the alleged estoppel. We may assume that it was established in the conspiracy action that the mortgage of James Cavanaugh was fraudulent, and made with intent to hinder and delay Quinby & Co. in the collection of their judgment and yet the nonsuit cannot be upheld. Joseph Cavanaugh must here be deemed a *bona fide* purchaser of the property for value. Whether his title be deemed to have come from James Cavanaugh or Joseph H. Strauss, or from both of them, it was perfect against the whole world. Even if they intended fraud in the disposition of the property they made, they could give a good title to a *bona fide* purchaser for value, and such he was as he gave his promissory notes for the property and paid one or more of them. A person who has purchased property under such circumstances that the seller could avoid it for fraud, can yet give a good title to a *bona fide* purchaser for value. *Simpson v. Del Hove*, 94 N. Y. 169. So a debtor may dispose of his property with the intent to defraud his creditors and yet give a good title to one who pays value and has no knowledge of, and does not participate in the fraud. 2 Rev. Stat. 137, § 52; *Starin v. Kelley*, 88 N. Y. 418; *Murphy v. Briggs*, 89 id. 446; *Parker v. Conner*, 93 id. 118.

Therefore after the sale of this property to Joseph Cavanaugh it ceased to be the property of James Cavanaugh for any purpose. It had passed beyond the reach of his creditors and could not be seized for his debts except upon proof of a fraudulent intent by him and Joseph H. Strauss not only, but also upon proof assailing for fraud the purchase of Joseph Cavanaugh. Therefore if it should be held that the mortgage of James Cavanaugh to Strauss was fraudulent and void as to the judgment creditors of the mortgagor, that would not justify the seizure of the property in the possession of Joseph Cavanaugh or of any one who purchased it from or under him. It cannot be well claimed that this plaintiff's rights are in any way affected because the mortgage assigned to him was given and assigned while the conspiracy action was pending. That action was not commenced to determine the status of that mortgage, or of the prior mortgage, or of the property covered thereby, and that mortgage and that property were not the subject of that action. It was simply an action to recover damages for a conspiracy, and hence, certainly as no complaint had been filed, the pendency of that action was not notice to any one not a party thereto of any infirmity in or claim against either mortgage. *Leitch v. Wells*, 48 N. Y. 585.

The judgment should be reversed and a new trial granted, costs to abide event. All concur.

SUPREME COURT OF PENNSYLVANIA.

BREDIN'S APPEAL and GREER'S APPEAL.

October 5, 1885.

CONSTITUTIONAL LAW — ACT OF AUG. 17, 1883 — FORMATION OF JUDICIAL DISTRICTS.

Article 5, section 5 of the Constitution of the State provides, "whenever a county shall contain forty thousand inhabitants it shall constitute a separate judicial district, and shall elect one judge learned in the law; and the general assembly shall provide for additional judges as the business of said district may require. Counties containing a population of less than is sufficient to constitute separate districts shall be formed into convenient single districts, or if necessary, may be attached to contiguous districts as the general assembly may provide." The act of August 17, 1883, for the formation of the judicial districts of the Commonwealth, provides that the seventeenth district "shall be composed of the county of Butler to which the county of Lawrence is hereby attached, and shall have two judges and the additional judge shall reside in Lawrence county." The act also provides that where a county is attached to an adjoining district the qualified voters of such county shall be entitled to vote for the president judge, and an additional law judge when provided for. The United States census of 1880 showed the county of Butler contained over fifty thousand inhabitants.

In an action attacking the constitutionality of the act of 1883, so far as it permitted the voters of Lawrence county to vote for judges representing Butler county, as in conflict with the provision of the Constitution, that counties of over forty thousand inhabitants shall constitute a separate judicial district,—*held*, that the section of the Constitution referred to, did not of itself, constitute a separate district when a county attained the number of inhabitants specified; but was intended to indicate the basis on which, at the proper time, judicial districts might be created by the legislature. That by the scope and spirit of the Constitution providing for the uniform operation and organization of courts, and the rights of electors, all qualified electors of each county forming a judicial district were entitled to vote for judges of that district; and that as the county of Lawrence formed a part of the seventeenth judicial district, the qualified electors of that county were authorized to vote for the judges of that district at the general election held November 4, 1884.

Appeal from decree of common pleas of the county of Butler.

MERCUR, Ch. J. These appeals were argued together. They are from the same decree. They present the same question. The contention arises under the act of 7th August, 1883. It provides for the formation of the judicial districts of the Commonwealth; how each shall be numbered, composed and designated, and the number of judges each shall have. Section 1, *inter alia*, declares, "the seventeenth district" (shall be composed) "of the county of Butler, to which the county of

Lawrence is hereby attached, and shall have two judges learned in the law, and the additional law judge shall reside at New Castle, in Lawrence county." Section 2 declares, "in all cases where a county is or shall be attached to an adjoining district the qualified voters of such county shall be entitled to vote for the president judge and an additional law judge when provided for." At the general elections held in November, 1884, for the election of two judges learned in the law, for the seventeenth judicial district, the appellants, and John McMichael and Aaron L. Hazen, and another were candidates. The qualified electors of each of said counties met at their respective legal places for holding elections, and voted for two judges, and the votes cast in each county were counted and ascertained at the county seat thereof. A return judge was appointed according to the requirements of the statute, in each county, to meet a similar officer appointed by the other county. These two met at the county seat of Butler county, at the time designated by statute and cast up the votes of both counties, and on a correct computation thereof, found that John McMichael and Aaron L. Hazen had received the highest number of votes, and issued certificates to them accordingly. The appellants attack the constitutional validity of the act of 1883, in permitting the qualified voters of the county of Lawrence to vote for law judges, and claim that the votes cast in that county were improperly counted.

If this view be correct, then appellants were duly elected and entitled to receive the certificates accordingly. The tribunal authorized by law to decide such a contest decided adversely to the claim of the appellants, and the commissions have been issued to the other candidates named. The appellants rest their case on article 5, section 5, of the Constitution, which declares, "whenever a county shall contain forty thousand inhabitants, it shall constitute a separate judicial district, and shall elect one judge learned in the law; and the general assembly shall provide for additional judges as the business of the said districts may require. Counties containing a population of less than is sufficient to constitute separate districts shall be formed into convenient single districts, or if necessary, may be attached to contiguous districts as the general assembly may provide." As the United States decennial census of 1880 showed the county of Butler contained more than fifty thousand inhabitants, the appellants claim that it alone thereby became entitled to become a separate judicial district, and that the electors thereof only could participate in the election of judges learned in the law, assigned to said district; in other words, although the county of Lawrence was legally united, annexed or attached in the formation of the district, yet the qualified electors thereof are, by the Constitution, denied all right to vote for the judges, who, for a full term of ten years, are to preside in the courts of their county. A proposition so startling as this and one affirming such an unequal and unjust discrimination against all the legal voters of a county ought not to be assented to unless its correctness be already established.

The section of the Constitution relied on was before us for construction in the case of *Commonwealth, ex rel. Chase, v. Harding et al.*, 87 Penn. St. 343. It was carefully considered and construction given thereto. It was held that this section did not of itself constitute a separate district when a county attains the number of inhabitants specified; but it indicates the basis on which, at the proper time and in the proper manner, judicial districts may be created by the legislature. The unreasonable and mischievous effects of any other construction are well stated in the able opinion of Mr. Chief Justice AGNEW. The correctness of this construction has since been affirmed and approved by this court, in a distinct manner, in *Commonwealth, ex rel. Burns, v. Handley et al.*, Pittsburgh Legal Journal of December 24th, 1884, and in sur-petition of Cahill, Slevin and McVey, not yet reported.

That the section of the Constitution cited was not intended to execute itself in the formation of judicial districts but requires legislative action is clearly shown by section 14 of the schedule. It declares "the general assembly shall, at the next succeeding session after each decennial census, and not oftener, designate the several judicial districts as required by the Constitution." Thus not only is the whole power of designating judicial districts given to the legislature, but it can be exercised only after each decennial census. Although a county forming

part of another district may in fact, for many years, have the population stated as sufficient to constitute a separate judicial district, yet it must bide its time and await the action of the general assembly. In seeking for the true meaning and proper construction of section 5, article 5, we must consider other portions of the Constitution, and so interpret the different parts as to produce harmony between them, and give a just and reasonable effect to the whole.

Section 15 of the same article declares, "all judges required to be learned in the law, except the judges of the supreme court, shall be elected by the qualified electors of the respective districts over which they are to preside, and shall hold their offices for the period of ten years, if they shall so long behave themselves well." Who are qualified electors? Section 1, article 8, answers this question. "Every male citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections." The qualifications following refer only to citizenship, duration of residence and the payment of taxes. If, then, persons possessing these qualifications are entitled to vote at "all elections," and judges learned in the law shall be elected by the qualified electors of the respective districts over which they are to preside, it must be conceded that these sections intend to give, and do give to the electors of the county of Lawrence, the right to vote for their judges, unless that county is not within the seventeenth judicial district over which said judges are to preside. This conclusion is supported by *Colvin v. Beaver*, 94 Penn. St., 388.

Two things are indisputable. One is, that the law judges of the seventeenth district do preside over and in the county of Lawrence. The other is, that the county is not in any other judicial district. No judges, other than those of the seventeenth district, are authorized to preside there. All writs issued from the several courts of record of the county of Lawrence must be tested in the name of the president judge of the district. The commissions issue to these judges as judges of the seventeenth judicial district. If the county of Lawrence is not within the district of these judges, then the president judge thereof has no power to call upon the president or law judge of any other district to hold a term of court therein. The electors of the county of Lawrence are either within the seventeenth district with the right to vote in the election of judges learned in the law, to preside there, or else they are outside of that district, and in no other, and legally have no such judge to preside in the courts of their county. Such a result would not only be repugnant to the whole scope and spirit of the Constitution relating to courts, but would destroy that uniformity in the organization and operations of courts of equal grade, which it expressly declares shall be preserved. This section 26 of article 5 *inter alia* declares "all laws relating to courts shall be general and of uniform operations, and the organization, jurisdiction and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgments of such courts, shall be uniform."

The construction claimed by the appellants for section 5 denies to one county that uniform organization and operation which the Constitution declares shall be enjoyed by all the counties, and which no law shall impair. The authority given by law to the presiding judge constitutes an essential part of the organization of the court, and fixes a limit to its operations. This, however, is only one view of the case. It has another side; that side is the people. Uniformity in the organization and operations of a court is not for the exclusive convenience of the judge who administers the laws, but its main purpose is for the benefit of the people of every county, whose rights might be injuriously affected by an absence of this uniformity.

We cannot assent to the views of the appellants. It is in clear conflict with too many parts of the Constitution. It strikes down those equal rights and valuable privileges which are so highly prized by our people, and which the Constitution was intended to secure, and we think does secure.

We are not unmindful of the case of *Com., ex rel. Attorney-General, v. Dumbald et al.*, 97 Penn. St. 293. It was twice argued, and each time decided differently, the last time by a mere majority of the judges of this court. It stands, however, as authority that under the legislation then existing, the county of Fayette was not entitled to elect associate judges. The question as to the

right of the qualified electors of the county attached to vote was not before us for decision, and was not decided.

We are, therefore, unanimously of the opinion that the qualified electors of the county of Lawrence were entitled to vote for judges learned in the law at the election held on the 4th day of November, 1884, and that John McMichael and Aaron L. Hazen received the greatest number of legal votes, and are entitled to the office to which each was elected.

It is further ordered that this decision be certified to the secretary of the Commonwealth.

Decree affirmed, and the appeal in each case is dismissed at the cost of the respective appellants therein.

NEW JERSEY COURT OF CHANCERY.

KORN v. EXECUTOR OF BECKER.

October, 1885.

SETTLEMENT AND RELEASE—FIDUCIARY RELATIONS—EQUITY JURISPRUDENCE.

The principle of equity jurisprudence that it is the duty of courts of equity to examine the transactions of persons between whom fiduciary relations have existed with the utmost watchfulness and caution, does not apply to transactions occurring subsequent to the time when such fiduciary relations were dissolved, and the parties are each represented by counsel, and no charge of corruption is made against the counsel.

On final hearing on bill and answer and proofs taken in open court.

Carl Lentz, for complainant. *F. E. Marsh*, for defendant.

VAN FLEET, V. C. This suit is brought to procure a decree declaring a release executed by the complainant to the defendant's testatrix inoperative and void.

The defendant's testatrix was the guardian of the complainant under an appointment made by the orphans' court of Essex county on the 18th day of February, 1868. She was also the complainant's mother. As guardian of the complainant, she received, about the date of her appointment, \$2,467. The complainant attained her majority on the 21st day of September, 1882. She had married two years previous, when about nineteen years of age. In March, 1883, the complainant employed counsel to take proceedings against her guardian to compel her to account and to pay her what she was entitled to. A citation requiring the guardian to account, returnable April 20, 1883, was taken out and served. Subsequently, on the application of the counsel of the guardian, the time within which the account should be presented was extended by the court to May 8, 1883, and like extensions were subsequently arranged between counsel. In the mean time negotiations for a settlement, without an accounting before the court, were started by the counsel of the parties. These negotiations resulted in an agreement of settlement, which seems to have been carried out on the 16th of June, 1883. The defendant's testatrix on that day paid, through her counsel, to the counsel of the complainant the sum agreed upon, and the complainant thereupon executed a general release to the defendant's testatrix, releasing her both as guardian and as an individual of and from all claims and demands whatever. The release was prepared by the complainant's counsel, she signed it in his presence and acknowledged its due execution before him. This is the instrument which the complainant seeks to have declared invalid.

It is charged that the release was procured by fraudulent means. The complainant, in describing the method by which she was defrauded, says, that when her guardian offered her the sum which she afterward consented to take, her guardian told her that she was not entitled to her money until her youngest sister attained twenty-one years of age, and that unless she would take what was then offered to her, she would get nothing for several years; that although this representation was false, her confidence in her mother induced her to believe it to be true, and being in

great need of money, she accepted the sum offered under the pressure of her necessities, and in reliance upon the truth of her mother's statement. She also says, that when the money was paid to her, she, at the request of her guardian and her guardian's counsel, signed some paper, but she does not remember what it was; that she did not understand, when she signed the paper, what it was, and was wholly ignorant of what her rights in the matter were. She further says that she did not learn that she had been defrauded in the settlement until after her guardian's death, which occurred just fifteen months after the execution of the release. Her grievance is that she was induced, by the misrepresentation of her guardian, to accept a less sum than she was legally entitled to.

This is the case made by the complainant's bill. If she has not proved it, her bill must be dismissed. She must stand or fall by the case made by her bill. I think it would be difficult to imagine a case where the proofs submitted to maintain an action show more conclusively that the complainant has no ground of action than the proofs do in this case. All the evidence before the court was submitted on behalf of the complainant; none was offered by the defendant. The proofs show that from the inception of the litigation between the complainant and her guardian, up until it was closed by the settlement, the complainant acted under the advice and direction of counsel of her own selection; that she was fully informed as to her rights, and also respecting the duties and obligations of her guardian; that after the litigation commenced no personal intercourse took place between the complainant and her guardian, but that all the negotiations leading up to the settlement were conducted by counsel, and were conducted with candor and fairness, and without the least attempt, on the part of the counsel of the guardian, so far as appears, to deceive or mislead, or to get an unfair advantage for his client. The proofs further show that the complainant was informed by her counsel of each step in the negotiation; that she had the benefit of his advice whenever she was called to speak or act; that she did nothing except by his advice, and that the instrument which she now assails as fraudulent was drawn by him, and executed by her in his presence to carry out an agreement which he had negotiated for her, and which she assented to after he had explained it to her, and she had advised with him whether she should assent to it or not. The complainant makes no charge against her counsel.

She accuses him of neither infidelity, nor negligence or unskillfulness; indeed, her bill conceals the fact that in the negotiation of the settlement and in its consummation she was represented by counsel; nay, more, the bill is so framed as to produce the conviction in the reader's mind that when the agreement of settlement was made the parties were in personal contact and the daughter completely subject to the mother's personal influence.

The facts put in evidence to impeach the release demonstrate, in my judgment, that its legal integrity is perfect. It is undoubtedly a highly salutary principle of equity jurisprudence that it is the duty of courts of equity to examine the transactions of persons between whom fiduciary relations have existed with the utmost watchfulness and caution, and the reason for the rule is that such persons can seldom deal on terms of perfect equality. Generally one possesses a more perfect knowledge concerning the subject-matter of the transaction than the other; and it is also ordinarily true that the one, in consequence of his former position of dependence, will naturally incline to yield a readier assent to the wishes of the other than he will to those of a stranger, and will also, as a general rule, receive the statements of the other with less caution and more confidence in their truth than he will those of a stranger. But this principle has no application to this case. Before these parties came to deal with each other, in respect to the matter now under consideration, the bond of confidence which had previously existed between them had been dissolved; distrust and fear had taken the place of confidence and respect; the parties had assumed a hostile attitude toward each other and were dealing with each other at arms' length, and so distrustful was each of the other that each had placed herself under the guidance of a skilled champion whose duty required him to exert himself to the utmost of his skill and ability for the protection of his client's interest. Being thus guarded, it was impossible for the defendant's testatrix to defraud the complainant except she first corrupted her counsel.

Nothing of that kind is charged. No fraud is proved, nor do the proofs show that any advantage was taken of the complainant in the settlement, or that any thing was withheld from her to which she was justly entitled.

The complainant's bill must be dismissed, with costs.

SECOND NAT. BANK OF JERSEY CITY v. O'ROURKE.

October, 1885.

EVIDENCE—WITNESS, CREDIBILITY OF.

Evidence to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself.

CHattel Mortgage—PURCHASER FOR VALUE.

A vendee, in order to be able to maintain his title against the creditors of his vendor, must not only be a purchaser for value, but a purchaser in good faith.

On final hearing on bill and answer and proofs taken in open court.

Theodore Ryerson and Gilbert Collins, for complainants. *John A. McGrath and Stephen B. Ransom*, for defendants.

VAN FLEET, V. C. This case involves simply the decision of a question of fact. The complainants are judgment creditors of Michael O'Rourke, and as such have filed their bill, asking that two instruments which he executed may be set aside as fraudulent against creditors. The first is a mortgage made by him to his two sons, Michael J. and John O'Rourke, bearing date March 1, 1883, to secure \$3,500, on two houses and lots situate in Jersey City; and the second is a bill of sale, bearing the same date, made by him to his son Michael J., by which he transferred a stock of groceries and every thing else belonging to the grocery business theretofore carried on by him, together with all sums of money which were owing to him in that business. The complainants charge that both these instruments are fraudulent as to creditors. Whether they are or not is the only question in dispute.

The history of the consideration of the mortgage is a very remarkable one. The mortgagees are two of eight children of the mortgagor. He has had two wives. By the first he had four children, two sons and two daughters, and by the last he has also had four children. The mortgagees are his two sons by his first wife. At the date of the mortgage, Michael J. was twenty-two years of age and John had just reached his majority. No consideration passed directly from them to their father, but their father makes this statement respecting the consideration of the mortgage. He is a shoemaker, and carried on the business of making and selling shoes, in a small way, from 1852 to 1882 or 1883; he had a bachelor brother, by the name of John, who was also a shoemaker, and who commenced working for Michael in May, 1852, and continued in his employ until his death, which occurred in March, 1878. John's wages were board and washing and \$5 a week in money. In the management of the business John took as active a part as Michael; he made sales and collections and worked on the bench. He took from the moneys received in the store, for his own use, whatever he saw fit. Michael says, I left it to himself, he could take \$1,000 if he wanted it. No account was kept of the moneys received by John on account of his wages and no settlement was made until 1876. Michael says John then asked for a settlement. A witness, produced by the defendants, and who swears he was present when John asked Michael to settle, testifies, that John said to Michael that he was thinking of going to the old country for his health, and that having worked there for him a number of years he would like to have a settlement, to which Michael replied that he would settle with him. Michael says, that John and he made a settlement shortly afterward, which was not very exact, they had no accounts, but just bunched it, and agreed on \$3,500, although the sum really due John was \$400 or \$500, in excess of that amount. Michael further says, that immediately after agreeing on the amount due, he paid John \$3,500, which sum John at once handed back to him, stating, that he desired him (Michael) to hold the money in trust for his two boys, Michael J. and John,

and give them a mortgage for it when they became of age. Michael also says, that although John lived for two years after the settlement, neither the money nor the trust was ever mentioned again until about a week before John's death, when John sent for him to come to his chamber, where he lay sick, and that then John gave him his bank book and told him to draw some \$80 or \$85, standing to his credit in a savings bank, use the money for his burial, and to give the boys a mortgage, when he saw fit, for the \$3,500, together with any balance which might be left of the money drawn from the bank. The defense claim that the mortgage in question was given in execution of this trust.

It must be admitted, if the history of this mortgage, as thus given, is true, that the mortgage is valid and should be upheld against the creditors of the mortgagor. The important question of the case is, can this evidence be believed? Now evidence to be believed must not only proceed from the mouth of a credible witness, but it must be credible in itself — such as the common experience and observation of mankind can approve as probable under the circumstances. We can have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. Whatever is repugnant to these belongs to the miraculous, and is outside of the limits of judicial cognizance. Evidence is generally considered improbable when it imputes to the parties to a transaction, occurring in the ordinary course of human affairs, conduct inconsistent with the principles by which men, similarly situated, are usually governed.

John O'Rourke, at the time the settlement was made, was about fifty-one years of age; he was a native of Ireland; his health had failed — he had consumption — and he was thinking of returning to the old country. It was this thought that led him to desire a settlement. The \$3,500 — if any such sum was due to him — represented the strength of his manhood and constituted his all. The condition of his health would naturally make him solicitous about his future; fears would start unbidden in his mind that he would soon be totally disabled, and then he would realize that nothing would stand between him and want but his accumulated earnings. He knew not how many years were before him, nor what they were to be, whether they were to be years of strength or years of weakness and suffering. And yet, with all these incentives to the practice of a wise providence, it is said that he was so improvident as to strip himself of every thing he had in the world. And for what? Few men, except under the influence of a very powerful motive, will make themselves beggars just as they reach the condition of life when, as they gaze at the future, the danger of want seems most imminent and distressing. John O'Rourke is not represented as a man of inordinate affection. He never evinced any special attachment to the mortgagees; so far as appears he had no greater love for them than for his other nephews and nieces. He is said to have been a man of deeply religious nature and to have lived a holy life. If he had impoverished himself for his church, his zeal for religion might have accounted for his act, but as it is his extraordinary act stands without either motive or reason.

But suppose it be conceded that an adequate motive existed, or that the *cestui que trusts* are not obliged, in order to maintain their mortgages, to show that the creator of the trust acted, in creating it, with the prudence which usually marks the conduct of men similarly situated, then the question will arise, can it be believed that an act of so much importance to the actor, as well as to the persons whom he intended to benefit, would have been done in the manner in which it is said this act was done? Men do not ordinarily dispose of \$3,500, especially if it constitutes all they have, with as little caution as they pull off their coats or do any other insignificant act. The story is that the man hoarded his wages until he had accumulated \$3,500, and then, though well advanced in years and broken in health, he stripped himself of all his property for the benefit of two of his nephews, and he did this, too, at a time when there was nothing in their condition which made such an act either necessary or desirable. The act was the most important of his life so far as it affected his property interests. He did not do it inconsiderately. No man does such an act without careful thought. If Michael O'Rourke tells the truth, this was a long cherished desire of John's heart, for he

says, John always told him that he intended to leave whatever he owed him, in his hands for his boys. If this is true, there can be no doubt that the project was one which was very near John's heart; indeed, it would seem to have been the great object of his life. He would, therefore, naturally be very anxious, when he came to lay plans for carrying it into effect, to see to it, that such precautions were adopted as would, in his judgment, render the accomplishment of his purpose certain. He might not have known what precautions were best to that end, but if he was conscious of his ignorance, it is reasonable to suppose that he would have sought counsel, or if it is believed that his secretive nature made him shrink from that course, still, I think we must regard it as certain, that his desire that his scheme should be faithfully executed would have induced him, when he came to place the money in Michael's hands, to have called a witness—for example his confessor—to bear testimony in case of Michael's death, or in case pecuniary misfortune should befall Michael, that he had made himself poor to provide a bounty for his two nephews. Nothing but an extraordinary love could have prompted such improvident generosity, and a love which is strong enough to induce one man to make himself poor that another may enjoy his property will naturally guard its property with the most jealous care. It will be eager to erect bars against the intrusion of others, and in its zeal to protect its object will adopt unnecessary safeguards. Yet nothing of that kind surrounds this act. The \$3,500 were passed over with as little ceremony as would have marked the transaction if the subject of the gift had been a dime. An important trust was created with less caution than most persons would have observed in dealing with a matter involving one-tenth of its pecuniary stake.

The transaction is, in other respects, a startlingly improbable one. Michael knew long prior to his settlement, that John intended to leave this money in his hands. He swears, it will be remembered, that John always told him such were his intentions, yet he says the very moment that John and he agreed upon the sum which should be paid, he, without inquiring whether or not John wanted the money, and without making the slightest allusion to John's oft-repeated declaration that he intended to leave this money in his hands for his boys, paid John the money, and John thereupon, at once, handed the money back, and created this trust. This was a very large sum of money for a person in Michael's circumstances to have at his command. He says he had had it in his house for about two weeks. If this is true, it is probably the only time in his life when he had so large a sum of money under his control for so long a period. But the most incredible feature of this part of his story is, that knowing, as he says he did, that John intended to leave this money in his hands, he should have paid John the money, and that John should have accepted it. Both the payment and acceptance are so utterly inconsistent with the purpose of one of the parties and the understanding of both, that nothing short of a credulity which is incapable of drawing a distinction between the probable and improbable can believe that they occurred. In addition, it should be noted, that the evidence of Michael O'Rourke in relation to this part of the transaction, given on different occasions, stands in strange contradiction. On his examination, under proceedings supplementary to the execution issued on the complainant's judgment, he testified that he paid John the \$3,500 immediately after the settlement, and that John took the money and put it in his trunk, where he kept it for about weeks, and then handed it back to him. On the trial of this case, he testified, it will be remembered, that John returned the money to him on the very day of the settlement and immediately on its being handed to him.

But again, by the terms of the trust, the money was to be held for the *cestui que trusts* until they reached the age of twenty-one years, and then the trustee was not to pay the money, but to give the *cestui que trusts* a mortgage for it. And Michael O'Rourke swears, that the reason John assigned for this provision of the trust was, the woman who was then his wife was not the mother of the *cestui que trusts*. It is impossible for my mind to follow this reasoning. If John wanted Michael's two sons to have the \$3,500 when they reached their majority, I cannot understand why he should not have directed that the money should be paid to them at that time, nor how the fact that Michael's wife was not their mother could have had the slightest influence

on John's mind in deciding what the terms of the trust should be. And it is equally difficult for me to understand how or why John should have thought of a mortgage in connection with his gift. The proofs render it quite certain that John had never held such a security. He knew nothing about mortgages. His nephews, and not his brother, were the subject of his bounty, and the natural and most direct way for him to have effected his purpose, and the one which would have been most likely to suggest itself to a man of his knowledge and experience, was to have directed that the money should be paid to his nephews when they reached full age.

The reason assigned for this provision of the trust is so absurd, and the provision itself is so manifestly unnatural under the circumstances as to place the whole story of the defense, when its other improbable features are considered, beyond the scope of a rational credulity.

From the fact that an attempt has been made to maintain this mortgage on a false consideration the conclusion is irresistible that it has no consideration. To my mind it is clear that it was executed to defend the creditors of the mortgagor.

The discussion of the other question, whether the bill of sale is entitled to be upheld as valid against the complainant or not, need not be extended. Both instruments were executed at the same time and were parts of the same transactions, and were doubtless the outgrowth of the same purpose. By them a debtor, who was hopelessly insolvent, and against whom his creditors had just instituted suits, stripped himself of all his property and placed two of his sons, who were members of his family and without means, in a position where, if the instruments are given effect according to their terms, they will take all his property and render any effort by his creditors to collect their debts abortive. The character of one of these instruments has already been defined. There can be little doubt that the bill of sale was executed for the same fraudulent purpose. But it is said the proofs show that the bill of sale was founded on a full consideration, actually paid. They do so show, but they also show something more. They show that the vendee was so eager to become the purchaser of this property that, though the vendor was his debtor in a sum nearly double the amount he agreed to pay for the property, he borrowed the money to make the purchase. But Michael J. O'Rourke, in order to maintain his title against the complainants, must be something more than a purchaser for value, he must be a purchaser in good faith. A vendee who purchases, knowing that the purpose of the vendor in selling is to place his property beyond the reach of his creditors, and he buys under circumstances which show that he was a participant in his vendor's fraud, acquires a title which the vendor's creditors may successfully impeach. *Green v. Tatum*, 19 N. J. Eq. 105; 8 C. on appeal, 21 id. 364; *Schmidt v. Opel*, 33 id. 138.

The father's purpose in this transaction is perfectly obvious. There can be no doubt that the son knew all about it and was something more than a willing instrument in the hands of his father. The complainants are entitled to a decree declaring both instruments void as to them. They are also entitled to costs.

1. The court, in disposing of the questions in dispute among the defendants to a bill of interpleader, is at liberty to adopt any recognized method of trial which will best accomplish justice in the particular case.

2. An order drawn by a creditor upon his debtor, directing the payment of a sum of money out of a specified fund, and which is presented to the debtor, though not accepted, constitutes a good assignment in equity.

3. A person to be in a position to impound money in the hands of the owner for his benefit by notice under the third section of the mechanics' lien law must be a creditor of the contractor for work done, or material furnished for the building; his debt must be due and he must have demanded payment of the contractor of a sum which the contractor is obliged to pay at once.

4. Under a building contract containing a clause that the work shall be done under the direction and to the satisfaction of a particular person, to be testified by a writing or certificate under his hand, no right to the money earned under the contract accrues, and no action can be maintained to recover it until the certificate is procured, or the contractor is entitled to it.

KIRTLAND v. MOORE.

October, 1885.

INTERPLEADER — ORDER IN WRITING — ACCEPTANCE — MECHANICS' LIEN — NOTICE — PRIORITY OF LIENS.

The court, in disposing of the questions in dispute among the defendants to a bill of interpleader, is at liberty to adopt any recognized method of trial which will best accomplish justice in the particular case.

An order drawn by a creditor upon his debtor directing the payment of a sum of money out of a specified fund, and which is presented to the debtor, though not accepted, constitutes a good assignment in equity.

A person to be entitled to the remedy given by the third section of the mechanics' lien law must (1) be a creditor of the contractor whose debt was contracted for work done to the building erected by the contractor for the owner, or for material furnished for the building. (2) His debt must be due. (3) There must be a demand and refusal, and the demand must be for such an amount as the creditor is entitled to be paid at once. (4) The creditor must give notice in writing to the owner of the contractor's refusal to pay and of the amount by him demanded. Where the statutory requisites exist and the proper steps have been taken it works an assignment *pro tanto* to the workman or material-man of the rights of the contractor against the owner, and to that extent they take the place of the contractor.

Where the contract under which work is done expressly provides that the work was to be performed under the direction, and to the satisfaction of a particular person, to be testified by a writing or certificate under his hand, no right to the money earned under the contract accrues, and no action can be maintained to recover it until the certificate has been procured, or the contractor is entitled to it.

On final hearing on answers to bill of interpleader and proofs taken in open court.

Willard P. Voorhees, for Alfred J. Butler. *J. V. D. E. Mott*, for Howell, Totten & Company. *George C. Ludlow*, for McFadden & Dooley. *James E. Howell*, for Chapin Hall Manufacturing Company. *Robert Adram*, for Samuel Armstrong.

VAN FLEET, V. C. This suit was commenced by bill of interpleader. A decree has been made, by consent, that the defendants interplead, and the questions now to be decided are, first, which of the defendants are entitled to the fund in court, and, second, in what order shall they be paid? The fund in controversy was earned under a building contract, made by the complainant with Frank W. Moore, which was filed pursuant to the directions of the statute, so that the right of all persons, except the contractor, to acquire a lien against the building was cut off. The sum in dispute is \$1,273.83. The claimants are five in number, and the aggregate amount of their claims is \$2,571.18. They all base their claims on notices given pursuant to the third section of the mechanics' lien law. Their notices were served as follows: that of Alfred J. Butler, September 8, 1888; those of Howell, Totten & Company and McFadden & Dooley, September 8, 1888; and that of the Chapin Hall Manufacturing Company, October 24.

The questions at issue in the case arise upon the answers to the bill of interpleader, no other pleading having been filed by the defendants. The court, in disposing of the questions in dispute among the defendants to a bill of interpleader, is at liberty to adopt any recognized method of trial which will best accomplish justice in the particular case. If at the hearing on the bill the questions, in which the defendants are alone interested, are stated with sufficient clearness and certainty in the answers to the bill to present proper issues, and they are ripe for decision, the court may, at the same time that it decides the question whether the bill was properly filed or not, also decide questions at issue among the defendants and dispose of the case finally. If, however, the case, as among the defendants, is not at that time in condition to be properly disposed of, the court may then adopt such course as may seem best under the circumstances, as by directing that issues shall be raised by appropriate pleadings, or that an action at law shall be brought, or that such other course shall be taken as may seem best suited to the nature of the case. *Executors of Condict v. King*, 2 Beas. 375; 2 Dan. Ch. Pr. (5th Am. ed.) 1569.

No direction has been given by the court in this case, but the defendants have brought the case to hearing on their answers filed to the complainant's bill. By

their answers they each rest their claim to the money in dispute on a single ground, namely, notice given to the owner pursuant to the direction of the third section of the mechanics' lien law. Neither, by his answer, discloses any other ground of claim, or sets up a right acquired by any other means, or in any other way; so that no other, no matter how well founded, has been put in issue in such manner that its validity can, under the present records, be the proper subject of either judicial investigation or determination. This remark is made because the proofs seem to show that two of the contestants have a ground of claim in addition to that set up in their answers. As the proofs now stand, it appears that the contractor, on the 18th of October, 1883, drew an order in favor of the Chapin Hall Manufacturing Company on the owner for the same sum claimed in the notice which they served on the owner on the 24th of October, 1883, and that the order was delivered by the payees to the owner within a day or two after its date, and remained in her hands up to the time of the trial.

It also appears that the contractor subsequently drew an order on the owner in favor of McFadden & Dooley for the sum specified in their notice. This order is without date. The proofs do not show that it was ever presented or shown to the owner, nor that she was ever notified of its existence. The doctrine is now at rest, that an order drawn by a creditor upon his debtor, directing the payment of a sum of money out of a specified fund and which is presented to the debtor, though not accepted, constitutes a good assignment in equity. *Superintendent of Schools v. Heath*, 2 McCar. 22; *Shannon v. Hoboken*, 37 N. J. Eq. 123; S. C., on appeal, id. 318.

A person to be in a position to be entitled to the remedy given by the third section of the mechanics' lien law must, in the first place, be a creditor of the contractor, not a general creditor, but a creditor whose debt was contracted for work done to the building erected by the contractor for the owner, or for material furnished for the building. Such is the plain direction of the statute. *Second.* He must be a creditor whose debt is due. Before a workman or material-man can notify the owner of his claim, he must put the contractor in fault. The statute says that when the contractor shall, upon demand, refuse to pay the money or wages due, the owner may be notified. Until, therefore, the contractor has refused to pay what is justly due and in arrear, the statutory remedy is not applicable. *Reeve v. Elmendorf*, 9 Vt. 125. *Third.* There must be a demand and refusal, and the demand must be for such an amount as the creditor is entitled to be paid at once. There can be no recovery against the owner of a lesser sum than that demanded of the contractor, because the finding that such lesser sum was the debt really due would, *per se*, show that the contractor was not in fault in refusing to pay. His obligation is to pay the money or wages due, and if more is demanded, he has a right to refuse to pay. *Reeve v. Elmendorf, supra.* *Fourth.* The creditor must give notice, in writing, to the owner of the contractor's refusal to pay and of the amount by him demanded. In a case where all these requisites exist, the workman or material-man has a right to have the owner retain the amount so due to him and demanded "out of the amount owing by him to the contractor," and the owner, on being satisfied of the correctness of the sum demanded, must pay the same to the workman or material-man, and the receipt of the workman or material-man will entitle the owner to an allowance therefor against the contractor. In a case where the statutory requisites exist, notice, given according to the statute, works an assignment, *pro tanto*, to the workman or material-man of the rights of the contractor against the owner. *Wightman v. Brenner*, 26 N. J. Eq. 489. Upon notice given, the workman or material-man, to the extent of his demand, takes the place of the contractor. *Reeve v. Elmendorf, supra.* But if, when the notice is served on the owner, there is nothing owing to the contractor, and he is without right against the owner, the notice is without legal effect. *Craig v. Smith*, 8 Vt. 549. The test is whether a suit for the money demanded will lie by the contractor against the owner; if it will not, the owner is not liable to a suit by the workman or material-man. *Reeve v. Elmendorf, supra.* The construction of the statute to this extent is settled, and the rights of the claimants to the fund in court must be determined by the rules above stated.

The notice of Alfred J. Butler was served, as already stated, September 8, 1883. His claim is for \$79.43. His debt had the required character; it was due, had been demanded, and payment refused; his notice was in proper form and duly served, and at the time of its service \$1,200 were due from the owner to the contractor. These facts made a perfect case in his favor, and gave him a clear right to be paid out of the money then due to the contractor. The moneys then due, however, constitute no part of the fund now in court; they were paid by the owner to the contractor on the 26th of September, 1883, and the fund now in court represents moneys earned by the contractor, under the contract, subsequent to that date. The owner's payment to the contractor, subsequent to the service of Mr. Butler's notice, was unquestionably wrongful as to him, and, if made without his consent, did not impair his rights against the owner. His notice by force of law put him, to the extent of his demand, in the place of the contractor, and operated as an assignment of so much of the money then due as was sufficient to pay his claim. By his notice he became by subrogation the creditor of the owner, and in this state of affairs a payment by the owner to another person of the money due to him obviously left his rights unimpaired and his debt undischarged. His notice did not touch the fund now in court; it was impossible for it to do so, for the fund did not then exist. He intended by this notice to reach the fund then due to the contractor. His notice was effectual to that end, and he stands, therefore, now precisely in the same position as he would if, under an assignment by the contractor of another fund, he was asserting a right in this. It is clear that he has no right in this fund.

The claimants next in order of time are Howell, Totten & Co. and McFadden & Dooley. Their notices were both served on the same day, but not precisely at the same time, that of Howell, Totten & Co. having been served first. McFadden & Dooley contend that although their notice was served after that of Howell, Totten & Co., yet that they are under the general rule; that the law does not regard the fraction of a day entitled to stand on the same footing with Howell, Totten & Co., and that the two claims should be held to be concurrent. The case does not call for a decision of this question. McFadden & Dooley did their work under a written contract. The sum or price they were to receive was not payable until their work was completed. Their contract expressly provided that their work was to be done under the direction and to the satisfaction of a particular person, to be testified by a writing or certificate under his hand. The construction which this clause is to receive is settled. No right to the money earned under the contract accrues, and no action can be maintained to recover it until the certificate has been procured, or the contractor is entitled to it. *Byrne v. Sisters of St. Elizabeth*, 45 N. J. L. 213. When McFadden & Dooley served their notice their work was not completed, their money was not due, they had no certificate, they had made no demand of payment of the contractor and had no right to do so. They had no right, therefore, to give notice to the owner, and their act, in that regard, was without the slightest legal effect. Their notice gives them no right to the fund in court. The proofs show that when Howell, Totten & Company served their notice they were creditors of the contractor, for a debt of the requisite nature, and that all the other facts, which the statute makes necessary to entitle them to look to the owner for payment, existed, and that their notice was in proper form and duly served. They are, therefore, entitled to be paid out of the moneys in court.

Two notices were served on behalf of Samuel Armstrong, the first, October 4, 1883, and the last, December 27, 1883. Nothing was due to him from the contractor when the first notice was served, and that fact appears on the face of the notice itself, but the proofs show that when the second notice was served, Mr. Armstrong had taken all the steps required by the statute to entitle him to impound the money, earned under the contract, in the hands of the owner for his benefit, and his claim will, therefore, be entitled to prevail, if, after paying claimants standing prior in point of time, any thing shall be left to be applied to his.

Notice of the claim of the Chapin Hall Manufacturing Company was served October 24, 1883. Their notice states that there was due to them, on that day,

the sum of \$641.86. Their books show that that amount was then due, but their proof of demand of payment of the contractor is, in my judgment, fatally defective. No demand is shown to have been made after October 18, 1883. A demand on that day is proved. It was a demand for \$641.86, but it is entirely clear, on the proofs produced by the claimants themselves, that the sum demanded on that day was in excess of the amount then either due or owing. Their claim is for lumber sold and delivered, and their books show, that up to and including the 18th of October they had only furnished lumber to the amount of \$508.94, so that it is manifest, that if they made a demand on the 18th of October of \$641.86, they demanded \$132.92 more than was due to them, and consequently that the refusal of the contractor to pay was rightful. Their books also show that they delivered lumber to the contractor on the 19th of October, and also on the 24th, and the difference between the amount which was due on the 18th, and that which was due on the 24th is made up by the amount charged for the lumber delivered on the 19th and 24th, but there is no proof whatever that any demand was made subsequent to the 18th of October, nor any evidence in the case tending to show that the lumber charged on the 19th and 24th of October had been actually delivered prior to the 18th. Their proofs on this vital point are fatally defective, and their claim, for that reason, must be rejected.

The fact has already been mentioned that the Chapin Hall Manufacturing Company hold an order, drawn by the contractor on the owner, for the same sum claimed in the notice which they served on the owner. That paper was put in evidence without objection, and is now before the court. It may be that its validity was not challenged, nor its competency as evidence disputed, because it had not been set up in the pleadings by these claimants as one of the grounds of their claim. The other claimants were not bound to dispute it until it was set up in the pleadings as a ground of claim, and they thus afforded the opportunity given by law in all cases for investigation and defense. If, however, its validity is not open to question, and its integrity is unassailable, then, according to an established rule of equity jurisprudence, it transferred to these claimants a part of the fund in court, and they should not be deprived of the right thus conferred unless by laches, otherwise they have extinguished it.

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Negligent killing — does not survive against representative of wrong-doer.] A cause of action given by statute to the personal representatives of a deceased person, to recover damages for the negligent killing of such person, does not survive the death of the wrong-doer. *Yertore v. Wiswald*, 16 How. Pr. 8, overruled. *Hegerich, Administratrix, v. Keddle, Executor*, N. Y., 86; *Moriarty v. Bartlett*, N. Y., 91.

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AGENCY.

1. **City board — employees — compensation — approval by city council.**] A statute provided that the board of public works in the city of Providence might hire such employees as it deemed needful, "and agree with them for their compensation, provided, however, that when such compensation shall exceed the sum of \$1,000 per annum, such compensation shall be subject to the approval of the city council . . . which said compensation shall be paid out of the city treasury." Of the employees so hired, the city council approved the compensation of all except two, who were hired at more than \$1,000 per annum, and in regard to whom the council took no action. *Held*, that these two were entitled to the pay agreed on with the board of public works. *Held*, further, that the city council could disapprove the compensation agreed on by the board of public works or approve it with a reduction in amount, but could not, by mere non-action, defeat the agreement made by the board. *Mathewson v. Tripp*, R. I., 31.
2. **Commissions — right to recover.**] An agent was employed to purchase ice for his principal, and authorized to receive from the vendor a certain commission from the purchase-price. The contract was signed by plaintiff as agent, and no concealment or fraud was practiced on defendant. *Held*, that the contract was not void as against public policy, and plaintiff was entitled to recover. *Snow v. Penobscot River Ice Company, Me.*, 94.

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ANIMALS.

1. **Bees — no title by trespass.]** Bees are animals *feræ naturæ*, and until reclaimed are only owned *ratione soli*. In obtaining possession of an animal *feræ naturæ* no title is gained by one who when so obtaining possession is a trespasser. A. without B.'s permission put upon a tree on B.'s land an empty box for bees to live in. The box remained there more than two years, when C. took the box down, took out a swarm of bees and replaced the box. A. after demand upon C. brought trover against C. for the value of the bees, honey and honeycomb. *Held*, that A. could not maintain his action against C. *Rezroth v. Coon*, R. I., 458.
2. **Injury by dog — contributory negligence.]** The doctrine of contributory negligence applies in an action to recover double damages under Gen. Laws, chap. 115, § 11, for an injury done by a dog. *Quimby v. Woodbury*, N. H., 554.

ANNUITY.

Contingent claim.] The annuity was not strictly a contingent claim. Its payment was a condition precedent to the right of the heirs to take the estate. Sections 2204-2206, Rev. Laws, are not applicable. The oratrix is not a common creditor; she stands upon the rights of a widow to share in the distribution of the estate. *Little v. Dwinell*, Vt., 649.

APPEAL.

1. **Code, Art. 5, § 44 — transcript of records — jurisdiction — orphans' court.]** Under the Code the essential condition upon which the circuit court is empowered to entertain an appeal from the orphans' court is the mutual assent of the parties expressed in writing and filed with the register. Under the statute providing that the orphans' court shall, upon an appeal being taken, direct a transcript of the proceedings to be transmitted to the circuit court, it is not indispensable to the jurisdiction of the circuit court that an absolutely full transcript of every thing transpiring or submitted in evidence before the orphans' court should be before it. Jurisdiction attaches to the circuit court when the appeal is entered into by agreement, in writing, and filed with the register, and a copy of the paper presenting the issue between the parties is transmitted. *State, use of Wilson, v. McCarty*, Md., 694.
2. **Decree allowing settlement — administrator's account.]** Leave to appeal from a decree of the probate court allowing a settlement of an administrator's account cannot be granted when the terms of the settlement were agreed to by counsel for the petitioners, and there was no fraud, and the only errors in the account were such as would have been discovered by reasonable diligence on the part of the petitioners and their counsel. *Ahearn v. Mann*, N. H., 551.
3. **Order of railroad commissioners not appealable.]** An appeal to this court does not lie to review questions of fact passed upon by commissioners appointed under the general railroad law. *N. Y., L. E. & W. R. R. Co. v. N. Y., L. & W. R. R. Co.*, N. Y., 283.
4. **Probate of will — appellant as witness.]** On the trial of an appeal from the probate of a will the applicant cannot be a witness unless the executor testifies. *Welch v. Adams*, N. H., 544.

ARBITRATION.

1. **Revocation before final award — interlocutory announcement before revocation.]** A submission to arbitration is a power which may be revoked, at any time before it is executed, by the publication of the award. Where the authority of the arbitrators had been revoked by one of the parties before final award — *Held*, that an oral announcement by the arbitrators of their determination upon certain items in question before the revocation, even if intended by the arbitrators to be final upon those items, would be bad, unless the parties had agreed that they should be the subject of a separate award. *Boston and Lowell Railroad Corp. v. Nashua and Lowell Railroad Corp.*, Mass., 217.

ARBITRATION — *Continued.*

2. **Submission—award—ratification—waiver—pleading—assumpsit.**] The plaintiff and the defendant railroad agreed to and did submit in writing to two arbitrators "to appraise the damages" which should be caused by the defendant's taking of the plaintiff's land for railroad purposes. The arbitrators awarded that the plaintiff should deed; that the defendant should pay \$100; that it should build and maintain a certain cattle-pass; that it should keep up the fences while the road was being built; and that it should not injure a spring of water near the railroad line. The declaration averred that the plaintiff had performed his part of the award by deeding, etc.; that defendant had occupied his land since the award was made, and had only paid the \$100; that it neglected to build the cattle-pass and keep up the fence; that it had injured the spring by filling around it; and set forth the injuries. *Held*, on demurrer to the declaration, that the defendant had waived the right to claim that the arbitrators did not follow the submission, as it had gained all it sought by the submission, and holds it by virtue of the award; that if the arbitrators exceeded their authority, the defendant ratified their action by accepting the deed, etc. *Assumpsit* will lie upon the award. It is no objection that successive actions may arise. The right of action is complete so far as damages have already happened. *Taylor v. St. Johnsbury Railroad Company, Vt., 252.*

ARSON.

See CRIMINAL LAW, 527.

ASSESSMENT.

1. **Repavement of street—special remedy to vacate.**] An additional width of flagging ordered by the city to be laid on a sidewalk already paved is a repavement within the rule requiring a petition of a majority of the property owners along the line of improvement; and this is so, although the existing width is left undisturbed. The special remedy given to property owners for illegal assessments by the act, chapter 838, Laws of 1858, is by chapter 550 of the Laws of 1880, restricted to reducing the assessment to the fair value of the actual improvement made. But the property owner may still challenge the validity of the assessment whenever his property is seized under it, or it is made the foundation of proceedings against him. *Petition of Smith to vacate, etc., N. Y., 417.*
2. **Sewer—public records, amendment of—selectmen of town, power to provide for sewers—warrant for sale of property.**] While no particular form of words is made necessary by the statute to be used by the authorities in laying out a sewer, yet there must be such a laying out before any assessment therefor can be made; and this must be done with sufficient precision to show what the sewer is, or is to be, for which parties are liable to be assessed, or for the construction of which their estates may receive damages. The authority of the selectmen of a town to keep a record of their proceedings carries with it the right to amend such record at a subsequent date, where the proceedings at the time had been defectively recorded. While, ordinarily, the laying out of a sewer by the town authorities should be made before any work is done, yet if a sewer be actually constructed and completed without a formal previous order, there is no reason why it may not then be formally laid out and appropriate proceedings be had thereafter in regard to assessments. No previous notice to parties in interest is required in order to lay out a sewer. The town laid out and built a sewer in the street on which defendant's property was situated, and subsequently, but before any assessment was laid, adopted a general system of sewerage. The expense of the sewer first constructed was included in the cost of the general system, which increased defendant's assessment beyond his proportional share of the cost of the first sewer. *Held*, that the action of the town was lawful, no assessment having been laid for the particular sewer, at the time of adopting the general system. A warrant, by virtue of which real estate is sold for an assessment, is not invalid because it fails to direct the collector how to dispose of the money when received. *Town of Leominster v. Conant, Mass., 420.*

See CORPORATION, 658; TAXATION, 157.

ASSIGNMENT.

1. **Attachment—insolvency—effect of discharge.**] T., being insolvent, made a general assignment to defendant, P., a creditor, agreeing among other things to convey to any assignee of T. in insolvency who thereafter might be duly

ASSIGNMENT — *Continued.*

- appointed in Massachusetts, to which assignment plaintiff verbally assented. After the bringing of this action T. was adjudged insolvent and obtained his discharge. *Held*, that the assignment was valid, the discharge of T. defeated the attachment, and P., the trustee, was properly discharged. *Jones v. Tilton, Packard and others, Trustees*, Mass., 72.
2. **Chose in action.**] A general assignment in writing of a part of miscellaneous demands to be selected by the assignee is not such an assignment as the statute requires, to authorize the assignee to maintain an action thereon in his own name. *Wilson v. Page*, Me., 582.
 3. **For creditors — removal of assignee — neglect to file inventory.**] In Pub. Stat. R. I., chap. 237, § 3, of the removal of assignees, the words "for cause shown" are confined to neglect in filing an inventory and schedule. The court will not peremptorily remove an assignee for neglecting to file an inventory and schedule as required by statute, when the neglect is unintentional or seems to have good excuse. *Case v. Mason*, R. I., 530.
 4. **Wages to be earned — acceptance — creditors.**] An assignment of wages to be earned, with the acceptance of the employer written upon the face instead of upon the back of the instrument, being duly filed with the town clerk, is good against a creditor of the laborer who seeks to reach the fund by trustee process. *Levis v. Longee and Trustees and Hughes*, N. H., 337.
 5. **Wages of employee — acceptance.**] An acceptance of an assignment of wages by an employee of a corporation made in writing by one who is not an officer of the corporation, but a confidential clerk in their office, apparently having authority to do the act, is not void. *O'Neil v. Dunn*, N. H., 611.
- See CHATTEL MORTGAGE, 42; CORPORATION, 487; INSOLVENCY, 447, 578, 645; INSURANCE, 175, 470; PATENT, 17; PRINCIPAL AND SURETY, 190; VENDOR AND PURCHASER, 523.

ATTACHMENT.

1. **Certificate of fund attached — Code Civ. Pro., §§ 650, 651, 677.**] A certificate of the amount of money in their hands, given by third person, under section 650 of the Code of Civil Procedure, to a sheriff or attaching creditor, is not conclusive in an action brought pursuant to section 677 of the Code, and mistakes therein may be corrected. The doctrine of equitable estoppel does not apply in such a case. *Almy v. Thurber*, N. Y., 333.
2. **Change of possession — fraud — bailee.**] Plaintiffs sold on credit and delivered certain goods to B., who soon after sold his business and lease of his store to G., excepting the goods bought of plaintiffs, although they were to remain in the store and under the control of B. Plaintiffs thereafter repurchased the goods and made arrangements with G. to keep them in his store, who sold the same without plaintiffs' knowledge, representing to the purchaser that B. was the owner. The goods, while in the purchaser's possession, were attached by a creditor of B. *Held*, that there was a sufficient change of possession; that G. held the goods as plaintiffs' agent and that the title of plaintiffs was not changed by the erroneous statements made to or by the purchaser from G. *Wing v. Peabody*, Vt., 228.
3. **Does not reach land fraudulently conveyed — innocent purchaser — constructive notice.**] A general attachment of all a debtor's interest in real estate in a town does not hold lands fraudulently conveyed by the debtor by a deed recorded before the attachment, and conveyed by his fraudulent grantees after the attachment, to an innocent purchaser for value. Against the latter and subsequent purchasers from him such attachment is not constructive notice of a lien, or of *lis pendens*. *Ashland Savings Bank v. Mead*, N. H., 708.
4. **Notice of title — estoppel.**] In an action against an attaching officer, it appeared that the plaintiff on the day of the attachment, on inquiry, informed the attorney who made the original writ and the officer who made the attachment that the property belonged to another person. He did not then know of a claim against the other person or of an intention to attach it as the property of such person. On receiving the information, the defendant told the plaintiff that he had a writ against such other person upon which he attached the property. Within ten minutes thereafter the plaintiff notified the officer of his own title, demanded the property and attempted to take it but was prevented by the officer. *Held*, that the plaintiff was not estopped from showing the title in himself. *Fountain v. Whelpley*, Me., 180.

ATTACHMENT — *Continued.*

5. **Receiptor of attached property — pleading.]** The defendants with two others formed a partnership by verbal agreement and engaged in manufacturing shade rollers. The sign over the door of their place of business was "St. Albans Shade Roller Manufacturing Company," and their bills were made out in that name. Property owned by the partnership was attached on a writ in which the defendant was described as "The St. Albans Shade Roller Manufacturing Company, a corporation under the laws of Vermont." The two defendants receipted. In an action against the receiptors, — *Held*, that the receiptor could set up his ownership of the property as a good defense; that the original writ did not run against the defendants in this case, but really against nobody. *Adams v. Fox*, 17 Vt., 361, followed. *Halbert v. Soule*, Vt., 666.
6. **Special judgment — execution.]** Plaintiff sued defendant and attached certain personal property; defendant defaulted and the plaintiff, suggesting the pendency of certain insolvency proceedings against defendant, moved "that judgment be entered on said default against the property attached." The motion was granted and execution issued accordingly. The property attached proving insufficient to satisfy the full amount of the debt, plaintiff applied to the court for a judgment or an execution against defendant for the unsatisfied balance. *Held*, that the judgment was final; that plaintiff having elected to take the special judgment there was no authority in the court to change it into a general judgment or to authorize execution on it as such. *Gray v. Raymond*, Mass., 560.
7. **Specific performance — representatives brought in by revivor — parties as trustees.]** When a bill in equity for the specific performance of a bond for the conveyance of real estate has been inserted in a writ on which an attachment has been made prior to the decease of the sole defendant, the administrator with the will annexed, the heirs of the testator and the residuary devisee may be brought in by a revivor although no service had been made upon the testator prior to his decease. Where the testator died possessed of a large amount of real estate other than that embraced in his bond, and his widow is residuary devisee, the complainant may bring in the heirs of the testator together with the residuary devisee. If the heirs disclaim all interest in the land embraced in the bond the bill may be dismissed as to them. When the bill prays for an accounting between the original parties the administrator with the will annexed is a proper party, and the case will be sent to a master to state the accounts. And the bill must contain an offer to pay any balance found due from the plaintiff. The plaintiff and his wife are incompetent witnesses as to matters which happened prior to the decease of the defendant, unless the administrator first testifies thereto, or the books or other memoranda of the deceased party relating thereto are first used in evidence. Compensation in damages for not conveying land in accordance with the obligations of a bond is not regarded as an adequate relief, and the obligee may maintain a bill for specific performance. *Hubbard v. Johnson*, Me., 135.

See ASSIGNMENT, 72; PENSION, 57, 95.

ATTORNEY.

Collecting money — summary process.] When an attorney at law, making collections for his client, so retains the whole of the sum collected, or so retains a large part thereof as to raise a presumption of had faith on his part, the court will, by order, require him to make payment to his client. An attorney collected by suit \$75 for his client, and held the whole as payment for services in the suit, and in other litigation as to officers' fees, which grew out of the suit, the client not being interested in this other litigation. *Held*, that the court, in the circumstances, would allow the attorney to retain thirty per cent of the sum collected, and would order him to pay over the balance to his client. *Burns v. Allen*, R. I., 456.

AWARD.

See ARBITRATION, 252.

BAIL.

See SCIRE FACIAS, 366.

BAILMENT.

Negligence — gratuitous bailee.] Failure to provide suitable store-room, with reference to safety from fire, and proper means for extinguishing fire, is not of itself such gross negligence as renders a gratuitous bailee liable for loss occurring from accidental fire. *Clark v. Eastern Railroad Co., Mass., 119.*

BANK.

See NEGOTIABLE INSTRUMENT, 223.

BANKRUPTCY.

1. "Debt" — assessment of damages not.] The report and assessment of damages, by a referee appointed under the statute of 1876, and made during the pendency of bankruptcy proceedings in an action for a tort, do not constitute a debt which may be proved against the defendant's estate in bankruptcy. *Gilman v. Cate, N. H., 340.*
2. Debt created by fraud — U. S. R. S., § 5117 — constructive fraud — juror presumed competent.] The plaintiffs, as an accommodation to themselves, gave an order to the defendant directing their debtor to pay him what was due them. He collected and used the money by mingling it with his own; and in a few days afterward was adjudged a bankrupt. After his discharge, in an action to recover the money, the court below found that there was no evidence tending to show actual fraud or fraudulent intent. The plaintiffs testified that when the order was given they told him "to keep the money until they called for it." The defendant testified that they told him "to keep and use the money until they called for it." The jury found that the plaintiffs were right as to the instructions given. *Held*, that the defendant's duty was that of a bailee without hire; that his use of the money was a conversion of it, and a fraudulent act; that the debt was "created by fraud," within the meaning of the bankrupt act — U. S. R. S., § 5117 — and not discharged. Evidence was not admissible to show the cause and manner of the defendant's failure, for the purpose of proving that there was no fraud. It is presumed that a juror is competent until the contrary is proved. *Hammond v. Noble, Vt., 358.*
3. New promise — charge to jury.] The plaintiff held two notes against the defendant, one a renewal of the other, and both for the same debt. In an action of *assumpsit*, to the defendant's plea of discharge in bankruptcy, the plaintiff replied a new promise. The plaintiff's son acted in her behalf at the time it was claimed the promise was made; but he had the old note with him and did not know of the new one. The court in effect told the jury, that in order to recover, both parties must have mutually understood what the promise applied to — the old or the new note. And this was made prominent by repetition. *Held* error; as there was but one debt to which the promise could apply, and that it was sufficient the defendant understood that he was promising to pay his debt to the plaintiff. *Jones v. Sennott, Vt., 664.*

See FALSE REPRESENTATIONS, 108; LANDLORD AND TENANT, 561.

BEES.

See ANIMALS, 458.

BETTERMENTS.

A divisional share of the betterments may be assessed where the demandant in real action recovers only an undivided share of the estate. *Chandler v. Shaw, Me., 523.*

BILL OF LADING.

Charter-party — ratification by owners of vessels of through bills of lading — division of ocean and inland freight.] Plaintiffs shipped a quantity of goods from Chicago to Antwerp, to go from New York by steamship *Fernwood*, and issued through bills of lading for the same. Plaintiffs' New York agent had previously arranged with the charterers of the *Fernwood*, who had a contract with the owners of the vessel to furnish her cargo, for transportation by that vessel, and they agreed upon a division of the inland and ocean freight. But before the goods were delivered to the vessel the agent refused to deal with the charterers and notified the captain of that fact, whereupon the captain agreed to give his draft, in accordance with custom, for the inland freight and the goods were delivered to the vessel, the mate giving his receipt, which was afterward exchanged

BILL OF LADING — *Continued.*

for that of the captain. The goods were delivered to the consignees and the whole amount of the freight collected by the defendants, the owners of the vessel. They refused to account to the plaintiffs for the inland freight, claiming that they had received the goods from the charterers with whom they had an unliquidated account. In an action brought by the plaintiffs against the owners of the vessel for the inland freight, *held*, that they were entitled to recover; that notwithstanding the captain had issued no bills of lading for this specific part of the cargo, he should be deemed to have ratified those which were issued by the plaintiffs at Chicago covering the entire transportation. *Fargo v. Milburn*, N. Y., 718.

BILL OF SALE.

See CHATTEL MORTGAGE, 672.

BOARD OF CLAIMS.

See NEGLIGENCE, 155.

BOARD OF POLICE COMMISSIONERS.

Majority of the board sufficient to act on charges against members of the force.]

The rules of the police department provided that in case testimony taken upon complaints made against any member of the force should be heard by less than three commissioners, it should be laid before and examined by the several commissioners before judgment thereon. *Held* sufficient to answer the requirements of the rule, that the evidence be laid before and examined by the several commissioners constituting the board at a regular meeting thereof, to-wit, a majority of the whole board. *People, ex rel. Swift, v. Police Commissioners*, N. Y., 416.

BOND.

1. **Condition — construction.]** The bond required by Pub. Stat., chap. 220, § 14, from a defendant who takes exceptions to the rulings of a special court of common pleas, conditioned to pay "all rent or other moneys due or which may become due pending the action, and such damages and costs as may be awarded against him," covers damages for wrongful occupation even where the relation of landlord and tenant has never existed. *Union Company v. Whitely*, R. I., 454.
2. **Given for deed by Commonwealth — bay-windows projecting over street — action by attorney-general to remove.]** The defendant owned lands conveyed by the Commonwealth to his assignor by a bond given for a deed. The property was described as running to a passage-way sixteen feet wide; and the bond referred to a plan which showed the property in question was part of a plot of ground that had been filled in and improved by the Commonwealth, laid out with streets and passage-ways, and sold in lots to be used exclusively for residence purposes. The plan also contained a stipulation "that a passage-way sixteen feet wide is to be laid out in the rear of the premises, the same to be filled in by the Commonwealth and to be kept open and maintained by the abutters in common." The defendant built up to the line of the passage-way on his lot and then constructed a bay-window from a point eight feet above the sidewalk, extending three or four feet into the passage-way. In an action brought to compel its removal, *held*, that the projection should be removed; and that the action was properly brought in the name of the attorney-general. *Attorney-General v. Williams*, Mass., 279.
3. **Sureties — delivery of bond.]** The authority to deliver a bond, merely, may be given by parol. When a probate bond is signed by the sureties with the penal sum left blank, and intrusted by them to the principal to be filled up for a certain amount and delivered, the probability of his being required by the probate judge to insert a penal sum larger than the sureties directed, and of his doing so, is so obvious that the sureties must be held to take the risk of their principal's conduct, and they are bound by the instrument as delivered, provided the obligee has no notice of the breach of orders. *Judge of Probate v. Duggan*, Mass., 427.
4. **Tax collector — pleading — burden of proof — illegal assessment — invalid warrant.]** In an action on the bond of a collector of taxes the plaintiff must show that the collector was clothed with a legal assessment and warrant, or that he has actually collected taxes. Then upon plea of performance, the burden is upon the defendant to show that he has faithfully performed the duties of his office, or duly accounted for taxes actually collected. If he fails judgment should be entered for the penal sum of the bond. After such judgment the defendant

BOND — *Continued.*

may have the bond chancered, by the aid of an auditor, and execution will issue for the sum found due. When the penalty of a bond of defeasance is sued for and breaches are not assigned, the defendant may have over of the bond, and if it have a condition, the court on motion will order the plaintiff to assign the breaches upon which he relies, and the defendant may interpose his defense by way of brief statement under the general issue. When only two assessors have been qualified the assessment is illegal. An assessor's warrant, which fails to show what year's State tax is included, or the date of the town meeting at which the town tax was voted, or the dates when the collector should pay the State and county treasurers respectively is invalid. *Machiasport v. Small*, Me., 127.

See EXECUTION, 54; EXECUTORS AND ADMINISTRATORS, 559, 674; REPLEVIN, 37.

BOROUGH.

See COUNTY, 684.

BOUNDARY.

Agreed location — grantees bound by.] An agreement fixing the location of a disputed boundary line between two adjoining land-owners is binding upon their respective grantees. *Bartlett v. Young*, N. H., 326.

BREACH OF PROMISE OF MARRIAGE.

An action for breach of promise of marriage is an action *ex contractu*. *Malone v. Ryan*, R. I., 39.

BREACH OF WARRANTY.

See ESTOPPEL, 701; SALE, 735.

BROKER.

See AGENCY, 94.

BURDEN OF PROOF.

See EVIDENCE, 641; EXECUTION, 52; FRAUDULENT CONVEYANCE, 587; NEGLIGENCE, 101; REVENUE LAW, 636; STATUTE OF LIMITATIONS, 750; TOLLS, 63.

CARRIER.

Illegal charges — penalty.] If a railroad charges and receives, for transporting a car-load of merchandise to the station on its road where it delivers the goods, and they are accepted by the consignee, more than it charges for transporting the same a greater distance, it is liable to the penalty imposed by chapter 55, Laws of 1859, although by the original contract the merchandise was to be transported to a more distant station. *Osgood v. Concord Railroad*, Mass., 818.

CASE.

See JUSTICE OF THE PEACE, 357.

CATERER.

See NEGLIGENCE, 71.

CAVEAT EMPTOR.

See JUDICIAL SALE, 180.

CERTIORARI.

Commissioners of land office—Indian treaties—claims of non-resident Indians to share in annuities.] The commissioners of the land office do not constitute a court, and have no power to declare a debt against the State. Neither can they annul or vary existing treaties between the State and Indian tribes. The action of the commissioners is legislative; their powers and duties are to propose and institute measures which must be approved by the governor to be of any force or effect. Under the laws of this State and its treaties with Indian nations, that portion of the Cayuga nation of Indians residing in Canada has no claim upon any part of the annuities payable by the State to the various Indian tribes. To entitle any Indian tribe or portion of a tribe to a standing before the commissioners in reference to sharing in the annuities, they must be recognized as such by the laws of this State. *People, etc., ex rel. Cayuga Nation of Indians Residing in Canada, v. Commissioners of the Land Office*, N. Y., 234.

See OFFICE AND OFFICER, 297.

CHANCER.

See MORTGAGE, 238.

CHATTEL MORTGAGE.

1. **General assignment—interpleader—rights of parties.]** A. executed a mortgage to B. of certain personalty. The mortgage was made and received in good faith. The mortgagee never recorded the mortgage nor took possession of the property, but there was no collusion between the parties nor design to give the mortgagor a fictitious credit. A. subsequently made an assignment "of all his estate and property" for the benefit of his creditors. On a bill of interpleader brought by the assignee, *held*, that the mortgagee was entitled to the proceeds of the mortgaged property. *Held*, further, that the creditors were entitled only under the assignment and that the assignee succeeded only to the rights of the assignor. *Held*, further, that the statute which provides that "no mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the said mortgage be recorded," must be construed in accordance with the above holding. *Wilson v. Esten*, R. I., 42.
2. **New York statute—law of place governs.]** A chattel mortgage executed in New York, and valid there, is valid here, when the owner comes into this State with the property. *Norris v. Soules*, Vt., 687.
3. **Mortgagor's interest.]** After breach of condition the mortgagor has no attachable interest in the property. *Ib*.
4. **Valid one year.]** A chattel mortgage is valid during one year under the New York statute, requiring it to be refiled at the expiration of one year, irrespective of what is necessary to be done to keep it on foot for a succeeding year. *Ib*.
5. **Purchaser for value.]** A vendee, in order to be able to maintain his title against the creditors of his vendor, must not only be a purchaser for value, but a purchaser in good faith. *Second Natl. Bk. of New Jersey v. O'Rourke*, N. J., 762.
6. **Trespass—husband and wife—bill of sale.]** L., owning a gray horse, purchased a bay horse of the defendant's wife, and gave her a lien on both to secure the payment. Subsequently he executed a chattel mortgage on the gray horse and some other personalty to the plaintiff, who had notice of the lien. Afterward L. sold the horses to said wife, but delivered them to the husband. They remained in the joint possession of the defendants on a farm owned by the wife until the gray horse was sold by the husband. *Held*, (1) that the mortgage was superior to the lien; (2) that the mortgagee could maintain an action of trespass, without first exhausting his other security, although his mortgage debt was not due; (3) but that the action could only be sustained against the husband, as the joint possession of the horse was not at law the wife's tort. A mortgagee under a chattel mortgage has a right to take possession of the property at any time, if there is no stipulation to the contrary. *Longey v. Leach*, Vt., 672.

COMPOSITION.

Laches—tender.] A creditor agreed, in writing, to accept of his debtor twenty-five per cent of the amount due him and discharge his debt, whenever "it shall appear by legal adjudication, reference or otherwise, that I am the true owner of" the debt. July 7, the creditor notified the debtor that the court had decided that he was the owner of the debt, and that he was ready and willing to accept the percentage according to agreement. No payment being made, the creditor sued the original debt September 8. On November 19, the debtor tendered the twenty five per cent. *Held*, (1) that the tender was not seasonably made; (2) that the agreement of composition was forfeited; (3) that the original cause of action was revived. *Chapman v. Dennison Paper Manufacturing Co., Me.*, 304.

COMPROMISE.

See FRAUD, 186.

CONFLICT OF LAWS.

Whether note is payment—place of contract governs.] Whether a time note given in this State by a New Hampshire debtor to a Massachusetts creditor has the effect of payment *pro tanto* is to be determined by the law of New Hampshire. *Gilman Bros. v. Stevens*, N. H., 612.

See EXECUTORS AND ADMINISTRATORS, 476.

CONSIDERATION.

See GUARANTY, 812 ; STATUTE OF FRAUDS, 268.

CONSPIRACY.

See CRIMINAL LAW, 595.

CONSTITUTIONAL LAW.

1. **Act of Aug. 17, 1883—formation of judicial districts.]** Article 5, section 5 of the Constitution of the State provides, "whenever a county shall contain forty thousand inhabitants it shall constitute a separate judicial district, and shall elect one judge learned in the law; and the general assembly shall provide for additional judges as the business of said district may require. Counties containing a population of less than is sufficient to constitute separate districts shall be formed into convenient single districts, or if necessary, may be attached to contiguous districts as the general assembly may provide." The act of August 17, 1883, for the formation of the judicial districts of the Commonwealth, provides that the seventeenth district "shall be composed of the county of Butler to which the county of Lawrence is hereby attached, and shall have two judges, and the additional judge shall reside in Lawrence county." The act also provides that where a county is attached to an adjoining district the qualified voters of such county shall be entitled to vote for the president judge, and an additional law judge when provided for. The United States census of 1880 showed the county of Butler contained over fifty thousand inhabitants. In an action attacking the constitutionality of the act of 1883, as far as it permitted the voters of Lawrence county to vote for judges representing Butler county, as in conflict with the provision of the Constitution, that counties of over forty thousand inhabitants shall constitute a separate judicial district, *held*, that the section of the Constitution referred to did not of itself constitute a separate district when a county attained the number of inhabitants specified; but was intended to indicate the basis on which, at the proper time, judicial districts might be created by the legislature. That by the scope and spirit of the Constitution providing for the uniform operation and organization of courts, and the rights of electors, all qualified electors of each county forming a judicial district were entitled to vote for judges of that district; and that as the county of Lawrence formed a part of the seventeenth judicial district, the qualified electors of that county were authorized to vote for the judges of that district at the general election held November 4, 1884. *Bredin's Appeal and Greer's Appeal*, Penn., 757.
2. **Citizens of other States—requiring license—discrimination.]** A State statute requiring citizens of other States to procure a license to sell trees, shrubs, or other vines, that may be sold by its own citizens unlicensed, is in conflict with article 4, section 2, of the Constitution of the United States. *State v. Lancaster*, Mass., 317.
3. **Illegal tax—enjoining collection.]** A bill to enjoin the collection of an entire school district tax, assessed without authority of law, brought by all the tax payers, or by any number thereof in behalf of themselves and all others, may be sustained on the ground of the inherent jurisdiction of equity to interpose for the purpose of preventing multiplicity of suits. When municipal officers proceed to erect a school-house for a district under the provisions of Rev. Stat., chap. 11, § 56, they can legally expend therefor only so much money as the district may have voted for that purpose. The legislature cannot constitutionally authorize the assessment upon the polls and estates of a school district any sum of money expended by the municipal officers in erecting a school-house in the district in excess of the sum voted therefor by the district. *Carlton v. Newman*, Me., 597.
4. **Liberty of the citizen—committing to industrial school.]** A statute which authorizes a justice of the peace to commit to the industrial school a minor under the age of seventeen years, upon a complaint charging a crime with respect to which the jurisdiction of the justice only extends to requiring the accused to recognize in sureties for his appearance at court, is in conflict with article 15 of the Bill of Rights. *State v. Ray*, N. H., 678.
5. **Municipal debt—execution against private property.]** Executions upon judgments against towns may be levied upon the goods and chattels of the inhabitants. The statute of Maine authorizing this process is not in conflict with the

CONSTITUTIONAL LAW — *Continued.*

fourteenth amendment, United States Constitution. *Eames v. Savage*; *Same v. Bickford*, Me., 293.

6. **Oleomargarine.**] Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power and impartial tribunals to enforce them. Section 6 of "an act to prevent deception in sales of dairy products"—Laws of 1884, chap. 202—"provides that no person shall manufacture out of any oleaginous substance or substances, or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure, unadulterated milk, or cream of the same, or shall sell, or offer for sale, the same as an article of food." *Held* unconstitutional; as it absolutely prohibited the manufacture or sale of any article which could be used as a substitute for butter, however fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products against the competition of cheaper substances, capable of being applied to the same uses as articles of food. This was beyond the power of the legislature to do. *People v. Marx*, N. Y., 196.
7. **Statute authorizing storing water on another's land—to clear obstructions in river to float logs—compensation—injunction—construction of statutes.**] The act of 1874 authorized the orator with others to remove the rocks, float-wood, etc., from the bed and banks of Willoughby river, from its source at the outlet of Willoughby lake, so as to make it navigable for the running of logs, and to enter upon the bed of the river and its tributaries for that purpose; to make booms; to occupy land on the margin of the stream for the purpose of banking logs, by paying or tendering all damages. It was provided that if the parties could not agree upon the amount of damages, they were to be fixed by the selectmen; and if they were disqualified, then by three justices of the peace. No appeal was allowed, and no fund was provided, or security required, for payment of damages; but an action was given to recover them. This statute was amended by an act in 1878, which authorized the orator "to make, maintain, and control gates at the outlet of said Willoughby lake, for the purpose of saving water in said lake," etc., but could not raise the level of the waters above the ordinary high-water mark. The amendment contained no provision as to damages. The orator erected the gates on defendant's land, and brought this bill to restrain it from removing them. No compensation was made or tendered. *Held*, that the statutes were unconstitutional, in that no adequate provision was made for compensation; that the rights under an award or judgment are not sufficient for the taking of private property; that there was a taking of defendant's property; and that compensation should have been made at the time of the taking. *Poster v. Stafford National Bank*, Vt., 258.
8. **Trial by jury—evidence.**] The constitutional provision that "the right of trial by jury shall remain inviolate" does not create such right, but merely secures it as it existed when the Constitution was adopted. In an action to recover damages for injuries received by falling on a dangerous sidewalk defendant made default, plaintiff filed a motion to have the damages assessed by a jury, the court overruled the same, and assessed the damages. *Held* no error; the constitutional provision did not apply. In such an action evidence locating the line of the street each side of the place of injury was admissible on the question, where the line was at the place where the accident occurred. *Seeley v. City of Bridgeport*, Conn., 206.

See CORPORATION, 345; COUNTY, 674; TAXATION, 150, 243.

CONTINUANCE.

When operates as discontinuance—recognition—when void.] The clerk of a municipal court, in the absence of the judge, continued a case three weeks and five days, when he was empowered by statute to continue it only *three weeks*. *Held*, that the continuance operated a discontinuance; and that a subsequent continuance by the judge did not have the effect to revive the case; it being a criminal cause, the court had no authority to issue a new warrant commanding the respondent to be arrested to answer to the old complaint; and the recognition required by the court and entered into by the defendant and his surety was void; as there was no legal cause in court. *State v. Meagher*, Vt., 512.

CONTRACT.

1. **Executor and administrator — party in interest — Code Civ. Pro., §§ 449, 1814.]** Upon new contracts made by an executor or administrator, and never existing in favor of the decedent, but growing out of the contracts and dealings of the former alone, the action is properly brought in the name of the individual, and a debt against the decedent cannot be made the subject of a counter-claim. It must be paid in the ordinary course of administration, and can gain no preference, as it is entitled to none. Plaintiff, as executrix of her husband, sold upon credit to defendant property which defendant had sold to her husband, and for which he held his note. In an action against defendant to recover the purchase-price, *held*, that he could not use his demand on the unpaid note as an offset. *Thompson v. Whitmarsh*, N. Y., 714.
2. **Partners — amendment.]** When it appears that two or more parties were interested as partners in a contract upon which a suit is brought by one member only, a verdict for the plaintiff will be set aside and a new trial granted. In such a case an amendment will be allowed under the statute of Maine by adding the other partners as co-plaintiffs. *Ames v. Shaw*, Me., 145.
3. **Promise of partner — goods furnished firm.]** Plaintiff's assignor, B., sold a bill of goods to a firm of which defendants were partners. A dispute arising during the negotiation between B. and a member of the firm as to whether a certain lot of seeds should be included, the defendants, as individuals, agreed that if B. would let the seeds go in under the contract, they would pay for the same. *Held*, in action to recover the value thereof, that defendants were liable. *Pond, Assignee, v. Starkweather*, N. Y., 832.
4. **Sale of stock — rules of stock exchange — transfer of title by payment of margin and deposit of certificates.]** There may be a bargain and sale of goods sufficient to transfer the title, and that to support an action for goods bargained and sold, without any such delivery as will amount to a transfer of possession. Plaintiff sold defendants certain shares of stock, "payable and deliverable, buyer's option, sixty days;" thus showing that the parties did not intend a present transfer. By the rules of the stock exchange of which both parties were members, on all contracts for stocks sold on time, either party might require a deposit to be made any time during the existence of the contract; but the seller should have the privilege of depositing the stock in lieu of the cash, in which case the margins should be paid to him by the buyer, and the amount credited on the contract. Three days after the sale in question the defendants, on plaintiff's demand, paid plaintiff a margin of twenty per cent, and plaintiff, on the same day, in conformity with the rules of the exchange, deposited the certificates of stock with a trust company, with power of attorney for their transfer, executed in blank; and the trust company delivered to plaintiff a receipt therefor, agreeing to deliver upon return of the receipt indorsed by both plaintiff and defendant. In an action to recover the balance due on the stock, — *Held*, that the transaction amounted to a transfer of the title; that a deposit of the stock in lieu of the cash by the plaintiff, and payment of the margin by defendants to be credited on the contract price under the rules of the exchange, showed a change in the condition of the parties amounting to a transfer of the title, entitling the plaintiff after sixty days to maintain an action for balance due on the stock. *Frazier v. Simmons*, Mass., 813.
5. **Substitution of new contract.]** When, upon the refusal of one party to fulfill an agreement, the same parties enter into another agreement which is fully carried out, covering substantially the same grounds as the first but on different terms, it will be deemed, unless it appears that such was not the intention of the parties, a substitution of a new contract for the old. *Rogers v. Rogers*, Mass., 123.
6. **Of sale — title by adverse possession.]** Under a contract for the sale of land implying that the purchaser should receive a good title by record, — *Held*, that a title by adverse possession was not such a title, and that the purchaser was not bound to accept it. *Noyes v. Johnson*, Mass., 116.

See DAMAGES, 749, 754; INFANT, 738; SALE, 871; STATUTE OF FRAUDS, 630.

CONTRIBUTION.

- Fraudulent grantees of land.]** There may be contribution among fraudulent grantees of land when the land conveyed to one of them is taken to pay the grantor's debts, such contribution to be adjusted according to existing equities between the several grantees. *Janerin v. Curtis*, N. H., 504.

CONVERSION.

1. **Cutting standing timber.]** Trees, when severed from the land, become at once the property of the owner of the inheritance, and it is waste for a tenant for life to cut for sale, or to sell and allow the purchaser to cut standing trees suitable for timber or saw logs. *Lester, Administrator, v. Young, R. I., 21.*
2. **Married woman's property—husband cannot maintain action.]** A husband cannot sustain an action of trespass and trover in his own name for the conversion of his wife's property. *Hackett v. Hewitt, Vt., 516.*

CORPORATION.

1. **Bridge—exclusive right.]** A charter giving the right to erect a bridge across Connecticut river within certain limits, and collect tolls, but which contains no words making the granted rights exclusive within the limits named, does not give to the corporation a cause of action against land-owners on opposite sides of the river who open a winter road across their own lands and across the river, within the charter limits, and invite the public to pass thereon, with intent to divert travel from the bridge, to the injury of the plaintiffs. *Union Bridge Co. v. Spaulding, N. H., 845.*
2. **Forfeiture of franchise—scire facias—quo warranto—construction of statute.]** The mode of process, by which the corporate franchises of an incorporated trust company may be adjudged forfeited, is by writ of *scire facias*, under the statute—Rev. Laws, chap. 72—prosecuted in the name of the State, and not by complaint for a writ of *quo warranto*, prosecuted in the name of a private person, under chapter 74, Rev. Laws. The statutory remedy by implication supersedes the common law. *Green v. St. Albans Trust Co., Vt., 660.*
3. **Insolvency—assessments—liability of stockholders.]** The charter of the St. Albans Trust Company provided: "If at any time the capital stock paid into said corporation shall be impaired by losses or otherwise, the directors shall forthwith repair the same by assessment." The trust company being insolvent and under the control of a receiver,—*Held*, that a personal liability is not imposed upon the stockholders, and that they cannot be assessed for the purpose of paying the creditors; and that the purpose of said provision was rather to prevent the continuance of business with impaired capital." *Dewey v. St. Albans Trust Co., Vt., 658.*
4. **Shares of stock—assignment—attachment.]** The legal title to shares of corporate stock which are "assignable only on the books" of the corporation will not pass by an assignment of the shares neither made nor recorded on the books of the corporation. In Rhode Island an equitable or executory right to, or interest in, corporate stock is not attachable. A. was the record owner of corporate stock. He assigned it to B. Afterward B. assigned it to C., and this assignment was made on the books of the corporation. The stock never stood on the books of the corporation in the name of B. *Held*, that the stock was not attachable as the property of B. *Lippitt v. American Wood Paper Co., R. I., 487.*
5. **Tolls—charter conditions—burden of proof.]** Plaintiff's charter provided that "from and after it shall have constructed the dams, side booms, side dams, sluices and other improvements contemplated by this act, may demand and receive a toll of 'twenty-five cents per M' for all logs and lumber that shall pass over or by its dams and improvements." In an action against defendant to recover "tolls," *held*, the burden rests upon the plaintiff to show that the improvements made are sufficient to comply with the condition upon which toll may be demanded. The evidence failing to prove that the plaintiff had complied with the conditions of their charter at the time when defendants drove their logs, defendants were not liable. *Swift River Improvement Co. v. Brown, Me., 63.*
See PUBLIC STATUTES, 424; TAXATION, 6; WATER AND WATER-COURSES, 571.

CORPORATE STOCK.

- Redemption—bill not maintainable.]** A. transferred to B. certain corporate stock vesting the legal title in B., who held it as a chattel mortgage. After default by A. in the conditions of the mortgage and after B. had, subsequent to such default, held and treated the stock as his own for more than six years, A. filed a bill in equity to redeem. *Held*, that the bill could not be sustained. *Greene v. Dispeau, R. I., 19.*

CORPUS DELICTI.

See CRIMINAL LAW, 487.

COSTS.

1. **Equitable remedy doubtful.]** In a bill in equity, which was brought in good faith, where the remedy was somewhat doubtful, and the court dismissed the bill because there was an adequate remedy at law, *held* no costs should be awarded. *Ticcomb v. McAlister*, Me., 609.
2. The oratrix is entitled to costs against all the defendants, except the administrator, although the decree below in her favor was modified to some extent. *Little v. Durinell*, Vt., 649.
3. **Extra allowance — basis of computation — Code Civ. Proc., § 3253.]** Defendant entered into a contract with the water commissioners of Saratoga Springs, and on performance and acceptance thereof by said water commissioners was to receive \$31,000. Plaintiffs brought their action as tax payers, alleging in their complaint that said contract was in violation of the village charter, non-performance, collusion, etc. Judgment was rendered in favor of defendant. The special term granted an extra allowance, the general term reversed the order, holding that the difference between the contract price and the value of the labor, etc., furnished under the contract, was the only basis for an extra allowance, and in the absence of proof on the point no allowance could be made. *Held* error; that the right of the defendant to enforce the contract having been established, the subject-matter involved was the contract price, and not the profits on the contract. *Mingay v. Holly Manufacturing Co., Impleaded, etc.*, N. Y., 91.
4. **General Laws, chapter 233 — title to real estate not in question.]** Under Gen. Laws, chap. 233, § 5, the plaintiff cannot be allowed more costs than damages when the title to real estate is not in question, and the damages recorded do not exceed \$13.33. *Jones v. Lane*, N. H., 704.
5. **Partition — counsel fees.]** In Pub. Stat. R. I., chap. 230, § 22, of partition, the words "cost of partition" cover counsel fees as well as the costs of suit and other expenses of making partition. *Resdecker v. Bowen*, R. I., 531.
6. **Sheriff's fees for serving writ of replevin.]** An officer is entitled — R. L., § 4547 — to charge for serving a writ of replevin for *taking and delivering* the property to the plaintiff, in addition to travel, copy, and appraiser's fees, such sum as would be in proportion to the fees provided in other cases for securing attached property; but not for transporting the property to the plaintiff; nor for holding it until a bond is taken, or, ordinarily, until appraisal. *Woodward v. Amsden*, Vt., 517.

COUNTY.

Borough — opening streets and roads — act of March 18, 1868 — Art. XII, § 8, Const. of 1838 — constitutional law.] The purpose and effect of the act of March 18, 1868 — Pub. Laws, 352 — relating to the opening and straightening of roads and streets, was to transfer the burden of the damages therefor from the benefited property-owners, in the boroughs wherein streets were opened or straightened, to the tax payers of the county at large. The title to said act of 1868 being "An act relating to boroughs in the county of Chester"; and the purpose of the act, as above stated, — *Held*, that under article 12, section 8, of the Const. of 1838, which provides that "no bill shall be passed by the legislature containing more than one subject, which shall be clearly expressed in the title" — said act was unconstitutional and void. The title not only failed to clearly express the purpose of the act, but was misleading. *In re Road in Borough of Phoenixville*, Penn., 684.

COUNTY COMMISSIONERS.

Cattle-passes — petition — jurisdiction — committee — majority decides.] A majority of a committee, appointed by the court to revise the doings of the county commissioners in the location of a way, may decide, when all the committee participate in the view and hearing. A statute, giving the county commissioners power to "grade hills" in a way located by them, authorizes them to require fills as well as to cut down hills. The county commissioners have no authority to require cattle-passes to be constructed in a way located by them, and such a requirement renders their proceedings bad. A petition to the county commissioners for a way "beginning at the terminus of the new road now building in Newfield to Balch's mills, thence in a western direction to the N. H. line," is sufficient under the statute of Maine to give the commissioners jurisdiction. *Acton v. County Commissioners*, Me., 131.

CRIMINAL LAW.

1. **Arson — nolle prosequi.**] An indictment charged the defendant in one count with burning a dwelling-house and barn. *Held*, that the prosecuting officer may, by leave of court, and against the defendant's objections, enter *nolle prosequi* to so much of the indictment as charged the burning of the barn. The alleging of the commission of a criminal act in an indictment alleges the intent. *State v. Bean*, Me., 526.
2. **Conspiracy — demurrer.**] An indictment not in the language of the statute, or words conveying the same meaning, nor charging a crime known to the common law, will be quashed on demurrer. *State v. Higgins*, Me., 595.
3. **Costs.**] The county is not liable for costs incurred in prosecuting offenses against the police of towns on the complaint of selectmen. *Powers v. County of Sullivan and Town of Grantham*, N. H., 335.
4. **Evidence — impeachment of defendant.**] A defendant in proceedings, civil or criminal, who testifies in his own behalf may be impeached like any other witness by showing his previous conviction of a felony. *State v. McGuire*, R. I., 451.
5. **Evidence — threats against deceased.**] On a trial for murder it is competent to show the conduct and feelings of the prisoner toward the deceased as is also proof of previous threats or attempts to kill his victim. Although such evidence does not establish the fact that the prisoner intended to kill at the time of firing that fatal shot, yet it is to be weighed by the jury in connection with all the facts in the case, for the purpose of determining the question of motive, intent, deliberation and premeditation. *People v. Jones*, N. Y., 380.
6. **Forgery — evidence — handwriting — corpus delicti.**] When writing is offered as a standard of comparison, it is for the presiding judge to determine whether it is shown by clear testimony that it is the genuine handwriting of the party sought to be charged, and unless his finding is founded upon error of law, or upon evidence which is as matter of law insufficient to justify the finding, this court will not reverse it upon exceptions. Defendant asked a witness whether he knew of plaintiff's making imitations of notes by tracing, and had informed him how it could be done. The evidence was objected to, and defendant stated it was offered, not for the purpose of proving a distinct offense, but as showing the plaintiff had the skill and ability to forge the note in suit. *Held*, that the evidence was properly excluded. Where a person is accused of a crime, it is not competent to show as evidence of the *corpus delicti* that he has committed similar offenses, or that he is of bad character, or that he has the capacity and means of committing the crime. Memoranda, made in a diary kept by defendant's intestate, are not admissible in evidence. *Costello v. Crowell*, Mass., 437.
7. **House of ill-fame.**] At the trial of an indictment for keeping a house of ill-fame it appeared that the defendant owned the house, lived in it as its mistress, and let rooms to female lodgers who used them for purposes of prostitution. The presiding justice instructed the jury that the defendant was guilty if she let her rooms to prostitutes for prostitution, or knowingly permitted them to be used and resorted to for that purpose, though the occupants were merely boarders or lodgers and were not employed to ply their business by her as mistress of the house. *Held* no error. *State v. Smith*, R. I., 452.
8. **Indictment against railroad company — practice — nolle prosequi.**] A *nolle prosequi* may be entered by the prosecution, with leave of court, during the trial before a jury of a statutory indictment of a railroad company to recover damages for the loss of life of a person alleged to have been instantly killed by reason of the negligent management of the defendant's train. *State v. Maine Central Railroad Company*, Me., 383.
9. **Indictment — uncertainty.**] An indictment which charges the sale of intoxicating liquor in language equally applicable to the offense discussed in General Laws, chapter 109, section 13, and that described in section 15 of the same chapter, is insufficient. *State v. Leavitt*, N. H., 706.
10. **Indictment — accessory before fact — Peculation Act, 1875.**] Where a felony is committed through the agency of a guilty instrument, or participant, the instigator thereof is an accessory before the fact and must be indicted and tried as such. Defendant was convicted under the "Peculation Act" — L. 1875, chap. 19 — upon an indictment charging him with having fraudulently and feloniously obtained and received from the treasurer of the city of Buffalo, funds belonging to said city. A second count charged the conversion of the funds to

CRIMINAL LAW — *Continued.*

- the defendant's own use. In both counts he was charged as a principal. Defendant had no knowledge of the transaction for which he was indicted; did not in fact receive the money personally, but it was deposited by the city treasurer, or by his direction, with a banking firm of which defendant and the treasurer were members. The city treasurer had, with knowledge of defendant, used the city funds in the firm business. *Held*, that the offense charged was a felony; that as he was not either actually or constructively present, he could not be convicted as a principal; the evidence tending to prove that he was accessory before the fact, he could not be convicted under an indictment charging him as a principal. History of the term "felony" in this State discussed. *People v. Lyon*, N. Y., 76.
11. **Indictment.**] An indictment for keeping for sale fermented cider in less quantity than ten gallons need not contain a denial that it was intended to be sold elsewhere than in this State. *State v. Perkins*, N. H., 503.
12. **Information—minute on, by clerk, when exhibited.**] The minute on the information was, "Filed Oct. 15, 1883," and under the official signature of the clerk. *Held* sufficient. *State v. Brainard*, Vt., 669.
- Larceny—intent.**] At the trial of A. indicted for stealing from the person of B., it appeared that A., somewhat intoxicated, had been seen fumbling in the pockets of B., who was very drunk, taking money from them and putting it in his own. A. did not account for the possession of money found on him. B., after becoming sober, denied any acquaintance with A., and claimed to have had money, which was gone. *Held*, that the question of A.'s intent was rightly left to the jury. *State v. McAndrews*, R. I., 455.
14. **Larceny — parting with possession and retaining title.**] Where one is induced by false and fraudulent representations to pledge money as security, parting with its possession, but without intending to part with the title thereto, a conversion of the money by a party inducing the fraud constitutes the crime of larceny. *People v. Morse*, N. Y., 379.
15. **Liquors — juror contributed money to prosecute.**] At the trial of one indicted for keeping a liquor nuisance the presiding justice commits no error in refusing to allow a juror to be asked on his *voir dire* whether he has contributed money for the prosecution of persons generally who are charged with keeping such nuisances. *State v. Hozsie*, R. I., 441.
16. **Murder — charge of court.**] The defendant, on his trial for murder, testified in his own behalf. The court charged the jury as follows: "A party is now declared to be a competent witness in his own behalf, and the question of the credit to be attached to his testimony is a question for the jury. But the interest he has in the issue is never to be excluded from the minds of the jury. The testimony is entitled to all the weight which the jury can fairly give it, and was subject to the same tests as the testimony of any other witness. So far as the testimony of the prisoner at the bar is contradictory of itself, it cannot be true. Two contradictory statements cannot be true. When he testifies he knew nothing of the personal property which he took from that house, until after he took the cars at Auburn, and when he testifies afterward that he took the watch from the wall, and took the bank-book from the bureau drawer, so far as those statements are contradictory, one of them is to be considered false. Whenever you find that the prisoner has made a statement not true, to establish a falsity instead of a truth, his testimony is not entitled to the credit of a witness who stands fairly before you uncontradicted. His testimony then is entitled to no weight or credit of itself, except so far as it is inconsistent with the known and established facts of the case, or corroborated by other witnesses. This is a consideration which you cannot avoid; it is forced upon you by the facts of the case and the importance of the issues here involved." *Held* no error. The court intended no more than that a jury are permitted to disbelieve the testimony of a witness who has willfully testified falsely before them as to any material fact. *People v. Petmecky*, N. Y., 374.
17. **Perjury — pleading — listers — R. I., §§ 3, 2658.**] Towns are required by statute to elect annually three, four, or five listers, who constitute a board, a majority of which is essential to legal action. One acting alone has no jurisdiction; his acts would be void. Hence an indictment charging a lister with perjury, in that he had violated his official oath, is defective without allegation of the election of the requisite number of listers, and that they *qualified and acted as such*. *State v. Peters*, Vt., 246.

CRIMINAL LAW — *Continued.*

18. **Practice.]** An indictment alleging that the respondent at a certain time and place "unlawfully did keep a drinking-house and tippling-shop" is sufficient. *State v. Rollins, Me.*, 584.

See NEGLIGENCE, 473.

DAMAGES.

1. **Breach of contract to accept goods.]** Plaintiffs sold defendants a quantity of brick to be delivered from time to time. Upon a cargo of brick being tendered, defendant refused to accept the same, and, as the referee found, without any excuse for such refusal. *Held*, that the tender and refusal constituted a breach of the contract by defendant; that after such breach it was not necessary for the plaintiffs to tender the whole quantity of brick called for by the contract before bringing this action; that the right of action having accrued it was not waived, as matter of law, by a subsequent offer on the part of the plaintiffs to furnish the brick, which was not accepted by defendant until an advance in the market had materially changed the situation. On the question of damages, *held*, that the price which the plaintiffs received for the brick on a sale to other parties was immaterial, in view of the facts that they were delivered on contracts made prior to the date of the breach of the contract with defendant, and that the plaintiffs had the ability to furnish all the brick required for all their contracts, including that with the defendant. *Canda v. Wick, N. Y.*, 749.
2. **Contract to exchange lands — mutual mistake — no warranty or fraud.]** Both parties to a written contract for the exchange of lands were mistaken as to the location and description of the lands which one of the parties assumed to own. There was no warranty of ownership contained in the contract. *Held*, that the party who had mistakenly assumed to own land as described was not liable to the other party for trouble and expense he had incurred in ascertaining the facts in regard to defendant's land. *Day v. Nason, N. Y.*, 754.
3. **Counsel fees — statute of limitations.]** In trespass for *mesne profits* the plaintiff cannot recover counsel fees and expenses paid out in the ejectment suit. Punitive damages are allowed only when the defendant has shown malice or bad faith. Causes of action accrue when the trespasses are committed, and a recovery can only be had for such time as lies within the limits of the statute of limitations. *Herreshoff v. Tripp, R. I.*, 463.

See EMINENT DOMAIN, 625; FRAUD, 186; WAYS, 149.

DECEDENT'S ESTATE.

Publication — notice of sale — adjournment.] The sale of a decedent's realty to pay the debts was advertised by the administrator in a newspaper issued daily, the advertisement being inserted twice a week during two weeks and in each issue during the two following weeks preceding the time of sale. *Held*, that the notice given complied with the provisions of Pub. Stat. R. I., chap. 179, § 16, which required notice "in some public newspaper for four successive weeks." The day before that appointed for the sale notice of a postponement for a week at the same hour and place was added to the notice of the sale, and the notice of sale and postponement appeared in each issue of the paper up to and including the day of sale. *Held*, that the notice of the postponement was sufficient under Pub. Stat. R. I., chap. 179, § 17, which required notice of "such adjournment in the same manner in which notice of the sale was given, as soon as may be after such adjournment and up to the day of the adjourned sale, unless the adjournment shall be from day to day only, and then by making public proclamation thereof at the time and place of the sale and by setting up a notice thereof at such place." *Harris, Petitioner, R. I.*, 50.

DECLARATION.

See NEGLIGENCE, 236.

DEED.

1. **Conditional, breach of — forfeiture — damages — penalty — good-will — appurtenance — waiver.]** B. owned two hotels — the Trotter House and the Bliss Hotel — in the same village, and sold the Trotter House to the orator for \$4,250, and at the same time, and as part of the same contract, for the consideration of \$3,500, paid him by the orator, agreed that the Bliss Hotel should never be used

DEED — *Continued.*

for hotel and boarding-house purposes; and as security for this inhibition, conveyed the Bliss Hotel to the orator by deed with covenants of warranty, conditioned that the deed was to be void if the restraint was observed, otherwise in force. After several years the orator went out of the hotel business, and conveyed his hotel, but not his interest under the conditional deed. B., observing the condition so long as he was the owner of the Bliss Hotel, after a few years sold it in parcels; and the several defendants became the owners thereof. Large improvements had been made on the property. There was a clear breach of the condition; but some of the defendants were innocent as to this, and some not. A bill having been brought for a forfeiture of the premises,— *Held*, that equity did not require an enforcement of the conditional deed; but that the orator ought to be made whole, and so should recover the \$2,500—what he paid for the immunity—and interest from the time he demanded the premises. He waived the right to recover interest prior to the time of the demand, by not making a demand sooner, although the breaches were of so much earlier date. The immunity secured by the conditional deed was not an appurtenance to the Trotter House. Keeping boarders by one occupying a portion of the inhabited premises, also furnishing oysters, cooked and raw, pies, cake, etc., to travelers, was a breach of the condition; but keeping or entertaining of one's friends is not such breach. *Stevens v. Pillsbury*, Vt., 361.

2. **Description** — “northerly and easterly.”] A deed contained the following reservation: “But reserving all the lumber on the northerly and easterly side of the bog on said lot, and meaning to convey all the lumber on the southerly and westerly side of said bog.” The bog was of irregular shape and extended beyond the east and south lines of the lot, but did not intersect with the north and west lines. Calling the most northerly point of the bog A, and the westerly point C— *Held*, that the reservation covers only the timber upon that part of the lot which lies northerly and easterly of the boundary line of the bog leading from A to where it strikes the east line of the lot and east of a line running north from A to the north line of the lot. *Held*, further, that the reservation did not cover the timber on that part of the lot lying northerly of the boundary line of the bog from A to C. *Poster v. Post*, Me., 395.
3. **Inconsistent clauses** — construction — partition.] When a deed contains inconsistent clauses, courts in construing it will consider the whole instrument and the intentions of its maker, subject to the rules of law. If all its parts cannot stand, those will be rejected which oppose the maker's intentions. If its language can be interpreted in different ways, courts will look at the circumstances of its execution, and extrinsic evidence is admissible to enable them to do this. If the interpretation still remains doubtful, the deed will be construed in favor of the grantee. A deed of partition between co-tenants gave an area and boundaries, which latter excluded a part of the area. The area given agreed with the result found by adding together the grants made to the original owner and deducting therefrom the grants made by him. No reason appeared why any part of the area should have been retained as common property. The grantee of the deed of partition entered on and for more than twenty-five years occupied the whole area. *Held*, that the whole area passed by the deed of partition. A reference in one deed to another “for a more particular description” of the premises conveyed incorporates into the former whatever is contained in the latter. *Waterman v. Andrews*, R. I., 25.
4. **Married woman's** — acknowledgment.] Under a statute which provided that in every case of a deed executed by husband and wife to convey the wife's realty, “the wife acknowledging such deed or instrument shall be examined privily and apart from her husband, and shall declare to the officer taking such acknowledgment that the deed or instrument shown and explained to her by such magistrate is her voluntary act, and that she doth not wish to retract the same,” an acknowledgment was certified to as follows by the magistrate who took it: “Personally appeared S. A. J. and A. J., wife of said S. A. J., to the within and foregoing written instrument and severally acknowledged the same to be their free and voluntary act and deed, hand and seal, the said A. J. having acknowledged separate and apart from the said husband as the law directs, and that they do not wish to retract the same.” *Held*, that the acknowledgment was fatally defective. The statutory provision requiring the deed to be “shown and explained” to the married woman was mandatory, and that the omission from the magistrate's

DEED — *Continued.*

- certificate of a statement that the deed had been "shown and explained" to the married woman was fatal. *Paine v. Baker*, R. I., 487.
5. **From Massachusetts — office copies — evidence — identity of grantee.]** Copies of deeds from the Commonwealth of Massachusetts, of land in Maine, may be certified by the land agent of Maine to the registry of deeds where the land is situated, and certified copies from such registry may be used in evidence whenever the original deeds could be. Massachusetts conveyed land in Maine to Samuel Cook without naming his place of residence. She conveyed other lands in the same township to Samuel Cook, of Houlton. *Held*, that these facts, *prima facie*, establish the identity of Samuel Cook, of Houlton, as grantee in the first-named deed. A deed was made in 1837 by the land agent of the Commonwealth of Massachusetts to Samuel Cook, as assignee of a soldier certificate. The only evidence of the assignment to Cook was the recital of that fact in the deed. *Held*, in a real action by one claiming under Cook, that as against one who claimed neither under the soldier nor the Commonwealth, the recital was *prima facie* proof of the fact recited. *Chandler v. Wilson*, Me., 519.
 6. **Mortgage — levy.]** March 8, 1875, S. conveyed to Z. a small lot of land cut out of a larger parcel then owned by S. September 2, 1875, he conveyed to Z. the whole parcel by metes and bounds that embraced and included the small lot first conveyed, and on the same day Z. mortgaged to S. the same premises by same metes and bounds, and on April 23, 1878, Z. conveyed to S. the same premises which S. conveyed to him September 2, 1875. July 30, 1879, a creditor of Z. attached and, by due proceedings, subsequently levied upon the small lot first conveyed by S. to Z. as the property of Z. *Held*, that the creditor acquired no title by the attachment and levy which could be enforced in law. *Stevens v. Stevens*, Me., 570.
 7. **Reservation.]** When a deed of land reserves a building standing upon it "and one rod of land equal distance around it," the lines of the lot reserved correspond with the lines of the building, and if that be rectangular, the lot will be rectangular. *Perkins v. Aldrich*, Me., 289.
 8. **Trustees take as joint tenants.]** Courts incline to hold trustees joint tenants rather than tenants in common, to avoid inconvenience in administering the trust. Conveyance by deed to A., B. and C. in trust for them "or other the trustees hereunder for the time being to take charge and possession of said trust estate and to hold the same for the sole use" of the *cestuis*, with power to them "or the survivors or survivor of them or other the trustees or trustee hereunder for the time being, at any time and from time to time, in their or his discretion and as soon as reasonably and properly may be, to sell, let or lease the same," and in further trust for them, "or the survivors or survivor of them, or other the trustees or trustee hereunder for the time being to receive the proceeds of all sales or leases" to pay taxes, etc., "and the surplus to pay whenever and so often as it can conveniently be done to" the *cestuis*; *held*, that A., B. and C. took as joint tenants. *Franklin Institution for Savings v. People's Savings Bank*, R. I., 47.

See BOUNDARY, 326; FRAUD, 467; TENANTS IN COMMON, 428.

DELIVERY.

See EVIDENCE, 588.

DEMURRER.

See CRIMINAL LAW, 595; PLEADING, 573.

DEPOSITION.

Charge — practice.] It is presumed that there was no error in the charge of the court, or in admitting a deposition, when no copies of them were furnished the supreme court, though referred to and made a part of the exceptions; and that the court exercised its discretion in admitting a deposition. *McNeish v. Hulls Oat Co.*, Vt., 654.

See EVIDENCE, 654.

DESCENT.

Children of deceased brothers and sisters per capita.] Under the statute of distribution, there being none nearer of kin living, the children of deceased brothers and sisters take equal shares, *per capita*. *Nichols v. Shepard*, N. H., 676.

DEVISE.

See WILL, 33, 70, 146, 603.

DISCONTINUANCE.

See EXECUTORS AND ADMINISTRATORS, 187.

DIVORCE.

See MARRIAGE, 23, 52, 461, 481, 579, 605.

DOWER.

See MARRIAGE, 607.

DRAFT.

See EVIDENCE, 111; NEGOTIABLE INSTRUMENT, 218.

DURESS.

Embezzlement by son—mortgage by mother.] When a son has been guilty of embezzlement and his mother made a note and executed a mortgage to the employer from whom he had embezzled, and the court was satisfied that the mother's controlling motive was to protect her son from exposure and prosecution, *held*, that she was not a free agent and that the note and mortgage should be annulled and canceled. *Foley v. Greene*, R. I., 40.

EASEMENT.

Ways from necessity—location of.] The parties may make and change the location of ways arising from necessity. Such location may be inferred from the acts of the parties. *Rumill v. Robbins*, Me., 222.

EJECTMENT.

1. **Mesne profits.]** In trespass for *mesne profits*, two leases offered in evidence by the plaintiff to show the rental value of the premises and the time when he obtained possession were excluded by the presiding justice. The plaintiff petitioned for a new trial. The record of the ejectment suit had been put in. The lessee of one of the leases had testified as to his rent, and the petition did not set out the rent reserved in the other lease. *Held*, that the petition did not show that the plaintiff was injured by the exclusion of the deeds and should not be granted. *Herreshoff v. Tripp*, R. I., 463.
2. **New trial—verdict against evidence.]** At the hearing of a plaintiff's petition for a new trial of an action of ejectment on the ground that the verdict was against the evidence, it appeared that the only evidence on the record and allowed by the justice presiding at the trial related to the defendant's possession. The time prescribed for the allowance of evidence under the forty-eighth rule of practice at law had expired. *Held*, that the plaintiff could not amend the allowed statement of evidence by affidavits setting forth what the other evidence in the case was, and showing that the only matter submitted to the jury by the presiding justice was the question of possession. *Held*, further, that the plaintiff was entitled to show to the court by proof that the only question submitted to the jury was that of the defendant's possession. *Held*, further, it being shown by affidavits that the presiding justice ruled as matter of law in the plaintiff's favor on all questions save that of possession, which was alone submitted to the jury, that the court would consider the petition for a new trial on the allowed evidence. *Chafee v. Sprague*, R. I., 483.
3. **Parties plaintiff.]** In ejectment, if several plaintiffs join, all must be entitled to possession, otherwise by the general rule judgment must be given for the defendant. This rule is not affected by Pub. Stat. R. I., chap. 230, § 1, but is modified by Pub. Stat. R. I., chap. 204, § 34. Hence, when, of several plaintiffs, only two were found entitled, *held*, that the court, on motion, would allow amendment by striking out the other plaintiffs, and that this would be done, although the two plaintiffs had in the suit set up title to a larger tract including the *locus* in dispute, which was inconsistent with the title which they were found validly to hold. In ejectment, the defendant's plea of the title to himself, through adverse possession, dispenses with further proof of ouster. *Waterman v. Andrews*, R. I., 25.

ELECTION.

Production of ballots—who entitled to a recount.] The act of June 14, 1881, relating to the production of packages of votes by the secretary of State, before the court or other proper authority, was not intended to give everybody, or every citizen, or every voter of the county, an absolute right to a recount without due cause shown. *Pearson v. Norton*, N. H., 550.

ELECTION OF REMEDIES.

See PARTITION, 49.

EMINENT DOMAIN.

1. **Abandonment of proceedings—damages—recovery.]** By a resolution of the general assembly, passed in 1860 and added to in 1862, the borough of Danbury was empowered to supply itself with water by purchasing, or by taking for the purpose, any stream of water, water privileges or lands necessary or convenient for the purpose, within or without the limits of the borough, with a provision for the assessment of the value of any property taken otherwise than by purchase, and for payment to the owner of the property so taken. Under this resolution the borough, at a legal meeting held on the 16th day of July, 1880, voted to procure a supply of water for the use of the borough "from a stream running near the residence of Samuel Gregory." On the 26th of September of that year the borough purchased of Gregory certain lands through which the stream ran, and which were below certain lands and a water privilege on the same stream belonging to the plaintiffs. The water commissioners of the borough, not being able to agree with the plaintiffs as to the compensation to be made them for the taking of their mill privilege and lands, applied to a judge of the superior court for the appointment of appraisers to assess the damages. Appraisers were appointed, a hearing was had, both parties being present, and they made their report, assessing the damages at \$3,000. June 29, 1881, the borough, at a legal meeting, rescinded the vote of July 16, 1880, and nothing further was done with regard to the taking of the plaintiff's land and privilege, and the \$3,000 was not paid. Notice of this action of the borough was given to the plaintiffs, and they afterward sold to other parties and conveyed by warranty two parcels of the land which the borough had proposed to take. In an action to recover the said \$3,000, — *Held*, that the plaintiffs could not recover; the borough, after the assessment, had still a right to abandon the idea of taking the land, and the only security the owner of the property had was in the necessity of the borough making payment before the land was actually taken. *Stevens v. Borough of Danbury*, Conn., 207.
2. **Damages—owner's lien.]** When land is taken for public use, the owner has a lien upon it for its "equivalent in money," which a court of equity will enforce, unless the owner has done that which in law precludes him from asking its enforcement. *Adams v. Railroad Co.*, Vt., 635.
3. **Evidence that value of land increased—interest.]** Evidence is not admissible to prove that woodland was enhanced in value by the building of the railroad over meadow land attached to the same farm. Interest is recoverable from the present company only from the date of its possession. *Id.*
4. **Fixing compensation for privileges between street railway companies.]** Under Public Statutes, chapter 118, authorizing the railroad commissioners to determine the manner and conditions under which one street railway company may use the tracks of another, and the compensation to be paid therefor, the commissioners, in fixing the compensation, may take into account the amount paid by the company to another corporation for the use of its roads and bridges as well as the actual cost of construction. *Cambridge Railroad Co. v. Charles River Street Railway Co.*, Mass., 315.
5. **Highway—authority of street commissioners to lay out foot-way across a railroad.]** The distinction between the words "highway" and "town-way," as sometimes used in the statutes, does not apply to the city of Boston, as its board of street commissioners is the only tribunal authorized to lay out ways in that city, and the statute prescribes a uniform manner in which they shall be laid out. Highways and railroads are both established by the legislative exercise of the right of eminent domain, defegated in one case to public officers and in the other to private persons. Both are franchises, and the legislature has authority to amend either so as to interfere with a previous grant to the other, providing

EMINENT DOMAIN — *Continued.*

for compensation when private rights are impaired. The appropriation of land to the public use of a railroad is not inconsistent with its public use as a high-way crossing, and may be subsequently appropriated for that purpose. The street commissioners of Boston have authority to lay out foot-ways across a railroad track in that city. *Boston and Albany Railroad Co. v. City of Boston*, Mass., 725.

6. **Statutory compliance — school district — invalid notice.]** Where private property is sought to be taken against the will of the owner, under statute authority, all the statute requirements must be fully and strictly complied with. In the procedure no step, however unimportant seemingly, must be omitted, nor will the substitution of other steps in the place of those named in the statute be sufficient. Defendants, as a committee of a school district, entered upon the land of plaintiff, who was a mortgagee in possession, partly removed a fence and built on the lot a school-house. In an action of trespass *quare clausum*, defendants justified under the statute proceedings in pursuance of which they gave notice as follows: "To the inhabitants of school district No. 19, in the town of Harpswell: Application in writing having been made to the undersigned, as selectmen of the town of Harpswell, by . . . committee of said district, for the location and erection of a school-house, to call a meeting of the qualified voters thereof for the purpose hereinafter named. You are hereby notified and warned to meet at the Union House, within said district, on the fifth day of June next, at two o'clock in the afternoon, for the purpose of hearing the inhabitants of said district on the *subject of their disagreement respecting a suitable place to be selected for the erection of a school-house in said district*, and of deciding where such school-house shall be located and lay out the same. Given, etc." *Held*, that the notice was insufficient to conclude the owner as to the extent of the lot or the amount of damages, and consequently the proceedings were invalid. *Leavitt v. Eastman*, Me., 109.

See MORTGAGE, 625 ; NUISANCE, 117.

ENCROACHMENT.

See INJUNCTION, 562.

EQUITY.

1. A suit in equity is not commenced until the bill is filed. *Clark v. Slagton*, N. H., 548.
2. **Practice — waters — constructing wharf.]** The plaintiff, in a bill of complaint, prayed for an injunction to restrain the defendant from constructing his wharf, on the ground that, if constructed as proposed, it will lie directly in front of the plaintiff's lot, and materially obstruct the access to it by water. *Held*, that the facts alleged being denied in the answer, the burden was on the plaintiff to prove them. *Dillingham v. Roberts*, Me., 397.

See VENDOR AND PURCHASER, 523.

ESTOPPEL.

1. **Agent exceeding authority.]** Defendant owning a chattel mortgage assigned a certain interest in it to a foreign corporation, who had an "agent and representative" in this State, who was present and acquiesced in the conditional sale by the defendant to the plaintiff of the mortgaged property. *Held*, in the absence of proof, that the agent exceeded his authority, that his acts were binding on his principal, and that it would have been estopped from foreclosing its mortgage if the plaintiff had fulfilled his contract of purchase. *Reynolds v. Roberts*, Vt., 735.
2. **Gross negligence — gross fraud — innocent mistake.]** In 1870 A. built a house on land which he supposed was his, but in fact was owned by B., who was present and made no objection. In 1872 A. mortgaged the premises to C., and B. witnessed the deed; and subsequently A. conveyed to C. by warranty deed to extinguish the mortgage. On the death of C. in 1881, and the appointment of appraisers, B. pointed the house out to them, saying that it belonged to C.'s estate; and it was appraised as such, and assigned by the probate court to C.'s daughter, as her distributive share. The referee found that B. first knew in 1875 that the house stood on his land, and that there was no evidence which showed that the oratrix was influenced by what B. said or did in accepting the house. *Held*, that B.'s conduct amounted to *gross negligence or gross fraud*, and

ESTOPPEL — *Continued.*

- in either case he should be estopped from claiming the house, and should be compelled to deed the land to C.'s daughter. *Greene v. Smith*, Vt., 631.
3. Judgment by default for price — subsequent action for breach of warranty.] A judgment rendered upon default for the price of goods sold, the amount thereof being fixed by agreement, is not a bar to an action by the purchaser for a breach of warranty of the quality of the goods. *Parker v. Roberts*, N. H., 701, 702, note.
 4. Suit against town for negligence — former judgment.] A. brought an action against B. to recover damages for injuries received by collision with certain teams left in a highway by B. B. obtained judgment. A. then brought an action against the town in which the highway was situated, to recover damages for his injuries, charging the town with negligence in permitting the highway to be unsafe. The town pleaded in bar the judgment recovered by B. against A. alleging that B. caused the defect complained of. To this plea A. demurred. *Held*, that the plea was good, and that the demurrer should be overruled, and that A., by the judgment which B. recovered against him, was estopped from suing the town. *Hill v. Bain*, R. I., 618.
 5. Town, purchaser of land sold for taxes — setting up owner's title.] A town which becomes the purchaser of land sold for taxes under Gen. Laws, chap. 59, § 6, is not estopped to set up the title so acquired by the fact that for two years after the sale, and before a deed had been given by the collector, the premises were taxed to the owner, and the taxes paid by him. *Berry v. Bickford*, N. H., 502.
 6. When judgment not effectual as.] A former judgment cannot be made effectual as an estoppel where it does not clearly appear from such judgment and the proceedings in the action wherein it was rendered, that the jury found the facts relied upon as a defense, or that they may have reached their conclusion without deciding such facts. Neither is one not a party to the former action, and who obtained his title to the property in question before the verdict and judgment in that action, concluded by it, notwithstanding he obtained his title from one of the parties to that action. *Zoeller v. Riley*, N. Y., 755.
- See* ATTACHMENT, 130; FALSE REPRESENTATIONS, 108; HIGHWAY, 326; NEGOTIABLE INSTRUMENT, 588.

EVIDENCE.

1. Action brought without plaintiff's consent.] Evidence was offered by a defendant, on his motion to dismiss, to show that the action was brought without the plaintiff's consent. This evidence was rejected by the presiding justice, who ruled that the plaintiff, knowing of the action, should himself appear and object. *Held* error, and that the evidence should have been received; and that this court would hold the case and hear the evidence, the motion to dismiss being a question for the court. Justice courts are the successors of courts of magistrates, and the clerk of a justice court is the proper person to certify records and papers of the court of magistrates to which his justice court succeeded. *Clarke v. Rice*, R. I., 482.
2. Condition of highway — expert testimony — surveyor.] The surveyor of highways was called as a witness for the defense, and stated that he thought the position of the post did not make it dangerous. In cross-examination he was asked if he did not, after the accident, remove the post. *Held*, that the question was admissible in cross-examination to show that his conduct was inconsistent with his expressed opinion. Another highway surveyor was called for the defense, and asked whether, in his opinion as an expert, the highway was safe, convenient and in good repair. *Held*, that his evidence was rightly excluded, the question of the highway defect being one of plain fact for the jury, not one of expert skill. *Yean v. Williams*, R. I., 450.
3. Declarations to vendor subsequent to purchase.] When both plaintiff and defendant claim to have derived title to the property in question from the same party — the one by sheriff's sale, and the other by private sale — what the defendant said to his vendor, subsequently to his contract of purchase, in the absence of the plaintiff, is not admissible in behalf of the defendant. *Judevine v. Weeks*, Vt., 641.
4. Delivery — production of assignment.] The production of the assignment of a mortgage, at the trial of a writ of entry in the name of the assignee, for the

EVIDENCE — *Continued.*

benefit of the assignor, by the attorney of record for the plaintiff, is *prima facie* evidence of the delivery of the assignment from the assignor to the assignee. *Richardson v. Noble*, Me., 588.

5. **Deposition — party cannot swear as to contents — suppressing — presumption.]** It is proper to inquire of a party whether he has taken the deposition of a witness supposed to be familiar with the matter in contention, but not as to the contents of the deposition; and it is presumed to contain evidence against the party suppressing it. *Ib.*
6. **Deposition — notice.]** A rule of court has been complied with, which requires notice to be given for the taking of a deposition out of the State fifteen days before the term of court, when notice was given only fifteen days prior to an adjourned term, the adjournment having been announced through the public press; and also, although the taking of the deposition was adjourned to a time only three days prior to the adjourned term, the opposite party not appearing. The depositions were properly in the hands of the jury, although no special leave was granted by the court, the court having remarked in its charge that the "deposition would be before them." It is in the discretion of the court to relax the rules of the court. *McNeish v. Hulless Oat Co.*, Vt., 654.
7. **Destruction of paper showing indebtedness — administrator — witness.]** D., upon the death of his father, took possession of all his papers, including several notes held by the deceased against D., and he afterward retained possession of the same as administrator of his estate. It appeared that some of the most important of the papers showing D.'s indebtedness had disappeared in a manner not satisfactorily explained. In an action to charge him with his indebtedness to the estate, D., as a witness, identified certain notes produced and shown to him by his own counsel, and testified that they were notes made by him, and payable to the deceased, and that he paid them at maturity. Exception was taken to this evidence in so far as it proved the witness had paid the notes. *Held*, that the exception was well taken; that the notes, standing alone, implied an indebtedness of the witness to the deceased, and it was not competent, under the evidence act, for him to overthrow this presumption by his own testimony; that the fact that the notes were in his possession had no tendency, of itself, to show that he had paid them, inasmuch as his own unpaid notes would naturally come into his possession after the death of his intestate. When it appears that a party has suppressed or destroyed evidence of his indebtedness to the deceased, such indebtedness may be established by testimony which, under ordinary circumstances, would be regarded as too vague and indefinite. In such case a presumption arises that if the truth had appeared it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance, and accordingly slight evidence of the contents of the instrument destroyed will usually, in such a case, be sufficient. *Love v. Dilley*. *Edwards v. Love*, Md., 697.
8. **Draft — presumption — administrator — adverse party as witness.]** Where one makes a draft from a fund composed partly of his own money and partly of the money of another, the presumption is, that it was drawn from his own funds, but may be rebutted by evidence. Where an administrator testifies to facts happening before the death of his testator, the testimony of adverse party must be confined to the specific facts testified to by the representative party. The complainant, the administrator upon the estate of Daniel E. Hall, testified before the master as to some facts happening before the death of Hall. The respondent offered the testimony (in a deposition) of M., one of the respondents, as to other facts happening before the death of Hall. The evidence of the other facts was excluded. *Held* no error. *Hall v. Otis*, Me., 111.
9. **Parol, of contents of paper.]** The contents of a paper cannot be proved by parol, where the paper itself is produced. The trial court may properly exclude evidence, which in itself is immaterial, when counsel does not propose to follow it up with other evidence material to the issue. *Crosby v. Hotelling*, N. Y., 828.
10. **Presumption — impeaching sheriff's sale — burden of proof.]** It is presumed that a sheriff's sale, regular in form, was made in good faith, and the burden of proof is on the party attempting to impeach a sheriff's sale, to prove that it was fraudulent, and not on the purchaser, that it was *bona fide*. *Ib.*

EVIDENCE—*Continued.*

11. **Witness, credibility of.]** Evidence to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. *Second Nat. Bank of Jersey City v. O'Rourke*, N. J., 762.
- See* CRIMINAL LAW, 380, 451; EMINENT DOMAIN, 625; FRAUD, 168; FRAUDULENT CONVEYANCE, 707; LANDLORD AND TENANT, 69; MONEY HAD AND RECEIVED, 567; MORTGAGE, 414; NEGLIGENCE, 96, 155; NEGOTIABLE INSTRUMENT, 289; PARTNERSHIP, 637; PAUPER, 149; PRACTICE, 352, 583; TREASURER'S BOND, 164; USURY, 752.

EXECUTION.

1. **Against person — bond for release — insolvency.]** A debtor while in custody on execution for debt filed his petition in insolvency. *Held*, that he was not thereby entitled to release from arrest. Defendant, having been arrested on an execution for debt, the next day filed his petition in insolvency, and two days later gave the usual statutory bond to procure his release from arrest. Having thereafter obtained his discharge in insolvency, with the intention of releasing his bondsmen on said bond, he presented himself to the jailer, and was locked up a short time, and then released. In an action of the bond, *held*, that the discharge in the insolvency proceedings operated to discharge the debt, but that the arrest was unaffected thereby. *Held*, also, that by giving the bond, a new contract was entered into, but that defendant, having complied with one of its conditions, his bondsmen were not liable. *Hussey v. Danforth*, Me., 54.
2. **Extents not returnable — parol evidence—officer may adjourn sale—fixtures—delinquent collector.]** An extent is not returnable; and when an officer sells the property of a delinquent tax collector on an extent, no return is required, and his doings under it — as that the sale was adjourned to another place than the one where it had been advertised — may be shown by parol. If he makes a return, and his proof is variant from it, it affects its credibility and not its admissibility. Boards in a corn barn, used for a permanent floor, and stone posts deposited upon the farm for the purpose and with the intention of building necessary fences, could not lawfully be sold as personalty by an officer on the extent. *Trespassa de bonis* is the proper form of action to recover for the boards and posts, as the claim was not for breaking and entering but for taking and carrying away. *Hackett v. Amsden*, Vt., 747.
3. **Title of purchaser on — validity — burden of proof — presumption as to return.]** The return of an execution by a sheriff is, in Rhode Island, not necessary to vest in a purchaser at the execution sale the defendant's interest in realty sold under the execution. Nor does the validity of the purchaser's title depend on the sheriff's leaving a copy of the execution with the town clerk, as required by statute. Where a plaintiff's case rested on the invalidity of a sheriff's sale, the burden of proof being on the plaintiff,—*Held* that the legal presumption that the sheriff's return set forth all which he did was balanced by the contrary presumption that the sheriff performed his statutory duty. Hence the plaintiff should have shown, by extrinsic evidence, neglect of duty on the sheriff's part. *Poster v. Berry*, R. I., 32.

See ATTACHMENT, 560; CONSTITUTIONAL LAW, 293; JUDICIAL SALE, 38.

EXEMPTION.

- Claim of, by debtor—refusal of constable to allow claim—levy and sale—trespass.]** An officer who seizes property of a defendant under a lawful execution and refuses to permit him to have the benefit of the exemption act of 1849 — such defendant being entitled to the exemption, and having made demand, becomes a trespasser *ab initio*. An officer has no authority to sell goods which the debtor is entitled to retain under said act, unless the debtor waives his right or neglects to demand it. A waiver of this right by the debtor is valid without consideration other than the debt itself; but mere silence on his part and a refusal to renew a demand once made cannot be construed as a waiver of his claim. *Neeling v. Arnot*, Penn., 690.

EXECUTOR AND ADMINISTRATOR.

1. **Accounts — taxes — who should pay.]** An executor cannot be allowed in his account the amount of taxes paid by him prior to a sale of the land for payment of debts. The heirs and devisees, being entitled to the rents until sold, should pay the taxes. *Fessenden v. Judge of Probate*, Me., 106.

EXECUTOR AND ADMINISTRATOR — *Continued.*

2. **Action to set aside conveyance in fraud of creditors.]** An administrator can maintain a bill in equity for the discovery of assets and the recovery of property conveyed by the deceased in fraud of his creditors, so far as it is needed to pay the debts of the deceased. *Janerin v. Curtis*, N. H., 504.
3. **Cancellation of bond—effect.]** The cancellation of an administrator's bond by the court of probate does not revoke the appointment of the administrator nor does it disqualify him from bringing suit as administrator. *Clark v. Rice*, R. I., 482.
4. **Conflict of laws—note assigned by foreign administrator.]** A. died in Connecticut and letters of administration on his estate were taken out in Connecticut. There were no claims in Rhode Island against the estate of A. *Held*, that the Connecticut administrator could transfer and indorse a promissory note due the estate of A. so as to enable the indorsee to bring suit on the note in Rhode Island. Promissory notes given to two joint administrators for a debt due to the estate of the intestate may be transferred and indorsed by one of the administrators. B. and C. were appointed administrators of A.'s estate both in Connecticut and New York. *Held*, that the administrators could in New York make a good transfer of a note due the estate of the intestate, although by reason of the intestate's domicile they were liable to account in Connecticut for the proceeds of the transfer. Two notes were given to B. and C., the administrators, by a debtor of A.'s estate in Rhode Island for the amount due the estate. After the notes became due the debtor made part payment to C. arranging to settle the whole debt thereafter. Then B. in New York transferred the notes to D. in payment of a debt due from the estate of A., and D. notified the Rhode Island debtor of the transfer. Subsequently the Rhode Island debtor made an additional payment to C., taking from him a general release under seal. *Held*, that D. could recover in Rhode Island from the Rhode Island debtor the amount due on the notes when D. received them. *Mackay v. St. Mary's Church*, R. I., 476.
5. **Liability for testator's debts—probate bond—sureties.]** The only mode in which an executor can be held personally liable for the debt of his testator, and an execution on a judgment for such a debt issue against him personally, is that prescribed by Pub. Stat., chap. 166, §§ 5, 10; Stat. 1784, chap. 82, § 9. *Jenkins v. Wood, Executor*, Mass., 559.
6. **Party plaintiff—discontinuance—adverse party as witness.]** After the plaintiff, who is an administrator, has discontinued as to one of two defendants, because of his insolvency, such person may be a witness in behalf of the other defendant. Where a witness who has testified to the payment of money to a person since deceased, also testifies to another fact as occurring the same day, it is competent, as tending to contradict the witness as to the payment of the money, to disprove the other fact. *Segar v. Lufkin*, Me., 137.
7. **Statutory bond—action against surety.]** Where the bond of an executor fails to require the principal to render an account upon oath, within one year, it is not conformable to statute, and an action cannot be maintained upon it in the name of the successor of the judge to whom it was given. *Frye v. Crockett*, Me., 291.
8. **When cannot set aside conveyance in fraud of creditors.]** An administrator cannot, in Rhode Island, maintain proceedings to recover property conveyed away by the deceased, though the conveyances may have been in fraud of creditors and the property may be needed to pay the debts of the estate of the deceased. In such case the defrauded creditors are the proper parties to act. *Estes, Administrator, v. Howland*, R. I., 479.
9. **When may.]** An administrator is, however, the proper party to act, in order to recover sufficient property to defray the expenses of administration if the assets in his hands are not sufficient for this purpose. *Id.*
10. **When court may order to give bond—order not appealable.]** When one is both executor and trustee, and by the will is not required to execute a bond, the probate court under the statute, if deemed proper from a subsequent change of the executor's circumstances, can order him to give a bond, and such order is not appealable to the county court. *Felton v. Sowles*, Vt., 674.
11. **When chargeable with interest.]** The administrator should be charged with interest received by him on interest-bearing notes. *Probate Court v. Winch*, 642.
12. **Waste upon real estate in insolvent estates—cutting timber from wild lands.]** In order to enable an administrator to maintain trespass against the purchaser

EXECUTOR AND ADMINISTRATOR — Continued.

from the heirs, who, after the intestate's death and before the appointment of the administrator, cut and removed timber from timber lands belonging to the estate, he must show that the estate he represents is actually insolvent. This he can show only by the probate records which must include the records where his last domicile was, since the principal assets must be presumed to be there. And the administrator is bound to know the last domicile of his intestate. The cutting of timber from wild lands in a careful and prudent manner, keeping in view the future value of the land as well as the present income, is not waste within the meaning of R. S. 1871, chap. 66, § 20, or chap. 95, § 12. *McNichol v. Eaton*, Me., 888.

See CONTRACT, 714; EVIDENCE, 697; STATUTE OF LIMITATIONS, 465.

EXTRA ALLOWANCE.

See COSTS, 191.

FALSE IMPRISONMENT.

Infancy — process — liability of officer.] An infant is exempt from arrest for a debt upon execution or mesne process; but an action for trespass or illegal arrest will not lie against the officer making the arrest, even if the writ was illegally and irregularly issued, providing it was issued by a court having jurisdiction and was regular and valid upon its face. Under such circumstances the fact that the plaintiff notified the officer of his infancy at the time would be immaterial. *Cassier v. Fales*, Mass., 172.

FALSE REPRESENTATIONS.

1. **Inducing loan — bankrupt — estoppel.]** Plaintiff induced a loan from defendant upon the false representation that he had already been adjudged a bankrupt, and needed funds to carry him through the bankruptcy proceedings. Not paying the loan defendant made oath required by statute and plaintiff was arrested upon a writ wherein the loan was sued for. In an action to recover damages on the ground that the arrest was illegal, — *Held*, that plaintiff was estopped from showing the falsity of the oath as to the amount due, and that his discharge in bankruptcy did not discharge the loan. *Caswell v. Fuller*, Me., 108.
2. **Tenancy at will.]** C. represented to D. that they were to have the same rights in a store, into which both were to move, that a prior tenant had. The prior tenant had occupied the store for years under an oral agreement with the owner. *Held*, 1. That the representation amounted simply to a statement that they were to have a tenancy at will. 2. And the fact that the owner ejected D., after thirty days' notice, gave him no right of action against C. Without proof of actual loss resulting from deceit, no action is maintainable therefor. *Danforth v. Cushing*, Me., 142.

FENCE.

Adjoining land-owners — landlord and tenant — repairs.] It is the duty of a farm tenant by force of law to make all needed current repairs on the fences; and if they are not kept in lawful condition, it is his fault, and not the landlord's; and an action cannot be maintained against the landlord by an adjoining land-owner, whose colt escaped through an insufficient division fence, and strayed on to the railroad track, and was there injured. And this is so although the fence was in the same condition at the time of the accident as when the tenant went into possession. Adjoining land-owners may make a parol agreement as to a division fence that is binding on themselves until repudiated; and on their grantees, if recognized and acquiesced in by them. *Blood v. Spaulding*, Vt., 743.

FIXTURES.

See EXECUTION, 747.

FORCIBLE ENTRY AND DETAINER.

Mortgage — foreclosure.] A mortgagee cannot maintain forcible entry and detainer against the mortgagor or those claiming under him unless the mortgage has been foreclosed. Where the certificate of the publication of a notice of foreclosure states that it was published in a newspaper "published" in the county, it is not sufficient to comply with a statute requiring such notice to be published in a newspaper "printed" in the county. *Bragdon v. Hatch*, Me., 605.

FORMER ADJUDICATION.

Parol evidence — matter not appearing from record.] Parol evidence is competent to prove that matters not appearing of record were adjudicated in a former suit. *Errol v. Bragg*, N. H., 877.

See ESTOPPEL.

FRAUD.

1. **Mortgage to secure more than due — good faith.]** A mortgage given to secure a note made for a larger sum than the amount actually due from the mortgagor is not invalid as against creditors of the mortgagor, if it appears that it was not made to hinder, delay or defraud those creditors. *Whittridge v. Edmunds*, N. H., 323.
2. **Purchasing goods — evidence — presumptive knowledge.]** Although fraud is generally a question for the jury, it should only be submitted to them upon competent and sufficient proof. It is essential to a cause of action for fraud and deceit, in obtaining goods upon credit, that there be some evidence of an intention on the part of the defendant to deceive or mislead the plaintiff. What a creditor might have known in the common course of business, he must be presumed to have known. *Macullar v. McKinley*, N. Y., 168.
3. **Rescission — damages — compromise.]** The fraud for which an action for damages will lie must be some fraud with reference to the subject-matter which the defrauded party has received by virtue of the fraudulent contract. Plaintiff, upon a false and fraudulent statement of the facts as to the value of a disputed right of action, compromised the same. In an action to recover damages therefor, *held*, that the measure of plaintiff's actual loss was the excess of that value upon the true state of facts as known or honestly believed, over the value fixed, upon a false state of facts fraudulently asserted, or in other words, the compromise should be made honest and fair. *Gould v. Cayuga County Bank, etc.*, N. Y., 186.
4. **Setting aside deed for.]** A., by fraud and deception, obtained a deed of realty from B. B., after learning the deceit practiced, ignored the deed to A., and conveyed the same realty to C. *Held*, that C. could maintain a bill in equity against A. to annul B.'s deed to A. without making B. party to the bill. *Paine v. Baker*, R. I., 467.

See ATTACHMENT, 228; BANKRUPTCY, 358; ESTOPPEL, 631; MARRIAGE, 52; PLEADING, 24; PRACTICE, 352.

FRAUDULENT CONVEYANCE.

1. **Bona fide purchaser from debtor — title.]** A debtor who disposes of his property with the intention of defrauding his creditors may, nevertheless, give a good title to one who pays value, and has no knowledge of, and does not participate in the fraud. *Zoeller v. Riley*, 755.
2. **Burden of proof.]** Where a judgment creditor seeks by proceedings in equity to recover real estate conveyed to the wife of the debtor in fraud of creditors and the answer upon oath alleges that the conveyance was prior to the date of the debt and without fraud, the burden is upon the creditor to overcome the answer by proof of the fraud. *Knight v. Kidder*, Me., 587.
3. **Evidence — vendor's declaration — good faith.]** When the vendor remained in possession of land conveyed, his declarations, showing under what claim he held possession, are admissible upon the good faith of the transaction. *Osgood v. Eaton*, N. H., 707.
4. **To prevent wife from collecting alimony.]** A conveyance made to hinder and prevent the wife of the grantor from collecting alimony in a proceeding for divorce is fraudulent as to her, and will be set aside if necessary to enable her to collect the amount of the decree. *Janvrin v. Curtis*, N. H., 504.
5. **When preference does not make.]** The fact that a conveyance was made for the purpose of preferring certain creditors of the grantor does not of itself make such conveyance fraudulent as to his other creditors. An objection to the competency of a magistrate appointed to determine whether an execution debtor shall be admitted to take the poor debtor's oath should be addressed to the judge who makes the appointment. *Osgood v. Thorne*, N. H., 497.

GARNISHMENT.

Liability of garnishee — neglect to make affidavit.] A. garnished in an action brought by B. against C., the writ being returnable to a justice court June 26,

GARNISHMENT — *Continued.*

filed his sworn account headed "justice court, June 29." The justice court charged A. as trustee, the memorandum being "A. ch'd no aff't." Whereupon B., after obtaining judgment against C., sued A. for neglecting to file a sworn account. *Held*, that the heading of the account formed no part of it, and that A. had filed his affidavit as garnishee. *Held*, further, that the order of the justice court in charging A. as trustee did not have the force of the judgment. Under the law of Rhode Island the charging a garnishee who does not appear has not the force of a judgment. The garnishee's liability is statutory, not fixed by the charging as by an adjudication. *Eddy v. Providence Machine Co.*, R. I., 444.

GIFT.

Savings bank deposit.] By direction of her aunt, who died in four days afterward, C. took the key from a bureau drawer, unlocked the trunk and took therefrom a savings bank-book. Her aunt said: "Now keep this; and if any thing happens to me, bury me decently and put a headstone over me, and any thing that is left is yours." *Curtis v. Portland Savings Bank*, Me., 136.

See WILL, 336.

GUARANTY.

Of payment — consideration.] Defendant C. owned real estate subject to a mortgage which she had assumed and agreed to pay, given to secure the note in suit. Several payments being overdue the holder of the note threatened to foreclose the mortgage, whereupon it was agreed between them that he should forbear foreclosure, and that she, in consideration thereof, should become responsible to him for the payment of the note, and for that purpose signed her name upon the back of the note. In an action to recover the balance due on the note, and while the case was under consideration by the court, the plaintiff was permitted against defendant's objection to write upon the original note over the signature of C., the words, "I guarantee the payment of the within note." *Held*, that the indorsement of the note by C. imported a guaranty of the payment of the same, and gave the plaintiff authority to write over her name the contract imported by law; and that if necessary at all, it could be done during the trial. *Scott v. Calkin*, Mass., 312.

GUARDIAN.

See NEGOTIABLE INSTRUMENT, 223; *PLEADING*, 365.

GUARDIAN'S BOND.

Liability of heirs of deceased surety.] Where a surety on a guardian's bond has deceased, his heirs are not liable under R. S., chap. 87, § 16, jointly with the principal on the bond. *Strickland v. Holmes*, Me., 221.

HABEAS CORPUS.

Intoxicated person, arrest of—illegal imprisonment — R. L., §§ 1363-4 — justice of the peace.] The relator was arrested by an officer charging him with being intoxicated, and brought before a justice of the peace to disclose the person of whom he obtained his liquor. He disclosed that he was not intoxicated, that he had not drank any intoxicating liquor on the day of his arrest, and offered other testimony than his own to prove that fact; but the justice refused to hear it, and committed him to jail until he would disclose. *Held*, that the imprisonment was illegal, and that the relator was entitled to be discharged on *habeas corpus*. The justice should have first determined whether the relator was in such a state of intoxication as to disturb the public peace; the officer's return was not conclusive of that fact, and the relator had a right to meet it with contradictory proof, which it was the duty of the justice to hear. In a *habeas corpus* hearing the rights of the relator are not dependent upon the officer's return; but under the statute — R. L., § 1363 — he may deny the return and allege other material facts; thus, the return showed that the justice found that the relator "had been intoxicated, and had disturbed the public peace," but the supreme court find from facts alleged in the relator's complaint that he was not intoxicated. *Mat-ter of Hardigan*, Vt., 250.

HIGHWAY.

1. **Approaches to bridge — duty to keep in repair.]** The defendant was bound to keep in repair a bridge and its approaches over its railroad. Both the bridge and the highway were subsequently widened, the former by the defendant, the latter by the town authorities. In an action to recover damages alleged to have been caused by a defect in the approach to the bridge, but (as claimed by defendant) outside of the approach as it was when the bridge was originally built, *held*, that whatever constituted, at any time, the approaches to the bridge, the defendant was bound to keep in repair. *Carter v. Boston and Providence Railroad Co.*, Mass., 315.
 2. **Pent road — waiver — mortgagee—R. L., § 2932.]** Selectmen can lay out a pent road for winter use over one man's land to another man's wood lot, although it is laid for the special convenience of the owner of such lot. The road may terminate at the farm line of such owner, instead of being extended to his buildings. The fact that one of the petitioners was not a freeholder does not affect the action of the selectmen in establishing the road. When notice has been given, and a party appears before selectmen on a question of laying a highway, and makes no objection to the sufficiency of the notice, he waives the objection. When a road is established over mortgaged premises, the statute — R. L., § 2932 — affords ample remedy to the mortgagee. *Brock v. Town of Barnet*, Vt., 350.
 3. **Petitioners withdrawing.]** It is ordinarily the right of petitioners for a highway, before a hearing of the petition, to withdraw upon payment of costs; and the petition may be amended by striking their names therefrom. *Webster v. Bridgewater*, N. H., 347.
 4. **Railroad company obstructing — lessee — evidence.]** A railroad corporation may be indicted for obstructing a highway. When a railroad corporation, without law or right, so obstructs a highway by building the road-bed within its limits, that it could be indicted for creating a nuisance, the lessee of such railroad company, from lapse of time, or acquiescence on the part of the town, gains no right to encroach further upon the highway, as the exigencies of its business may require, for the purpose of widening, repairing and straightening its track; and there is no presumption that the company in taking a part took the whole of the highway, when all the evidence tended to prove that the original obstruction was without authority of law. And if such lessee, in repairing its track, suffer stone and gravel to run into the highway and remain there an unreasonable time so as to impede travel, it would be an indictable nuisance. The defendant having been indicted for obstructing a highway, to show its dangerous condition and the relation of the highway and the railroad, evidence was admissible to prove that there were no cattle-guards at the crossings; and that water had been thrown from the side of an engine upon horses traveling in the highway. *State v. Troy and Boston Railroad Co.*, Vt., 263.
 5. **Town denying existence — estoppel.]** In an action upon the statute of highways, a town is not estopped to deny the existence of a highway not established in a statutory method. *Wentworth v. Rochester*, N. H., 326.
- See* EMINENT DOMAIN, 725; MUNICIPAL CORPORATION, 562; NEGLIGENCE, 67, 398, 450; RAILROAD, 343.

HOMESTEAD.

1. **Presumption.]** The defendant owned two lots of land, one containing an acre and a half, with a house on it, kept for his home, worth \$450, and the other lot, forty rods distant, kept and occupied as a part of the homestead, worth \$650, and sold both. *Held*, that \$500 were exempt, as the homestead included not only the house and lot on which it stood, but \$50 in value in the other lot. It will not be presumed that defendant had exempt property of the same kind in New Hampshire. *Hastie v. Kelley*, Vt., 346.
2. **Right of widow in — life estate.]** The right of a widow in premises set out to her as a homestead under the act of 1868 is an estate for life. *Lake v. Page*, N. H., 557.
3. **R. L., § 1894 — widow.]** To constitute a homestead within the protection of the exemption law, there must be a dwelling-house upon the land owned by the housekeeper, or one in process of erection, and actually used or set apart and kept for a home and an abiding place for the family. Defendant's husband living

HOMESTEAD — *Continued.*

with her in her house, and owning land contiguous thereto, mortgaged the same, she not joining in the deed. His land, he used in connection with his wife's house and land, as a home for the family, and the only building thereon was a barn. In an action to foreclose two mortgages,— *Held*, that the husband never had a homestead in his land, consequently the widow could hold none. *Rice v. Rudd*, Vt., 224.

See PROBATE COURT, 642.

HUSBAND AND WIFE.

See CHATTEL MORTGAGE, 672; MARRIED WOMAN, 373.

ICE.

Right to take, free to all.] Lily pond, containing more than ten acres, is a "great pond" within the meaning of the ordinance of 1641-7, and is a public pond, and the right to take ice therefrom is free to all, which right must be exercised in a reasonable manner and with due regard for the rights of others. *Bristol v. Brockport Ice Co.*, Me., 107.

INDIANS.

Cayuga nation — annuities under treaties of 1789, 1795.] The annuities promised the "Cayuga Nation of Indians," under the treaties of 1789, 1795, cannot be recovered except by the tribal organization as a nation, and no individual member thereof has any interest separate from the tribe. *Cayuga Indians residing in Canada v. State of New York*, N. Y., 81.

See CERTIORARI, 284.

INDICTMENT.

See CRIMINAL LAW, 76, 246, 452, 527, 584, 595, 706.

INFANCY.

1. **Arrest for debt.]** Under the laws of Massachusetts an infant is not liable to arrest for debt upon a civil process. *Louis Cassier's Case*, Mass., 171.
2. **Avoidance of contract.]** The defendant, while an infant, executed the note in suit for a horse; and before he attained his majority rescinded the contract, tendered the horse to the payee, which was refused, and demanded the note. *Held*, in an action on the note, that the defendant could avoid his contract while under age; and that the avoidance and tender annulled it on both sides *ab initio*. *Hoyt v. Wilkinson*, Vt., 738.

See FALSE IMPRISONMENT, 172; PARENT AND CHILD.

INJUNCTION.

1. **Cemetery within twenty rods of dwelling-house.]** Under Gen. Laws, chap. 40, § 2, a public cemetery cannot be laid out within twenty rods of a dwelling-house without consent of the owner, although the land to be so used had been procured by voluntary purchase. *Stevens v. Manchester*, N. H., 714.
2. **Encroachment by piazza and dormer window — restriction in deed.]** The roof of a piazza and a dormer window therein are extensions of a building and a part of it, within the restrictions of a deed prohibiting the owner from erecting a building within a certain distance of the street. *Bagnall v. Davies*, Mass., 562.
3. **Parol license for use of way — grantor conveyed land — grantee not.]** A parol license by the grantor to the grantee of land for the use of a way along the margin thereof over other land of the grantor does not create a right in the grantee which will fix a servitude upon the adjoining land after it has passed to a purchaser who had no notice of the supposed right. A defendant in equity may have affirmative relief upon an answer in the nature of a cross-bill, setting out facts which show that he is entitled to the relief sought. *Cox v. Leviston*, N. H., 339.
4. **Restraining diversion of water.]** Injunction granted to restrain a mill-owner from opening his gates and allowing water to run to waste when the plaintiff, an owner on the other side of the stream, taking his water from the same dam, has a right to all the water not needed for use by the defendant. *Fuller v. Daniels*, N. H., 498.

See NUISANCE, 9; RECEIVER, 329; STATUTE OF FRAUDS, 630; WATER AND WATER-COURSES, 608.

ILLEGAL IMPRISONMENT.

See HABEAS CORPUS, 250.

INNKEEPER.

Jewelry of guest.] Revised Statutes, chap. 27, § 7, limiting the liability of an innholder for losses sustained by a guest, specifies the following exceptions, "wearing apparel, articles worn or carried upon the person, to a reasonable amount, personal baggage, and money necessary for traveling expenses and personal use." *Held*, that a gold watch, a pair of gold bracelets, a gold thimble, three gold rings and a gold neck-pin, lost by a guest who had taken them along for her personal use, and for no other purpose, were within the exceptions specified in the statute. *Noble v. Milliken*, Me., 578.

INSOLVENCY.

1. **Assignment pending proceedings — receiver — *lis pendens*.]** While proceedings were pending against A. and B., copartners, for the appointment of a receiver of their property under Pub. Stat. R. I., chap. 237, § 13, "Of proceedings in insolvency," A. made an assignment of his individual property to C. The receiver after his appointment petitioned the court for an order upon A. and C., requiring them to join in a conveyance to him of the assigned realty and to transfer to him the assigned personality. *Held*, that the assignment was subject to the doctrine of *lis pendens*, and that the petition of the receiver should be granted. *Arnold, Receiver, v. Providence Lumber Co.*, R. I., 447.
2. **Assignee — levying creditor.]** An officer may be allowed to amend his return in accordance with the fact, when the rights of third persons have not intervened, other than an assignee in insolvency. The fact that a judgment against sureties was levied upon the property of one surety at the instance of the other surety does not affect the title acquired by the levy. If a co-surety receive payment from the principal of any portion of a judgment against the sureties, the assignee in insolvency of the other surety who paid a portion of the judgment has a clear and adequate remedy for an equitable share of the payment by the principal. *Norton v. Vose*, Me., 578.
3. **Assignee — sureties — contribution.]** A. and B. gave their note to the bank for \$1,000, and each received one-half of the money. Soon after, B. was adjudged an insolvent, and the bank procured the whole note to be allowed against his estate, which paid a dividend of forty-two per cent. After the allowance the bank sold its interest in the note and claim to A.'s agent, who purchased for A. The assignee paid the forty-two per cent on the entire note to A., and now seeks to recover back one-half of it. *Held*, that A. was surety that the estate had not yet paid what belonged to it to pay, and that the action could not be sustained. *Garfield v. Foskett*, Vt., 645.
4. **Claim holder — right of action.]** A claim holder against the insolvent estate of a decedent may, after his claim has been stricken out of the commissioner's report, under the statute, bring suit thereon without giving notice of his intention so to do. *James v. James*, R. I., 13.
5. **Foreign attachment.]** All attachments made within four months of the commencement of proceedings in insolvency, under the insolvent law of Maine, are dissolved by the assignment of the judge of the court of insolvency of the property of the insolvent to the assignee. *Wright v. Huntress*, Me., 148.
6. **"Merchant or trader" — discharge.]** Casual transactions in mining stocks, independent and outside of an established business, amounting in all, in the course of the year, to about \$3,500, do not constitute a man a "merchant or trader" within the meaning of the insolvent law. *Ex parte Conant. In re Fogler*, Me., 392.
7. **Non-resident creditor — practice — pending suit continued — R. L., § 1797.]** A non-resident creditor can sustain an action against a party adjudged an insolvent debtor, while his estate is being settled by an assignee, if such creditor has not participated in the proceedings, and has not submitted to the jurisdiction of the insolvency court. But the statute — R. L., § 1797 — whereby a pending suit shall be stayed on the application of the debtor, until the question of discharge has been determined, is binding upon non-resident as well as resident creditors. But a formal application in the nature of a motion for continuance must be made to the court; and a plea in bar merely setting up the insolvency proceedings will not be treated as such motion. *Russitt v. Hilliard*, Vt., 240.

See ASSIGNMENT, 73; CORPORATION, 658; EXECUTION AGAINST PERSON, 54;

PATENT, 77; PRACTICE, 734.

INSURANCE.

1. **Fire — misdescription — knowledge of agent — waiver of written assent.]** Where a person assumes to be the agent of an insurance company and writes an application with his name upon it as agent, and the company receives it, writes a policy upon it with the name of the assumed agent on the back, sends it to him to deliver and collect the premium, the assured (himself believing in the agency) may well consider these facts as a recognition, on the part of the company, of the agency. The agent of an insurance company may bind the company by waiving written assent to material alterations in the property insured where the assured does not know of any restriction of the agent's authority. *Packard v. Dorchester Mutual Fire Insurance Company, Me.*, 188.
2. **Fire — non-resident company — penalty on failure to give bond — place of trial.]** The defendants were agents of a fire insurance company not incorporated within this State, and issued two policies of insurance on property situated in the village of Ithaca, without giving the bond required in such cases by chapter 465, Laws of 1875. The contracts of insurance were signed and the policies delivered in the city of New York. An action was commenced by the fire department of Ithaca to recover the penalty imposed by that statute for failure to give the bond. On a motion to change the venue to New York county, *held*, that, under section 983 of the Code, the action should be tried in Tompkins county. *Ithaca Fire Department v. Beecher, N. Y.*, 418.
3. **Subrogation.]** The right of an insurance company insuring property *in transitu*, to be substituted to the rights of the insured as against the common carrier upon paying a loss, is subject to the owner's contract of carriage with the railroad company, provided there be no fraudulent concealment from the insurer. An insurance company insuring property *in transitu*, and making no provisions in regard to the nature of the contract of carriage, must be held to have insured subject to the actual contract of carriage so far as it was a lawful contract. *Jackson Company v. Boylston Insurance Company, Mass.*, 274.
4. **Temporary illegal use — revival of policy.]** The temporary illegal use of property merely suspends a policy of insurance thereon during the continuance of such illegal use, and if before a loss occurs, the illegal use has ceased, in an action on the policy the plaintiff is entitled to recover. *Hinckley v. Germania Insurance Company, Mass.*, 73.
5. **Co-operative life — assignment of policy.]** Certificates issued by an association formed under the act, chapter 204, Laws of 1877, authorizing the formation of associations for the purpose of rendering assistance to the widows, orphans or other dependents of deceased members, are not assignable or transferable by the members of such an association to any one not embraced within one of the classes mentioned in the statute. And this is so although the beneficiary named in the certificate joins in the assignment. *Briggs, Trustee, v. Earl, Mass.*, 175.
6. **Life policy — payable to wife and children — assignment of creditor — right of parties.]** F. took out a life insurance policy payable to M. and the children of F. When the policy was taken out M. was his wife and he had four children living by a former wife. Subsequently a child was born to F. and M. Afterward F. and M. transferred their right, title and interest in the policy by an unsealed instrument signed by them, as collateral security for a debt of F., and the instrument and the policy were delivered to the creditor. No question was made as to the validity of the transfer. On a bill of interpleader brought by the insuring company after the deaths of F. and M., *held*, that the policy was an executed, irrevocable, voluntary settlement in favor of the wife and children in being when it was taken out; *held*, further, that F. and M. could pledge or assign the policy to the extent of their interests in it; *held*, further, the policy being for \$5,000, that one-fifth of this amount was due to the creditor and one-fifth to each of the four children; *held*, further, one of the four children having died a minor before F., that the one-fifth due this child should be paid to his legal representative, if any, and if none, to the administrator of F., the child's father and next of kin. *Connecticut Mut. Life Ins. Co. v. Baldwin, R. I.*, 470.
7. **Marine policy — parol evidence to vary.]** Statements made by an insurance agent before issuing a policy cannot be used to change the contract of insurance finally made as contained in the policy. Under a marine policy "free from claim for particular and general average," the plaintiff must show either an actual total loss of the property insured, or a constructive total loss followed by an abandonment. *Burnham v. Boston Marine Ins. Co., Mass.*, 178.

See MARRIAGE, 23.

INTEREST.

On taxes — warrant to collector.] Without a distinct vote definitely determining when taxes should be payable, the payment of interest on taxes cannot lawfully be enforced. A vote declaring that interest shall be collected after a time named is not sufficient. If the warrant from the assessors contain such a recital of facts as would authorize a collection of interest, then the collector might justify his collection of interest under his warrant, although the recitals were not in fact true. *Snow v. Weeks*, Me., 606.

See EMINENT DOMAIN, 625.

INTERPLEADER.

Order in writing — acceptance — mechanics' lien — notice — priority of liens.] The court, in disposing of the questions in dispute among the defendants to a bill of interpleader, is at liberty to adopt any recognized method of trial which will best accomplish justice in the particular case. An order drawn by a creditor upon his debtor directing the payment of a sum of money out of a specified fund, and which is presented to the debtor, though not accepted, constitutes a good assignment in equity. A person to be entitled to the remedy given by the third section of the mechanics' lien law must (1) be a creditor of the contractor whose debt was contracted for work done to the building erected by the contractor for the owner, or for material furnished for the building. (2) His debt must be due. (3) There must be a demand and refusal, and the demand must be for such an amount as the creditor is entitled to be paid at once. (4) The creditor must give notice in writing to the owner of the contractor's refusal to pay, and of the amount by him demanded. Where the statutory requisites exist and the proper steps have been taken it works an assignment *pro tanto* to the workman or material-man, of the rights of the contractor against the owner, and to that extent they take the place of the contractor. Where the contract under which work is done expressly provides that the work was to be performed under the direction, and to the satisfaction of a particular person, to be testified by a writing or certificate under his hand, no right to the money earned under the contract accrues, and no action can be maintained to recover it until the certificate has been procured, or the contractor is entitled to it. *Kirtland v. Moore*, N. J., 766.

See CHATTEL MORTGAGE, 42.

JOINDER OF PARTIES.

See PARTNERSHIP, 204; WILL, 740.

JOINT TENANTS.

See DEED, 47.

JUDGMENT.

Non-resident — service by publication — effect of.] A judgment by default against one not an inhabitant of this State, where there is no service of the writ except by publication, is not a judgment *in personam*, and can be given no force or effect beyond an appropriation of the property attached on the writ. In an action on such a judgment the validity of an attachment of the defendant's property on the original writ cannot be questioned. *Kendrick v. Kimball*, 33 N. H. 482, qualified. *Eastman v. Dearborn*, N. H., 712.

See PLEADING, 109.

JUDGMENT IN REM.

See LIEN, 133.

JUDICIAL SALE.

1. A purchaser of real estate at an execution sale may in equity avoid conveyances previously made by the judgment debtor in fraud of his creditors. *Belcher v. Arnold*, R. I., 88.
2. **Caveat emptor — subrogation — judgment sale — rights of parties paying prior mortgage.]** The maxim of *caveat emptor* applies to judicial sales. Plaintiffs purchased, in 1869, certain real estate sold under a judgment docketed in 1865, which was at the time incumbered by a mortgage given in 1863. Subsequent to the recovery of the judgment, the judgment debtor conveyed, and the property passed through several conveyances to the defendant, who acquired title in 1871.

JUDICIAL SALE — *Continued.*

his grantor being Marks Cottrell. The mortgage of 1863 had been taken up and a second mortgage given in 1866 by the then owner. In 1871 Marks Cottrell mortgaged the property, and with the proceeds paid off the second mortgage. In an action of ejectment, *held*, that the original mortgage of 1863 had been kept alive and was still a prior lien upon the property as against the plaintiff, whose title depended upon the judgment of 1865, and that the rights of the parties should be adjusted accordingly. *Clute v. Emmerich*, N. Y., 180.

JURISDICTION.

See APPEAL, 694; TRESPASS, 510.

JUSTICE OF PEACE.

Jurisdiction of trespass on freehold — case — pleading — waiver — amendment — R. L., §§ 821, 912.] Under the statute — §§ 821, 912 — a justice of the peace has not jurisdiction in an action on the case, where the title to land is concerned although the count be joined with one in trespass on the freehold, and the sum in demand does not exceed \$20. When a justice has jurisdiction of only the count in trespass, he cannot amend himself into jurisdiction by striking out the count in case. A jurisdictional question can be raised at any time. Nor does a party waive his right to raise it in the county court by pleading to issue in the justice court after his motion to dismiss has been overruled. *French v. Holt*, Vt., 357.

LANDLORD AND TENANT.

1. **Option of renewal — evidence.]** In an action to recover rent on a lease for one year, with privilege of two more at lessee's option, *held*, that although the fact of holding over raised a presumption that defendant had exercised his option and was, therefore, liable for the rent, yet that evidence that the fact was otherwise, as it did not contradict the lease, was admissible. *Atlantic National Bank v. Demmon*, Mass., 69.
2. **Perpetual lease — forfeiture — demand of rent.]** The failure of a tenant under a perpetual lease from the selectmen of a town to pay rent according to the terms of the lease, or a neglect by the tenant to pay when the rent was called for, does not work a forfeiture, no legal demand having been made for the rent on the very day it became due and at the very place where payable. *Willard v. Benton*, Vt., 648.
3. **Sub-lessees — rent — bankruptcy.]** T. leased a building for a term of years, intending it to be used by a manufacturing company, he being their agent for that purpose, and it was so understood by the lessor; but the lease was made directly to T. and the company was not named or referred to in it. The company took possession, and T. subsequently became insolvent. In an action to charge the company on the covenants in the lease, *held*, that the lease being under seal and nothing to show that the company did business in the name of T. or used that name as describing itself, they must be deemed to have occupied under T. and not as lessees in the lease. *Held*, also, that T. having become a bankrupt and his assignees electing not to assume the lease, the rent due from the sub-lessees at the time of the bankruptcy belonged to the assignees, and that which accrued subsequently could be reached in equity by the lessor. *Haley v. Boston Belting Co.*, Mass., 561.
4. **Trespass by tenant — pleading — justice court — under general issue cannot question title.]** A landlord cannot maintain trespass for injury to the premises let, done by the tenant during the tenancy. His remedy is trespass on the case. Pub. Stat. R. I., chap. 196, § 30, provides: "Whenever an action of trespass shall be brought before any justice court and the defendant shall plead the general issue, he shall not be allowed to offer any evidence that may bring the title to real estate in question." *Held*, that the word "title" meant the right of possession not the fact of possession. In trespass, before a justice court, evidence may be given to disprove the fact of the plaintiff's possession, if it can be given without bringing the right of possession into dispute. When, without objection, a defendant introduced evidence affecting both the fact and right of the plaintiff's possession, *held*, that in the circumstances the evidence was good to the extent and for the purposes allowed by the statute. *Carroll v. Rigney*, R. I., 621.
5. **Life lease — two lessees.]** A lease to two "for and during their natural life" continues during the life of each. *Kenney v. Wentworth*, Me., 222.

LARCENY.

See CRIMINAL LAW, 455.

LEASE.

General assignment—liability of assignee for rent.] Where it is not shown that the relation of landlord and tenant exists, an assignee of an insolvent is not liable for rent. *Wales v. Chase*, Mass., 311.

See TRESPASS, 22.

LEGACY.

See WILL, 61, 148, 663, 740.

LEVY.

See DEED, 570; EXEMPTION, 690.

LEX LOCI.

See CONDITIONAL SALE, 371.

LIBEL AND SLANDER.

1. **Pleading—justification.]** In an action for libel, it is not sufficient for the defendant to justify the very words as published; but he must justify them in the sense alleged in the declaration under innuendoes, when the innuendoes fairly explain them; thus, the plaintiff was chief judge of the supreme court; the publication contained the following: "*He has received presents and favors from leading litigants*," the innuendo or explanation given to these words in the declaration was, "meaning thereby that the plaintiff was guilty of bribery in his said office," etc. The plea justified the words as true, but did not justify them in the sense charged by the innuendo. *Held*, that the plea was defective; that the words, aided by the facts alleged in the plea, were susceptible of the meaning given to them in the innuendo, and that it was for the jury to say whether they were used in that sense or not. Nor does the concluding allegation in the plea, that the defendant "did publish the said words of and concerning the plaintiff as in said first count," etc., amount to a justification of the words in the sense imputed to them in the innuendo, because if the defendant intended to charge the plaintiff with bribery and wished to justify, the justification should be in clear and unequivocal terms. *Royce v. Maloney*, Vt., 508.
2. **Privileged communications—statements in petition for removal of officer—malice.]** Certain citizens presented to the town council of their town a request that K. might be removed from his office of constable because: "*firstly*, said K. is a man utterly devoid of principle, and uses his office more for the purpose of wreaking his personal spite than for the peace and harmony of the community; *secondly*, said K. is wholly ignorant of the duties of his office; *thirdly*, said K. has at various times heretofore maliciously and wickedly assaulted and arrested sundry persons who were entirely innocent of the charges charged by him against them;" whereupon K. brought an action for libel against the citizens, and at the trial introduced evidence to show that the statements of the request were false. *Held*, that the action could not be maintained without affirmative proof of express malice; that proof of the mere falsity of the statements would not support the action, and that the statements were not such as, if proved untrue, to imply actual malice. *Kent v. Bongartz*, R. I., 616.

LICENSE.

See INJUNCTION, 339.

LIEN.

1. **R. S., chap. 91—personal services—includes that of "team"—judgment in rem.]** The lien given by the statutes of Maine to one who labors at hauling logs attaches to his personal services and the services of his team, if he has the rightful possession of the team, and is entitled to its earnings during the time the services were performed, though he may not own the team. When it appears that such services were not performed upon the logs or hauling of them, or that his claim for services upon the logs is so mingled and intermixed with other claims for which he is entitled to no lien, that it is impossible to distinguish between lien and non-lien items, then no valid judgment *in rem* can be rendered. *Kelley v. Kelley*, Me., 133.
2. **On logs—declaration—attachment, where to be recorded.]** In an action to enforce a lien on logs, it is necessary for the writ to show that it is brought for

• LIEN — *Continued.*

that purpose, but it is not necessary that it should state the name of the owner or supposed owner of the logs. An officer attached a pile of logs containing three million feet, and in his return estimated them at six hundred thousand. *Held*, such an error will not invalidate the attachment. Where the owner of logs, upon which there is a lien, so intermingles them with other logs upon which there is no lien that the former cannot be distinguished from the latter, it is the duty of the officer serving the writ brought to enforce the lien to attach the whole lot. An attachment of personal property situated in an organized plantation having a clerk and other plantation officers, should be there recorded when the property is of that nature that the attachment may be preserved by recording in the town clerk's office. *Parker v. Williams, Me.*, 601.

LIFE ESTATE.

See WILL, 847, 589.

MALICE.

See LIBEL AND SLANDER, 616.

MALICIOUS PROSECUTION.

Probable cause — former adjudication.] In an action for malicious prosecution brought by A. against B., a judicial finding in the former action in favor of B. and against A. by the court of original jurisdiction is conclusive of probable cause, when such finding is not procured by unfair means, even if such finding is reversed on appeal. *Welch v. Boston and Providence Railroad Corporation, R. I.*, 36.

MANDAMUS.

1. **Bills for city advertising** — city of Troy — curative legislation.] A fair and honest claim against a municipal corporation is entitled to the application of the same rules of construction which would obtain in the case of a similar claim against an individual, and neither should be subject to a strained or technical interpretation of the law for the purpose of defeating them. The charter of the city of Troy provides as follows: "The common council shall designate not to exceed four newspapers having the largest circulation in the city in which the city advertising shall be done only on the order of the common council;" on March 11, 1879, the *Troy Observer* was among others legally designated as one of such newspapers. The relator procured a *mandamus* to compel the comptroller of the city to countersign two bills for services rendered between June 18, 1881, and June 5, 1883. The rendition of the services was not disputed, but the defense was, that the *Troy Observer* was ineligible for the legal performance of such work after February, 1880, by reason of not possessing the qualification of membership the Associated Press required by chapter 30 of the Laws of 1880. In October, 1881, and April, 1883, the common council again designated the *Observer* as one of such papers, ignoring the provision of the act of 1880. *Held*, that the curative acts of 1881 and 1884 should be so construed as to support the relator's claim. *People, ex rel. Collins, v. Spicer, Comptroller, N. Y.*, 82.
2. **To compel clerk to furnish copies of record** — statute of limitations.] A writ of *mandamus* is the proper process to compel the clerk of a municipal court to furnish certified copies of its records. There is no statute of limitations that bars the right to prefer a petition for a writ of *mandamus*. *State v. Meagher, Vt.*, 512.

See TAXATION, 243.

MANDATE.

Amendment — pleading — statute of limitations — R. L., § 775.] When, after several delays caused by the defendant, the supreme court affirms the decree below overruling a demurrer to the bill, and remands the case with a mandate, the mandate is obligatory on the court of chancery; and it has no power to allow the defendant to withdraw the demurrer and plead the statute of limitations; and especially is this so, as the same question could have been raised by the demurrer, and also as the defendant had moved in the supreme court for leave to withdraw the demurrer and to answer, and the case was left "with the court," for counsel to furnish briefs within a time certain, and defendant failing to furnish a brief, the decree below was affirmed; the circumstances being the same as when the motion was first made. *Sherman v. Windsor Manufacturing Co., Vt.*, 240.

MANUFACTURING CORPORATION.

Failure to file annual report.] When the condition of a company organized under the general act of 1848, chap. 40, is such that the end and object for which it was formed are destroyed, and there is neither an ability nor intention on its part at any time to further prosecute its business, it is no longer required to make the report mentioned in section 12 of that act. *Bruce v. Platt*, 80 N. Y. 379, followed. *Kirkland v. Kille, Impleaded, etc.*, N. Y., 281.
See TAXATION, 496.

MARRIAGE.

1. **Ante-nuptial agreement—provisions in lieu of dower—homestead.]** When the heirs of a deceased husband's estate refuse to pay an annuity, to a widow, after it had been paid for several years, which annuity had been provided by an ante-nuptial agreement, and intended to be in lieu of the provisions of law, she is entitled to take under the statute, a homestead and dower, the same as though no ante-nuptial agreement existed, the court never having decreed a distribution of the estate. And in such case, when the administrators, after paying the debts, turned a large part of the property over to the heirs, the rights of the widow may be enforced by bill in equity, not only against the heirs, but their grantees affected by notice of the widow's claim. The homestead and dower should be set out of that portion which was not sold by the administrators. *Little v. Dwinell*, Vt., 649.
2. **Divorce—agreement as to alimony—does not cease on husband's death.]** While a libel for a divorce by the husband was pending, the parties agreed in writing that in case a divorce should be decreed on that libel, two referees were named, who should determine what the wife should receive from the husband, in what way and manner, how it should be secured to her, and that the report of the referees should be made a part of the agreement of the court, be binding on the parties and enforced as such. The wife then brought a cross-libel. The court entered a divorce in each case at the same time, and in the proceedings on the husband's libel, ordered that alimony be paid to the wife in accordance with the award of the referees. *Held*, that the judgment of the court was valid. Where the decree of the court as to alimony expressly provides that it is to continue during the natural life of the wife, it will continue during her entire life, though the husband should die. *Stratton v. Stratton*, Me., 579.
3. **Divorce—practice.]** Where, in libel for divorce, the question is submitted to a jury who finds the libelee guilty, and he moves to set the verdict aside as against evidence, the question for the law court is, not whether the verdict is clearly right, but whether it is so clearly wrong as to require the court to set it aside. *Howard v. Howard*, Me., 605.
4. **Divorce—"sufficient ability to provide"—husband in prison.]** On an application for a divorce under a statute which made "neglect or refusal on the part of the husband, being of sufficient ability, to provide necessities for the subsistence of his wife"—Pub. Stat. of R. I., chap. 167, § 2—a cause for divorce, it appeared that the neglect to provide was caused by the committal of the husband to prison for a term of years under sentence for a felony. *Held*, that while incarcerated he had not "sufficient ability" to provide. *Held*, further, that in divorce proceedings the cause of the inability to provide on the part of the husband was immaterial, and that the petition for divorce must be dismissed. *Hammond v. Hammond*, R. I., 461.
5. **Separation—prior cause no bar to divorce.]** That the liberal divorce law of this State influenced a petitioner for divorce to come here does not make her any the less a domiciled inhabitant of the State, if she came here *bona fide* to reside permanently and not merely to obtain a divorce and then return to her former home. Articles of separation by husband and wife which contain no express stipulation against divorce are not *per se* a bar to a divorce prayed for by the injured party for causes existing prior to the execution of the articles. *Fosdick v. Fosdick*, R. I., 481.
6. **Dower.]** A married woman received from her husband in his life-time \$1,000 and some specific articles of personal property, and agreed in writing, under seal, that she received it "in full discharge of all claim or interest upon [her husband], and upon his property for her support and maintenance by way of dower or otherwise." *Held*, that this agreement was a bar to her right of dower in the husband's estate. *Woods v. Woods*, Me., 607.

MARRIAGE — *Continued.*

7. **Dower — chose in action — payment of debts — fraud on creditors.]** A widow's right of dower is before assignment of dower a mere *chose* in action. Courts of equity have, in the absence of statutory provisions, no power to subject a widow's right of dower before assignment to the payment of her judgment debts. The mere neglect or refusal of the widow to have assignment of dower made is not such a fraud upon her creditors as to give jurisdiction to a court of equity. *Mason v. Gray*, R. I., 62.
8. **Insurance policy payable to wife — effect of her petition for divorce.]** A took out a policy on his wife's life, payable in four years to her if living, and if not living, to himself. He paid the premiums, retained the policy, and received payments made upon it. She was living at the maturity of the policy, but had filed a petition for divorce. *Held*, that under the statute, the wife was entitled to the amount due on the policy at its maturity. *Aetna Life Insurance Co. v. Mason*, R. I., 28.

MARRIED WOMAN.

Husband — practice.] The bill was first dismissed on demurrer; then an amendment was allowed, but the case made by the master's report was not as strong as that made by the bill. *Held*, that the rule that the court will not reverse its decision in the same cause applies. The bill alleged, that the materials used in the erection of the wife's house were procured by the husband at the request of the wife, that the orator supposed the house was owned by the husband, and that, through this misunderstanding as to the title, the charges were made to the husband. *Held*, on demurrer, that a bill, brought to compel payment of the wife, should be dismissed. *Garity v. Wilder*, Vt., 378.
See DEED, 467.

MASTER AND SERVANT.

1. **Course of employment — license to use horse.]** The defendants were father and son. The son was twenty-eight years old, and, while living with his father as a hired man on his farm, took his father's horse and drove three miles to the railroad depot to get one of his own friends. The father did not know that the son took the horse until after he was gone; but expected and was willing that he should do so. The son had driven the team before without permission. The horse, tied to a post in the rear of the depot, where the defendants were accustomed to hitch, broke away, ran into the plaintiff's team, and injured him. The referee found that the son in tying the horse "did not exercise the prudence of an average prudent man." *Held*, that the father was not liable, but that the son was; that license to use the horse could not be inferred from the fact of former use without leave. *Way v. Powers*, Vt., 260.
2. **Negligence of fellow servants.]** While it is the duty of the master to furnish suitable machinery and keep it in proper repair, the making of such ordinary repairs as the use of the machinery required from day to day may be intrusted to servants; and if the master employs competent servants for that purpose and supplies them with suitable means, the master performs his duty, and such servants are fellow servants with those employed to use the machine. *Magee v. Boston Cordage Company*, Mass., 126.
3. **Negligence of independent contractor — error in charge to jury.]** The plaintiff's horse was frightened at a steam shovel, and ran, throwing the plaintiff out of his carriage, who thereby received the injury complained of. The shovel was located on the defendant's land, used to obtain gravel to ballast its road-bed, near the highway in which plaintiff was traveling. The defendant's evidence tended to show that the shovel was operated and wholly controlled by one M., an independent contractor, and his servants, although its use was contemplated when the contract was made; and the question being whether defendant or M. was liable, the court charged in effect, that the defendant's liability was co-extensive with that of M., if it was part of the agreement that the shovel should be used in doing the work. *Held* error; that the work being lawful, and the shovel not a nuisance, until it became such by negligent use, the defendant was not liable, unless the relation of master and servant existed between it and those operating the shovel; unless it not only prescribed the end, but directed the means and methods; and that the inquiry was, whether the defendant or M. was the principal or master in operating the shovel; if M., and it became a nuisance

MASTER AND SERVANT — *Continued.*

through his negligence, he alone was liable, although it was understood by the defendant, in making the contract, that the shovel was to be used. *Bailey v. Troy and Boston Railroad Co.*, Vt., 628.

4. **Precautions by master—notice of danger.]** The rule that a servant assumes the risks of service presupposes that the master has performed the duties of caution, care and vigilance; and it is those risks alone which cannot be obviated by the adoption of a reasonable measure of precaution by the master that the servant assumes. Defendant was the owner of a coal mine conducted under the management of a superintendent. The plaintiff, at the time of the accident, was upon a wall in the course of construction, for the purpose of furnishing a place behind which to deposit the refuse material of the mine, and, as claimed by defendant, also with a view of supporting the overhanging cliff from which the rock injuring plaintiff fell. The evidence as to the condition of the rock at the time of the accident was conflicting; the plaintiff's evidence showed that a large crack, parallel with and about ten feet back from the upper angle of the face of the cliff, had long existed and was plainly visible; that the attention of the superintendent and foreman had been called to it, and they were warned of its dangerous character; that they had instituted an experiment to determine whether it was growing or not, and that such experiment did show that it was increasing in width, and still took no precaution to support the rock while the workmen were engaged under it. The plaintiff's evidence also tended to show that the rock broke off at the place where the crack had been observed, and that with the fall the crack disappeared. *Held*, that a verdict in favor of plaintiff would not be disturbed; it must be assumed therefrom that it was determined that the rock fell from a cause of which the defendant had notice, and that precautions which would have prevented the injury were not adopted, although they were practicable and of easy and safe application. *Pantzar v. Tilly Foster Mining Co.*, N. Y., 193.
5. **Risks incident to employment.]** Where an employer knows of the danger to which his servant will be exposed in the performance of any labor to which he assigns him, and does not give him sufficient and reasonable notice thereof, its dangers not being obvious, and the servant, without negligence on his own part, through inexperience or reliance on the directions given, fails to perceive or understand the risk and is injured, the employer is responsible. But the servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take them. When one assumes an employment, if an additional and more dangerous duty is added to his original labor, and he knowingly, although unwillingly, accepts it, he accepts its incidental risks, cannot recover for an injury which occurs only from his own inexperience. *Leary v. Boston and Albany Railroad Co.*, Mass., 423.
6. **"Usual risks."]** When a servant of mature age and common intelligence engages to serve a master, he undertakes, as between himself and master, to run all the ordinary and apparent risks of the service. *Coolbroth v. Maine Central Railroad Co.*, Me., 140.

See NEGLIGENCE, 810.

MECHANICS' LIEN.

Variance between notice and proof.] In the notice of lien it was alleged that the stone were delivered on and between the 11th day of June and the 6th day of November, 1879, and so also it is alleged in the complaint, and the claim of the appellants is that the stone were actually furnished after November, 1879, and in the year 1880. *Held* not a fatal variance. *Williams v. Freel*, N. Y., 378.

See INTERPLEADER, 766.

MERGER.

Covenant to assume.] A covenant in a deed "to assume and pay a mortgage on the granted premises" is merged in a judgment of foreclosure of the mortgage and for deficiency in another State against the party covenanting. *Knower v. Reynolds*, N. Y., 3.

MESNE PROFITS.

See EJECTMENT, 468.

MISTAKE.

See PAYMENT, 271.

MONEY HAD AND RECEIVED.

1. **City physician — evidence.]** A city ordinance of Belfast provides that the city physician in addition to a stipulated salary should "receive, when collected, all sums for medical services rendered by him for paupers of other cities and towns." *Held*, (1) that an action for money had and received would lie by such physician against the city for money thus collected; (2) that the want of plenary proof of the qualification of the physician, under Rev. Stat., chap. 13, § 9, could not be invoked as a defense to such an action. *Fletcher v. Belfast, Me.*, 567.
2. **County commissioner — employment of, by master of house of correction — traveling expenses.]** The employment of a county commissioner by the master of a house of correction to make sales of goods manufactured by the prisoners is not forbidden by any statute. Such employment is not within the scope of his duties as county commissioner, and he is entitled to receive his actual traveling expenses. *County of Bristol v. Gray, Mass.*, 563.

MORTGAGE.

1. **Apportionment — marshaling securities — subrogation — payment of note.]** When one purchases a part of a farm with a mortgage on the whole farm, and assumes the entire mortgage by being secured to pay the excess above the consideration paid for his parcel, and he pays such excess, the notes so paid are extinguished; and on a foreclosure of the mortgage he cannot share in the security afforded by it. And the mortgagee is not affected by any equities arising between the separate owners, whereby such excess could be apportioned. *Rugg v. Brainerd, Vt.*, 668.
2. **Assignment — agent — parol authority.]** Authority to deliver a deed or other specialty may be by parol. Where the name of a grantee is filled in by an agent acting under the parol authority of his principal, and there is nothing in the papers to disclose that fact, and the party taking an assignment of the instrument does not know that the party from whom he received it acted as agent, except for the purpose of delivering the assignment, the transaction is not invalid because the agent's authority was not under seal. *Phelps v. Sullivan, Mass.*, 440.
3. **"Assumes" imposes personal liability.]** A covenant by the grantee in a deed to "assume" a mortgage, for the payment of which the grantor is personally liable, binds the grantee to pay the mortgage debt. *Schley v. Fryer, N. Y.*, 715.
4. **Bail forfeited — chancer.]** The mortgage was executed to secure the petitioner, for becoming bail by way of recognizance for the mortgagor's son, who had been indicted. On failure of the son to appear at court, the bond was forfeited, judgment rendered thereon without *scire facias* proceedings, an execution issued, and the amount was paid by the petitioner. *Held*, on proceedings to foreclose the mortgage, that it is immaterial whether the judgment for the penalty and the execution were void, as that objection is merely technical, and the petitioner's liability would continue; nor was the petitioner bound to delay payment that a motion to chancer might be interposed. *Griswold v. Barker, Vt.*, 238.
5. **Fictitious amount — illegal preference — right of creditors to redeem — note under seal — notice to taker — trustees not purchasers for value.]** Where property is sold for a fictitious value, and a mortgage given back to secure the purchase-price, in order to cover up and conceal the mortgagor's property by preferring the mortgagee for the amount expressed in the mortgage, the mortgage itself is not invalid as a preference of a pre-existing debt under the insolvent law, the mortgage not having been given for a pre-existing debt, but for a debt arising contemporaneous with the transaction. Where the contract price of land and a mortgage given to secure the same have been grossly exaggerated as a part of a fraudulent scheme in which all the parties connected therewith participated, the assignees of the mortgagor, acting in the interest of all his creditors, may redeem the property by paying the sum found to be justly due thereon. A note under seal purporting to be secured by a recorded mortgage, and the note and mortgage referring respectively to each other, the taker of either must take

MORTGAGE—*Continued.*

- according to the title of him who transfers it, as such title appears upon a proper examination. The assignment of securities to trustees for the purpose of paying the assignor's indebtedness transfers no greater rights to the trustees than the assignor himself possessed, and if the securities were available in the hands of the assignor, they are none the less so in the hands of one to whom he has transferred them for the purpose of paying his debts. The acceptance of such a trust does not make the trustees purchasers for value. *Jewett v. Tucker*, Mass., 430.
6. **Foreclosure by entry—equity of redemption.]** An entry to foreclose under the statute is valid, although the mortgagee is the owner of the equity of redemption, subject to a second mortgage on the same premises, and the holder of the second mortgage is ignorant of the entry for more than three years thereafter. The fact that before the expiration of three years from the date of the entry, the mortgagee receives the avails of other security held by him for the same debt, but to an amount less than the mortgage debt, does not of itself prove the intention on his part to waive the foreclosure. *Tompson v. Tappan et al.*, Mass., 270.
 7. **Foreclosure—redemption.]** The statute of Maine, relating to the foreclosure of real estate mortgages by an action at law, applies to mortgages in existence at the time of its enactment. Under it a foreclosure is ineffectual if there is a failure to record the abstract of the writ of possession with the time of obtaining possession. When the mortgagor remains in the possession of the premises, occupying for himself and not for the mortgagee, the right of redemption is not barred by lapse of time. The interest of a deceased mortgagee of real estate passes to the administrator as assets, and the widow and heirs cannot convey a title to the same. *Bird v. Kellar*, Me., 392.
 8. **Foreclosure—time given for redemption.]** In a decree from the plaintiff on a bill for the redemption of land from a mortgage a year from the date of the decree is the time ordinarily given for redemption. *Murphy v. Banck*, N. H., 710.
 9. **Foreclosure—judgment lien—equity of redemption—assignment.]** A conveyance under the foreclosure of a mortgage is a complete bar to the lien of a judgment creditor acquired subsequent to the mortgage; and such judgment creditor who is made a party to the foreclosure proceedings afterward has no right in the equity of redemption. A general assignment vests the whole of the assignor's estate in the assignee, subject only to the execution of the trust; and no title or interest remains in the assignor to which the lien of a subsequent judgment can attach. *People, ex rel. Short, v. Bacon, Sheriff*, N. Y., 158.
 10. **Mortgagee in possession—tender; interest after—redemption—items chargeable on settlement of account.]** The word "tender" as used in Public Statutes, chapter 181, section 22, in relation to the redemption of mortgaged premises, does not mean the same kind of offer as when used in reference to the payment of a mere moneyed debt, the amount of which both parties are presumed to know; and if the mortgagee refuses to accept the money except upon compliance with an illegal demand, interest should be continued, reduced, however, to the legal rate, in case the mortgage calls for more. Payments made by the mortgagee in possession for unpaid water rents due from the mortgagor at the time he took possession, in order to prevent the supply of water from being cut off, are properly chargeable to the mortgagor on the settlement of the account. In the absence of proof of negligence or want of due diligence on the part of the mortgagee to procure rent for a tenement he is not chargeable with the same. *Donahue v. Chase*, Mass., 210.
 11. **Mortgagee's rights after condition broken.]** In reference to mortgaged premises, after condition broken the interest of the mortgagor becomes at law absolutely vested in the mortgagee. A mortgagee who has come into possession by foreclosure and who is entitled to damages from a railroad company for having taken a part of the mortgage premises is not bound by an agreement made between the mortgagor and the company as to the amount of the damages; and, not being bound by such an agreement, he cannot take advantage of it. The damages which he is entitled to receive are the actual damages to the land. *Adams v. Railroad Co.*, Vt., 625.
 12. **Presumption of payment.]** The holder of a mortgage permitted a mortgagee, his mother, and the assignee of the equity, his sister, to occupy the mortgaged premises for more than twenty years, because of the relationship, and he testified, without contradiction, that the mortgage debt had not been paid. Held, that the presumption of payment was overcome by these facts. *Philbrook v. Clark*, Me., 141.

MORTGAGE—*Continued.*

13. **Privity of contract — subrogation.]** A. sold his farm, incumbered with three mortgages, to B., and B. ignorant of the first two assumed the third. Then C. and D. virtually exchanged farms; that is, under an agreement with the three, B. deeded to C., and C. deeded his own farm to D., and D. executed a mortgage back to secure the payment of said third mortgage. The orator owning foreclosed the first two mortgages; and while the foreclosure proceedings were pending, before his title became absolute, purchased said third mortgage. A bill having been brought to foreclose against D. — *Held*, that D.'s promise, though not in terms to any one, was, in legal intendment, to the orator, inuring to his benefit; and that he was entitled to a decree. *Whitcomb v. Whittemore*, Vt., 512.
 14. **Real estate, what is — building erected by tenant on lessor's land — assignee — foreclosure — party — insolvency.]** A building, erected by a tenant at will, on land owned by a railroad company, under a parol arrangement by which the tenant could remove the building at any time within thirty days after notice of termination of the lease had been given by the company, *is real estate*; and a mortgage, executed in accordance with the statute regulating the mortgaging of realty, is valid; and the building will not pass to the mortgagor's assignee in insolvency as personalty. But personal property, as a horse, wagon, etc., also included in said mortgage, will pass to such assignee; and this, on the ground that the instrument was a mortgage of real, but not personal, estate. In a proceeding to foreclose such mortgage, the assignee is a necessary party defendant. *Stofford v. Adair*, Vt., 242.
 15. **Surplus moneys — evidence — res gestæ.]** The court will not destroy a mortgage upon the foundation of a guess and in the absence of satisfactory evidence impeaching it. In an action involving the validity of a mortgage the mortgagor's declarations at the time of the delivery of the mortgage as to the purpose of such delivery are elements of the *res gestæ*. The death of the mortgagor does not preclude the book-keeper of the mortgagee from testifying to such declarations, he not being a party to the action, or interested in its event. *Germania Life Ins. Co. v. Rae*, N. Y., 414.
 16. **Two on same land — redemption — payment — purchase of note — husband — witness.]** When one purchases land incumbered with two mortgages, each on an undivided half, and assumes and agrees to pay both as part of the purchase-money, he cannot redeem the one without redeeming the other. By force of the purchaser's agreement, as to him and all under him, the two mortgages are consolidated into one, the burden of each resting on the whole; and both must be redeemed. When a husband is made a party defendant with others in a bill brought by his wife to redeem, on the ground that she has a homestead right in the premises, he is not a competent witness for her. *Wells v. Tucker*, Vt., 868.
 17. **Of vessel.]** A bill of sale of a vessel, absolute in form, given as security for the payment of a debt with a written agreement to reconvey upon payment of the debt, constitute a mortgage which should be foreclosed by the statute mode and not by proceedings in equity. *Titcomb v. McAllister*, Me., 609.
- See* DEED, 570; DURESS, 40; FORCIBLE ENTRY AND DETAINER, 605; FRAUD, 323; MERGER, 3; RECORDING ACT, 647, 728; STATUTE OF FRAUDS, 64; USURY, 752; VENDOR AND PURCHASER, 523; WILL, 44.

MUNICIPAL CORPORATION.

1. **Defective highway — railroad crossing — duty of company.]** A city is not liable for damages occurring by reason of a defect in a highway at the crossing of a railroad at grade, it being the duty of a railroad company to maintain a safe passageway across its road. This is so whether the highway was located before or after the construction of the railroad. *Scanlan v. City of Boston*, Mass., 562.
2. **Defective sidewalk — contributory negligence.]** It is the duty of a city to maintain its sidewalks in a reasonably safe condition for public use. Persons have a right to use the sidewalks, although acquainted with their defective condition, and whether guilty of contributory negligence is a question for the jury. *Bullock v. Mayor, etc., of New York*, N. Y., 170.
3. **Streets — notice of defect.]** When it appears that the street commissioner had been informed of a defect in a way, the jury are authorized to find, from this information and the presumption that the commissioner did his duty by going to look up and remedy the defect, that the commissioner had actual notice of the particular defect. *Welch v. Portland*, Me., 586.

MUNICIPAL CORPORATION — *Continued.*

4. **Title by adverse possession — interruption.]** In ejectment wherein the plaintiff's title rested on possession for more than twenty years, the *locus* was a long, sandy waste along the seashore, and the defendants were mere intruders. The plaintiff, a municipal corporation, had by vote let the *locus* year by year from 1839 to 1875. The court instructed the jury that to show title the town must prove open, adverse actual and exclusive possession for twenty continuous years, and "that the votes, though they were evidence of a claim of right on the part of the town, were not sufficient to prove title by possession unless the lessees took actual possession under them, that it was not necessary for the plaintiff town to show that the possession of its lessees was continuous in the sense of their being on the premises all the time, and that if the lessees were in possession of any part of said East Beach (the *locus*) under the votes it might be considered that they were in possession of the whole for the purpose of acquiring title by possession by the town." *Held*, that the instruction in the circumstances contained no error entitling the defendants to a new trial. Passage over the *locus* by the inhabitants of the town to get sea weed or sand, or use thereof for temporary deposit of sea weed, would not amount to an interruption of the possession. There being evidence to show that the *locus* was known as the East Beach, *held*, that it was for the jury to determine whether or not the town let the *locus* by that name. *Newsham v. Ball*, R. I., 14.

See ASSESSMENT, 417; NUISANCE, 488.

MURDER.

See CRIMINAL LAW, 274.

NAME.

- Unauthorized use of another's name — parties — "legal representatives."]** An action to restrain the unauthorized use of another's name in business, under Pub. Stats., chap. 76, § 6, must be brought in the name of the party whose name is used or his legal representatives — his executors or administrators. Such an action cannot be maintained in the name of a daughter to restrain the use of her deceased father's name. *Lodge v. Weld*, Mass., 280.

NEGLIGENCE.

1. **Caterer — furnishing unwholesome food — pleading.]** One who holds himself out to the public as a caterer is liable to one who is injured by partaking of unwholesome and poisonous food and drink prepared and furnished by him, irrespective of any question of privity of contract, and it is unnecessary to aver that defendant knew of its injurious quality. *Bishop v. Webber*, Mass., 71.
2. **Child under sixteen — act of 1876, chap. 122 — error in submitting question to jury.]** The "business or vocation" within the meaning of the act "to prevent and punish wrongs to children," must be an employment either vicious in itself or in the nature of an amusement, and has no application to productive industries, etc. Plaintiff who was under sixteen years of age, and employed in defendant's laundry, while at her work, and without negligence on her part, her hand was injured. The trial court submitted the question to the jury, whether the employment was within the term "dangerous to life or limb," and charged that if so, plaintiff was entitled to recover. *Held* error. *Hickey v. Taaffe*, N. Y., 7.
3. **Claim against State — board of claims — evidence.]** By the act, chapter 331, Laws of 1883, giving authority to the board of claims to hear and determine all claims against the State for damages sustained from the canals or their use and management, the State assumed the same measure of liability incurred by individuals engaged in similar enterprises, and is liable for damages resulting from the negligence of a lock-tender in the management of a lock. The court is not bound to give implicit credit to the testimony of a witness, even in the absence of affirmative evidence contradicting him, when it appears that he has a personal motive to misstate the facts. *Sipple v. State of New York*, N. Y., 155.
4. **Causing death — measure of damages.]** The damages that an administrator can recover under chapter 35, section 1, Laws of 1879, are not necessarily nominal, and may be assessed by the jury. The ordinary grounds of damage in such a case are the expense of board, nursing, medical aid, compensation for loss of time, physical and mental pain, including such sum as the jury think ought

NEGLIGENCE—*Continued.*

- to be given for distress and anxiety of mind, in view of approaching death, while in imminent danger of the injury received, and to the close of life. *Corliss v. Worcester, Nashua and Rochester Railroad*, N. H., 705.
- b. **Fire-escapes — neglecting to provide — no criminal liability.]** The provisions relating to fire-escapes and stairways in the "building act for the city of Providence"—Pub. Laws R. I., chap. 688, of April 12, 1878—are too indefinite and uncertain to impose a criminal liability upon the owner of a building for not furnishing either fire-escapes or stairways, as provided in the act, before the inspector of buildings has required them, hence an action cannot be maintained under Pub. Stat. R. I., chap. 204, § 21, arising from the crime or offense of not furnishing such fire-escapes or stairways. *Maker v. Stater Mill and Power Co.*, R. I., 478.
 6. **Defect in highway.]** On the concave side of a slight curve in a highway were three posts, the curve making the middle post stand out somewhat beyond the line of the other two posts. The horse of a traveler driving along the highway was frightened by a team behind, the traveler was injured by a collision with the middle post, and sued the town for damages, charging that the highway was left in a dangerous state by the town authorities. *Held*, that whether the town was negligent in allowing the post to stand was a question for the jury. *Held*, further, that though there might have been ample room in the roadway, yet if the post was so placed with reference to the general course of travel as to be dangerous, the town was liable. *Held*, further, that the jury should decide as to concurring causes of accident under proper instructions from the court, which were presumably given. *Yeaw v. Williams, Treasurer*, R. I., 450.
 7. **Defects in highway — want of railing — setting aside verdict.]** Neither ditches properly constructed for the drainage of the highway, nor the want of a railing between them and the highway, can be declared "defects" by the court as matter of law. In an action to recover for injuries received from being thrown from a carriage, the evidence showed that one of the occupants of the carriage, who was driving the plaintiff's horse at the time, had frequently passed over this road, and was well acquainted with its location and condition. He saw the lights from a carriage, which was coming from the opposite direction, some time before the carriage passed, but "supposed it was a light in a house" till the carriages were very near each other. The night was so dark that one witness testified he could not see his horse's head, and it appeared that the plaintiff's horse was driven at a trot from the time the light was first seen till the carriage was overturned. *Held*, that whether the party driving the plaintiff's horse was at the time in the exercise of due care, owing to the darkness of the night, the liability of meeting other teams, the degree of speed, the nature of the vehicle, and the number of persons it contained, was a question for the jury, and their verdict would not be set aside. *Morse v. Inhabitants of Belfast*, Me., 67.
 8. **Injuries on highways — evidence — horse in habit of stumbling.]** In an action for injuries to a traveler on the highway, evidence that the plaintiff's agent had directed her horse, which she was driving at the time of the accident, to be shod in a way to remedy the fault of stumbling, is admissible. *Sprague v. Bristol*, N. H., 552.
 9. **Pleading — declaration.]** In an action to recover for injuries received by the plaintiff's son, claimed to have been caused by the defendant's negligence, while lawfully engaged in tearing down and removing the brick walls of a school-house, in that the walls fell through a want of sufficient bracing, the declaration is bad on demurrer, unless such facts are alleged, that the court can see the relation of the parties and the duty which the defendant owed to the boy. A mere allegation of duty is insufficient, but the facts from which the duty springs must be alleged. *Kennedy v. Morgan*, Vt., 236.
 10. **Proximate cause — combination of causes — defective highway and accident.]** When a traveler on a highway is injured and the injury results from a combination of two causes, both proximate, one a defect in the highway and the other a natural cause or a pure accident, the town is liable in damages to the injured traveler, provided his injury would not have been sustained but for the defect in the highway. A., injured by falling on a highway which had been washed away in gullies and was slippery with frozen sleet, brought an action for damages against the town. At the trial the presiding judge charged the jury: "If

NEGLIGENCE—*Continued.*

the sidewalk where the accident happened was so defective as to render the town liable in case an accident had happened by reason of the defect in the absence of the obstruction caused by the ice, and this accident happened by reason of such defect and would not have happened but for it, then the town is liable even though the ice was one of the proximate causes of the accident." *Held* no error. *Hampson v. Taylor, Treasurer of Town of Bristol, R. I., 622.*

11. —horse momentarily uncontrolled--defective bridge.] If a well-broken horse, while being carefully driven, suddenly swerves or shies from a direct course, passing momentarily out of the control of the driver, and at that instant comes in contact with a defect in the road, such conduct of the horse will not be considered as the proximate cause of the accident. *Aldrich v. Inhabitants of Gorham, Me., 398.*
12. Passenger—evidence—duty to passenger leaving train.] In an action against a railroad company for the negligent killing of plaintiff's intestate, it is not necessary, in order to maintain the action, for the plaintiff to show exercise of ordinary care on the part of the deceased, if at the time of the killing he was a passenger on defendant's road. A passenger who has bought a ticket or paid his fare continues to be such while lawfully leaving the train or station. Where a railroad company has made provisions for passengers to leave the cars only upon one side of the track, and it is dangerous to leave upon the other, it is a question for the jury whether it is negligence on the part of the company not to provide some means to prevent passengers from leaving on the wrong side, or to notify them not to do so. *McKimble, Administratrix, v. Boston and Maine Railroad Co., Mass., 308.*
13. Duty of railroad company to travelers on highway adjoining railroad.] A railroad company has the right to run trains on its road adjoining a highway, and is not responsible to travelers on the highway for the consequences of noise or smoke caused by the prudent running of its trains. The right to fire up a locomotive, the natural consequence of which is to cause it to emit a dense volume of smoke and coal dust, at any place along the road, depends upon the character of the place and not whether there happens to be a person near at the time. An engineer is under no obligations to watch for travelers on a highway running for a considerable distance parallel with and adjoining the railroad. *Lamb v. Old Colony Railroad Co., Mass. 723.*
14. Getting out of car before arriving at station—inference either way—question for jury.] The verdict of a jury will not be set aside when the question of fact is not free from doubt, or when more than one conclusion can be drawn from the facts by reasonable men; and it is quite immaterial that the court might have come to a different conclusion from that drawn by the jury, or that another jury might, on the same evidence, find a different verdict. The train on which A. was approaching his home stopped before arriving at the station to allow a freight train coming in the opposite direction to pass the station. It was dark. A., thinking that the station was reached, got out and was injured by the freight train. The conductor, as soon as he learned the cause of the stop, moved his train forward to the station. It was in evidence that passengers at the station habitually left the train on both sides. A. sued the railroad company for his damages and recovered a verdict. *Held*, that the questions of the defendant's negligence and of the plaintiff's contributory negligence were for the jury to decide, under proper instructions from the court, which in the case at bar were presumably given. *Boas v. Providence and Worcester R. R. Co., R. I., 490.*
15. Railroad crossing—evidence—character for carelessness—contributory negligence—charge of court.] Plaintiff's intestate was killed at a railroad crossing, his sleigh colliding with a train. There was no evidence as to how the accident occurred, no one being with him, not having seen him when the collision took place. In an action to recover damage, *held*, that the opinions of witnesses as to his general character for carelessness were inadmissible as evidence that he was not guilty of contributory negligence. The court charged the jury to take into consideration, upon the question of the intestate's care upon the occasion of the injury, the knowledge of the jury "of the habits of thought and mind, and the natural instincts of men" to preserve themselves from injury. *Held* error; that being a mere presumption, it could not take the place of proof, and in the absence of any proof of the surrounding circumstances, was insufficient to send the case to the jury. *Chase v. Maine Central Railroad Co., Me., 96.*

NEGLIGENCE — *Continued.*

16. **Railroad crossing — presumption — burden of proof — absence of flagman.** The general rule is that where the injured party remains passive, the happening of an accident affords *prima facie* evidence of negligence. But in an action to recover for injuries received by a traveler at a railroad crossing, the traveler himself plays an active part, and the burden of proof is on him to show that he was not guilty of contributory negligence. It is negligence *per se* to attempt to cross a railroad track without first looking and listening for a coming train if there is a chance for doing so. As between a railroad and a traveler, the railroad has the right of way. Where not required by law, the failure to station a flagman at a crossing is not negligence *per se*, but it is a question for the jury. *Leasan v. Maine Central Railroad Co.*, Me., 101.
 17. **Railroad employee — acts not within scope of employment.]** A railroad company is not responsible for damages caused by the negligence of an employee, in the performance of an act not within the scope of his employment. *Walton v. New York Central Sleeping-Car Co.*, Mass., 310.
 18. **Trustees of public charity.]** The trustees of the City Hospital of Boston, as such, possess no property. They are only managing agents for the city in a work from which no profit or advantage is received. No negligence being shown on the part of the trustees in the appointment of a superintendent, they are not liable for an injury caused by his negligence. *Benton v. Trustees of the City Hospital of Boston*, Mass., 125.
- See BAILMENT, 119; ESTOPPEL, 631; HIGHWAY, 315; MASTER AND SERVANT, 126, 628; MUNICIPAL CORPORATION, 170.

NEGOTIABLE INSTRUMENT.

1. **Consideration — release from apprenticeship.]** A note given by a father, in consideration of the release of his minor son from an apprenticeship agreement, to which the father was a party, is founded upon a sufficient consideration. *Crombie v. McGrath*, Mass., 809.
2. **Draft — liability of party agreeing to accept.]** A bank discounting a draft, upon being shown the authority of the drawer to make the same, acquires no greater rights as against the party giving such authority than was actually intended to be conferred upon the drawer. *Nevada Bank v. Luce*, Mass., 213.
3. **Failure to return bad check within time required by clearing-house rules.**
4. **Guardian — pleading — bona fide purchaser.]** A bank took from a guardian, as a pledge to secure his own note, two negotiable bonds owned by the ward, on which was an indorsement, seen by the cashier at the time of the negotiation and which disclosed the fact that the ownership was in the ward. In an action of replevin to recover the bonds, — *held*, that defendant was not entitled to the protection of a *bona fide* purchaser, and that the settlement of the guardian's account did not affect the title to the bonds. *Langdon v. Baxter Nat. Bank*, Vt., 223.
5. **Indorser taking security — waiver of demand and notice.]** In Rhode Island the indorser of a promissory note, by taking security from the maker, does not waive demand upon the maker, and notice of non-payment. If, after the time for demand and notice has passed, the indorser of a promissory note merely requests the holder not to press the note against the maker, he does not thereby waive demand and notice. *Whittier v. Collins*, R. I., 527.
6. **Indorsement in blank — liability of indorser for unauthorized insertion — collection agency — liability for negligence of its attorneys — question of fact for jury.]** One who signs and delivers a note in blank will be deemed to have authorized the party to whom it is delivered to fill in the blanks in respects essential to the completeness of the note as a note. Thus the date, the amount, the name of the paper and the place of payment may be inserted in their proper blanks. But this does not authorize the holder to crowd into the body of the note a stipulation in no manner essential or necessary to the note as a completed instrument, as that from and after its maturity it shall bear a greater rate of interest than the normal rate allowed by law; and an accommodation indorser would be released from liability on a note by such an unauthorized insertion. An agency holding itself out as a professional expert in the collection of claims, and undertaking to make collections in all parts of the country through local agents and attorneys, is responsible for the negligence of its attorneys to whom it in-

NEGOITABLE INSTRUMENT — *Continued.*

- trusts such claims. Where there is evidence both ways as to the negligence or want of proper skill and diligence on the part of such attorney in securing a claim intrusted to him through the agency, a question of fact is raised which the defendant is entitled to have submitted to the jury. *Wyerhauser v. Dun*, N. Y., 720.
7. **Note secured by mortgage — estoppel.]** The holder of a note, secured by a mortgage upon land sold by the maker to a third person, is not estopped from enforcing the mortgage because he had previously promised the maker, without binding consideration, to surrender the note, though such third person had knowledge of and placed reliance upon such promise when he purchased the land. *Richardson v. Noble*, Me., 588.
 8. **Order — conditional acceptance — evidence.]** In an action upon a written order drawn upon and accepted by defendant, "to be paid out of the last payment," held, that the language quoted was part of defendant's contract of acceptance, and that evidence of a building contract between drawer and drawee, in reference to which the order was made and accepted, and of conversation between the parties referring to it, were competent to aid in the construction of the writing. *Procter v. Hartigan*, Mass., 310.
 9. **Parol evidence — maker in fact surety — benefit of collaterals.]** When one of two debtors is surety for the other and the common creditor has taken security from the principal debtor, he must give the surety the benefit of the security either by way of payment or subrogation. If the creditor surrenders the security without the surety's consent the surety is *pro tanto* discharged. The surety may show the surrender in defense either at law or in equity. If this relation of principal debtor and surety does not appear on the face of the obligation it may be shown by extrinsic evidence, as may also notice to the creditor of the relation. But the surrender of the security to discharge the surety must be a surrender of property actually acquired by the creditor for security. Mere non-action on the creditor's part, or neglect to obtain possession of property for security, which with more effort he might have obtained, does not discharge the surety. *Otis v. Van Storch*, R. I., 481.
 10. **Past-due note — sureties — agency — ratification.]** The owner of a past-due note payable to bearer placed it in a bank for collection. The makers of the note were in fact sureties. The plaintiff, at the request of the principal debtor, paid the note to the bank, and the bank remitted the proceeds thereof to the owner and delivered the note to the plaintiff. Held, that the plaintiff obtained a good title to the note and could maintain an action thereon against the sureties; that notwithstanding the bank had no authority to sell the note, yet the owner by receiving and retaining the money had ratified the act of his agent and he was bound by it. *Coykendall v. Constable*, N. Y., 166.
 11. **Promissory note — consideration — assignment.]** A note made by the treasurer of a savings bank without the knowledge of the trustees, running to the bank, for the purpose of making up to the bank a loss on loans for which he was neither morally nor legally responsible, is void for want of a consideration. An assignment of a life insurance policy to secure such a note, made without the knowledge of the trustees, is void for want of a delivery. When money is received by the trustees of a savings bank upon a life insurance policy upon the life of a deceased treasurer and applied by them to pay a note of such treasurer to the bank, which was void for want of consideration, that sum should be allowed as a credit in an action upon an account of the bank against such deceased treasurer. *Dexter Savings Bank v. Copeland*, Me., 390.
 12. **Promissory note — illegal consideration — evidence.]** The makers of a negotiable note are competent witnesses in an action by an indorsee against his immediate indorsers or in suits between their personal representatives, to show that the consideration for the transfer of the note was illegal. *Smith v. McGlinchy*, Me., 289.
 13. **Release of infant maker — other signer liable.]** A release to an infant co-signer of a joint note after he has repudiated the contract and reconveyed his interest in the land for which the note was given within a reasonable time after reaching majority has not the effect to discharge the other signer. *Young v. Currier*, N. H., 555.
 14. **Sealed note given by corporation.]** A promissory note in the ordinary form given by a corporation had on it when produced in court a paper seal. No vote

NEGOTIABLE INSTRUMENT — *Continued.*

of the corporation authorized the seal; the note did not purport to be under seal; the seal was not the corporate seal; and the treasurer of the corporation who was a witness in the case did not admit putting it on the note. *Held*, that the seal must be disregarded as "mere excess." *Mackay v. St. Mary's Church*, R. I., 476.

15. **Securities.** The payee of a note is entitled in equity to the securities held by a surety on the note. *Barton v. Croydon*, N. H., 557.

See DURESS, 40; MISTAKE, 271; PAYMENT, 271; TRUSTEE PROCESS, 614.

NEW TRIAL.

Where a motion for new trial, on the ground of newly-discovered evidence, does not aver, and the evidence does not show, that the party making the motion used due diligence in preparing the case for trial, a new trial will not be granted. *Donnell v. School District*, Me., 292.

See EJECTMENT, 483; PLEADING, 624; PRACTICE, 4.

NOLLE PROSEQUI.

See CRIMINAL LAW, 537; INDICTMENT, 383.

NOTICE.

Knowledge of attorney.] The records of the town showing that the title to the realty was in the oratrix's husband, the probate records showing that the estate had not been distributed by decree of court, and that the oratrix was entitled to an annuity, the knowledge of the mortgagee's attorney, who took the mortgage, of the condition of the property, constitute a sufficient notice to the grantees. *Little v. Dwinell*, Vt., 649.

Of sale.] *See* DECEDENT ESTATE, 50.

See ATTACHMENT, 708; EVIDENCE, 654; INTERPLEADER, 766; TESTACY, 255; TAXATION, 91.

NUISANCE.

1. **Abatement — power of city government — eminent domain.]** The city has no power to appropriate private property, without the owner's consent, for the purpose of abating a nuisance existing on adjacent lands. Such power can only be conferred by statute providing due compensation for the property taken. Such acts being beyond the power and authority of the common council the city cannot be held responsible in damages. *It seems*, that the liability, if any, rests upon the individuals who performed the acts. *Cavanagh v. City of Boston*, Mass., 117.
2. **All who assist guilty.]** Two persons may be convicted for maintaining the same nuisance if both take part in the maintenance, though one be merely an assistant of the other. A place may be a liquor nuisance if liquor selling is carried on as an incidental or subordinate purpose of the place, not as a main purpose. *State v. Hoxsie*, R. I., 441.
3. **Injunction — adulterated teas — expert testimony.]** Where the evidence raises a question of fact, as to whether the use of adulterated teas would or would not produce irreparable mischief or a necessity for the interposition of the court, an injunction restraining the sale thereof will not be granted. Opinions of experts based wholly upon theoretical knowledge of the nature and character of adulterating substances are of no greater value, as evidence, than the testimony of witnesses who had used the teas, as to their practical effect upon the human system. *Board of Health of New York v. Purdon*, N. Y., 9.
4. **Sewer — duty of city in constructing.]** When the legislature authorizes a city or town to construct sewers, or to use a natural stream as a sewer, it is not to be assumed that it intends that it may be done in such a way as to create a nuisance, unless this is the necessary result of the powers granted; and if it is practicable to do the work authorized without creating a nuisance, it is to be presumed that the legislature intended it should be done so. This, however, does not imply the duty of the city to adopt an extensive system of purification independent of the construction of the sewers, or require the taking of large tracts of land not authorized by statute for that purpose. *Morse v. City of Worcester*, Mass., 488.

OFFICE AND OFFICER.

1. **Appointment — conflicting claimants—title.**] The charter of a city provided for the appointment of a prosecuting attorney by the common council in joint convention, but was silent as to the mode of appointment. A motion to ballot for a prosecuting officer was carried, and on the ballot being taken, relator had a majority of all votes cast. A resolution, declaring him elected, was lost, and another, declaring the ballot taken null and void, carried, as was also one declaring another person elected to fill the office. *Held*, that having once exercised the power to appoint, and having no power to remove, the subsequent proceedings were irregular, null and void, and that the relator was entitled to the office. *Coogan v. Barbour*, Conn., 200.
2. **City marshal of Portland — removal — certiorari.**] By a special law the city marshal of Portland is "subject after hearing to removal by the mayor, by and with the consent of the aldermen," for "inefficiency or other cause." *Held*, (1) that the hearing must be by the mayor and aldermen as a board; (2) that a hearing by the aldermen alone, by the consent of the marshal even, is not sufficient; (3) that the mayor and aldermen must find a sufficient cause to exist and pass upon the truth of each charge before a valid order of removal can be made. Where the presiding judge rules *pro forma*, by consent of the parties and without exercising his own judgment, that a petition for a writ of *certiorari* be dismissed, the law court will entertain exceptions, and upon them determine whether the writ should issue. *Andrews v. King, Mayor*, Me., 297.
3. **Quo warranto — title.**] In *quo warranto* to determine the right to an elective office the record of the declared election is not conclusive. A person declared elected and inducted into office is a *de facto* officer, though not lawfully elected. *State v. Megin*, N. H., 541.
4. **Supervisors of check-list — election.**] If no supervisors of the check-list are chosen at a biennial election, they may be elected at a town meeting specially called for the purpose. *State v. Bean*, Mass., 320.

OFFICER.

See TRESPASS, 220.

OLEOMARGARINE.

See CONSTITUTIONAL LAW, 196.

ORPHANS' COURT.

See APPEAL, 694.

PARENT AND CHILD.

Custody of infant ceases on marriage.] The legal marriage of a female infant terminates the father's right to her custody and services. *Aldrich v. Bennett*, N. H., 614.

See SEDUCTION, 414.

PAROL CONTRACT.

See STATUTE OF FRAUDS, 233.

PAROL EVIDENCE.

See NEGOTIABLE INSTRUMENT, 461 ; WILL, 33.

PARTIES.

Only that heir is a proper party defendant who received the parcel of land burdened by the will with payment of the legacy. *Wetherbee v. Chase*, Vt., 663.

See EJECTMENT, 25.

PARTITION.

1. **Decree for accounting — action at law — election of remedies.**] In equity proceedings for an account, all the parties, both complainant and respondent, are, after decree for accounting, actors. A. sued B. in account. B. afterward filed a bill in equity against A. for partition and for an account of the matter involved in the action at law. A. answered the bill and joined in the prayer for an account; whereupon a decree was entered referring the cause to a master. Pending the master's hearing, A., in the action at law, sued out and served a writ of attach-

PARTITION — *Continued.*

- ment against B. by mesne process. On motion of B. in the equity cause, *held*, that A. should be restrained from prosecuting the action at law and be required to discharge the attachment. *Jenks v. Smith*, R. I., 49.
2. Sale — delay in furnishing title — purchaser released by.] Under ordinary circumstances a purchaser at a partition sale is entitled to a conveyance by a good title at the time fixed, and an unreasonable delay in furnishing the same is a sufficient answer to an application to compel him to take a conveyance and fulfill the terms of the sale. In such case it matters not that the purchaser has sustained no injury by the delay. *Rice v. Barrett et al.*, N. Y., 831.
 3. Tenants in common — tenant for life — estate in reversion.] A tenant in fee-simple of land, subject to a life estate in an undivided half, may maintain a petition for partition, under the statute, against the tenant for life. *Allen v. Libbey*, Mass., 565.

See COSTS, 581; DEED, 25.

PARTITION FENCES.

Contribution to costs — remedy.] In an action brought under Pub. Stat. R. I., chap. 106, § 6, of fences. When a fence was built by the plaintiff on his own land, not on the boundary line between his land and the defendant's and not on a boundary line recognized and acted on by the parties, *held*, that the defendant was not bound to contribute to the cost of the fence even though the fence, if paid for by both parties, would become a boundary line by estoppel. *Semble*, that the statute assumes a recognized or undisputed boundary line as the basis of the fence viewer's jurisdiction. *Held*, further, that section 5 of said act does not authorize an order to build a new fence where none has existed, but applies only to the rebuilding of a former fence or the repair of one which has become defective or ruinous. *Held*, further, that when a fence viewer under Pub. Stat. R. I., chap. 106, § 8, apportioned a line of fence, but did not "direct the time within which each party shall erect or repair his share of the same," no right of action arose. Under the statute, the common-law remedy for the neglect to build a partition fence in discharge of the statutory duty is case in tort, not *assumpsit*. *Howland v. Howland*, R. I., 11.

PARTNERSHIP.

1. Accounting — joinder of parties defendants.] P. and K. were joint owners of a wood lot and mill property, and carried on the lumber business as partners. K. also held two mortgages on P.'s interest in the property. P. died, and K. thereafter sold all his interest to C., who took possession of the entire property. On an accounting before commissioners, *held*, that K. was not bound to account for the rents and profits of the business or of the mortgaged premises after the sale to C. *Held*, further, that as K. and C. had no interest in common at any time in the property, the claims, if any, against each being distinct and separate, that they could not be joined as defendants in one action. *Patterson, Admr. v. Kellogg*, Conn., 204.
2. Assumption of firm debts by purchaser — action by firm creditor against such purchaser — evidence.] Where one buys the business and assets of a firm, and the bills payable by the firm are deducted in computing such assets, and their payment assumed by the purchaser, a creditor of the firm can maintain an action for his claim against the purchaser. In such an action, the testimony of other creditors of the firm, that the purchaser has paid their claims without objection, is admissible. *Ellon v. Perkenpine*, Penn., 637.
3. Dissolution — death of a partner — when for the jury to determine — evidence — rule 21 — Washington county court — deposition — practice.] While the death of a partner generally works the dissolution of a partnership, it does not have that effect when the partnership contract shows the intention of the parties was to give it a continuing existence; as when it takes the form of a joint-stock association, with transferable shares, officers, records and a general agent to transact the business. *McNeish v. Hulless Oat Company*, Vt., 54.
4. Articles of — construction for jury.] It is for the jury to determine on a reasonable construction of the articles of agreement, interpreted by the kind of business contemplated, and the manner of transacting it, whether the intention was that the partnership should be continuing, or dissolved by the death of a partner. *Ib.*

PARTNERSHIP — *Continued.*

5. **Bound by acts of agents — declaration of.]** Dealing in hullless oats was the main business of the partnership, under the control of a general agent, with a provision that its "affairs" were to be kept secret. *Held*, that the partners might be liable for common oats purchased by an agent, although it was not proved that they knew of the transaction; and that it was their duty to see to it, that their agents transacted no business outside the scope of the partnership. What the agent said to the vendor at the time of the sale as to who the partners were and what their responsibility, was admissible evidence. *Ib.*
6. **Payment of individual debts.]** The appropriation of partnership property to the payment of the individual debts of a partner is valid against subsequent creditors of the firm. *Farwell v. Metcalf*, N. H., 384.

See CONTRACT, 145; STATUTE OF FRAUDS, 213.

PATENT.

- Receiver — assignment.]** A receiver of an insolvent debtor, appointed under Pub. Stat. R. I., chap. 237, § 13, is entitled to a patent right belonging to the debtor, and the court may order the debtor to assign the same to the receiver. *Keach, Receiver, v. Chadwick*, R. I., 77.

PAUPER.

1. **Mental capacity — settlement — medical expert.]** To render a pauper capable of acquiring a settlement, he must have sufficient mental capacity to be able to perform intelligently the business ordinarily involved in taking up a residence. A doctor who was not an attending physician, and had made but a single examination *pendente lite*, was asked, "from your examination at that time, what, in your judgment, was his mental condition?" This was excluded, and plaintiff excepted. *Held*, that whether or not the witness was qualified to testify as an expert, was a question of fact for the trial judge, and his decision was final. *Inhabitants of Fayette v. Inhabitants of Chesterville*, Me., 59.
2. **Settlement — evidence.]** The declarations of an overseer of the poor, unconnected with any official act, are inadmissible against his town upon the question of a pauper settlement. *Inhabitants of Brighton v. Inhabitants of St. Albans*, Me., 149.
3. **Supplies.]** An individual cannot maintain an action against a town for supplies furnished a pauper, resident therein, when there is no count in the writ, founded on statute liability, unless he proves that the supplies were furnished as pauper supplies, by virtue of a contract with the overseers of the poor. *Farrington v. Anson*, Me., 596.

PAYMENT.

1. **Mistake — action to recover back — failure to return bad check within time required by clearing-house rules.]** By the rules of the Clearing-House Association, of which plaintiff and defendant were members, mistakes made in the clearing-house by crediting checks which are not good, are settled between the banks themselves. Such checks are to be returned by the bank receiving them to the bank from which they are received as soon as it is found they are not good, and in no case are they to be returned after one o'clock. The plaintiff paid to the defendant through the clearing-house the amount of a check drawn upon it, and which the drawer had not sufficient funds in the bank to meet. By a mistake, caused by the wrongful act of the drawer, the check was not returned to the defendant until after one o'clock. In an action brought to recover back the amount paid on the check, *held*, that inasmuch as the defendant had not changed its position in reference to the check during the interval between one o'clock and the time when the check was actually returned, and it appearing that the plaintiff had exercised reasonable care and diligence in the matter, that plaintiff could recover. That defendant could not, under such circumstances, on behalf of the owner of the check, take advantage of plaintiff's failure to return it within the time required by the rules of the association. *Held* further, that plaintiff was only entitled to recover the difference between the amount paid defendant on the check, and the amount of the drawer's deposit in plaintiff's bank for which he had a right to draw. *Merchants' National Bank v. National Bank of Commonwealth*, Mass., 271.
2. **Note of third person — evidence.]** Plaintiff testified that a third party's note was taken by him as collateral security merely; defendant, that it was taken as

PAYMENT — *Continued.*

payment. *Held*, that a letter from the maker of the note to plaintiff, saying he would pay the note, was admissible. *Bates v. Hazen*, N. H., 502.

3. **Rescission.**] Where one who holds a claim against a school district receives pay for the same from the town in which the district is located, it is not competent for him to rescind the payment and make the district again his debtor without the latter's consent. *Donnell v. School District No. 3*, in *Webster*, Me., 292.

See MORTGAGE, 368.

PENSION.

1. **Attachment—when cannot be recovered back.**] The defendant town furnished plaintiff with support, and also advanced him money to assist in obtaining his pension, plaintiff promising to repay when the pension was obtained, and after receiving it refused. The town brought its action and attached the money. *Held*, that the town was entitled to receive it, and plaintiff could not recover it back. *Crane v. Inhabitants of Linneus*, Me., 95.
2. **Exemption from —.**] Pension money, after it is received by the pensioner, is not exempt from attachment. *Friend in Equity v. Garcelon*, Me., 57.
3. **Town officer—fees for service of subpoenas.**] While a person while holding the offices of selectman, overseer of the poor and town agent, obtained a United States pension for one of his town's paupers, and in pursuance of previous agreement with the pensioner, appropriated the back pay toward the pensioner's indebtedness to the town for past support, which sum the pensioner, by an action at law, subsequently recovered from the officer,—*Held*, that the officer cannot maintain an action against the town for services, expenses and disbursements in defending the action against him by the pensioner, nor in successfully defending an indictment in the United States court for the taking of such money in violation of U. S. Rev. Stat., § 5485. A party cannot charge fees for serving subpoenas. A constable cannot charge fees for serving a subpoena on witnesses outside of his own town. *White v. Levant*, Me., 591.

PERJURY.

See CRIMINAL LAW, 246.

PERPETUITIES.

See WILL, 386.

PERSONAL SERVICES.

See LIEN, 133.

PLEADING.

1. The complaint alleged the making of the covenant and the subsequent recovery in another State, of a valid judgment thereon. There was no allegation that the mortgage had not been paid or that defendant failed to perform his covenant. The answer admitted the making of the covenant but denied the judgment. On the trial plaintiff failed to prove the judgment. *Held*, that the complaint contained a cause of action on the judgment only, and that he should have been nonsuited for failure to prove it. *Knover v. Reynolds*, N. Y., 3.
2. **Action to annul judgment—declaration.**] In an action to vacate a judgment and to annul an execution issued thereon, the declaration is fatally defective that does not show but that the defendant in the original action was arrested upon a valid precept, properly issued upon a valid judgment, rendered, upon legal process duly served, by a court having complete jurisdiction of the parties and of the subject-matter of the suit. *King v. Jeffrey*, Me., 109.
3. **Amendment.**] A declaration, containing only the common *indebitatus* counts, counting upon a sale to the defendant, cannot be amended by adding counts upon a contract of guaranty. *Brodek & Co. v. Hirschfeld*, Vt., 227.
4. **Amendment to bill in equity.**] When a bill in equity was brought by an administrator to set aside as fraudulent against creditors conveyances made by the deceased, and it did not appear whether the administrator held sufficient assets to pay the expenses of administration,—*Held*, that the bill instead of being dismissed might, if the administrator lacked funds to defray the expenses of administration, be amended by setting forth this fact and by adding the creditors or some of them suing for themselves and the others. *Estes, Adm., v. Howland*, R. I., 479.

PLEADING — *Continued.*

5. **Amendment — new cause of action.**] An amendment introducing a new cause of action cannot be allowed against a defaulted defendant without notice. *Ball v. Danforth*, N. H., 556.
 6. **Collector — assumpsit — case — tax — implied promise — construction of statutes — R. L., § 2 — consideration — specification.**] In an action given by the statute to a collector against a tax payer, when it is alleged that the plaintiff was collector of taxes for, etc.; that he has in his hands certain taxes named against the defendant, which were legally assessed and delivered to him as such collector for collection, and which are now due and unpaid against the defendant, which he is legally obliged to pay, and neglects and refuses to pay, although there is no allegation that the defendant promised to pay, the count is in *assumpsit*. Distinction between case and *assumpsit* stated. As the statute authorizes the collector to commence suit "in his name," it is not a misjoinder to join two counts, when by one the defendant is attached to answer the plaintiff in his individual, and by the other in his official capacity. When a statute prescribes the necessary requisites of a good declaration, none other need be added. The statute impliedly prescribes that the action shall be *assumpsit*, by prescribing that the action, though unnamed, shall be by trustee process. The first and third counts are sufficient, and are not demurrable, for duplicity, although in each, the State, State school, and town taxes are sought to be recovered. The allegation that the plaintiff was collector, and as such holds the taxes named due and unpaid against the defendant, is by force of the statute a legal consideration for the promise implied from the defendant; and the plaintiff could recover the tax at any time within three years. *Wheeler v. Wilson*, Vt., 265.
 7. **Demurrer — amendment.**] The statute abolishing the distinction between actions of trespass and trespass on the case relates to distinctions of form, and a special demurrer in such case, relating merely to form, is not available to the defendant. The court may, in its discretion, allow an amendment after a demurrer has been filed and acted upon. *Place v. Braun*, Me., 578.
 8. **Former suit — inconsistent action — poor debtor's oath — new trial.**] A recovered judgment in *assumpsit* against B. for money loaned. A. afterward brought case against B. for alleged fraudulent and false statements made to obtain the loan. B. pleaded in bar the judgment against him in *assumpsit*. *Held*, that the plea was not good, and that the value of the judgment in *assumpsit* was to be considered as *pro tanto* reducing the damages recoverable in the action on the case. To the action on the case B. also pleaded in bar that he had, after the judgment in *assumpsit*, taken the poor debtor's oath, which was administered notwithstanding A.'s objection of the alleged fraudulent and false statements. At the trial the presiding justice excluded the evidence offered to sustain this plea. On petition for a new trial, — *Held*, that as the evidence was not set out on the record, the court, not knowing what the evidence was, must assume it to have been rightly excluded. *Whittier v. Collins*, R. I. 624.
 9. **Fraud — facts constituting, must be alleged.**] A replication of fraud to a plea of release must set out the fraudulent acts relied on, that the court may determine whether they amount to fraud, and that the defendant may know on what to take issue. *Friedburg v. Knight*, R. I., 24.
 10. **Guardian — failure to allege ward's title.**] The orator, as a guardian, brought his bill to set aside a warranty deed executed by his insane ward, and failed to properly allege the ward's title; but the court thought it fairly inferable from the whole bill that she had some title, and held the defect to be one of form and overruled a general demurrer to the bill. *Stewart v. Flint*, Vt., 365.
- See* ATTACHMENT, 666; BOND, 127; LIBEL, 508; NEGLIGENCE, 71, 236; NEGOTIABLE INSTRUMENT, 223; PROBATE COURT, 369; JUSTICE OF PEACE, 357; USURY, 752.

PRACTICE.

1. When a majority of the justices of the supreme judicial court do not concur in granting a new trial judgment must be rendered on the verdict. *Charlotte v. Murrahfield*, Me., 588.
2. **Appeal from orphans' court decree — supersedeas.**] In order to operate as a *supersedeas*, an appeal from a definitive decree of an orphans' court in Pennsylvania must be brought up and filed in the supreme court on the first day of the term next following the day upon which said appeal is perfected. *Miller's Appeal*, Penn., 635.

PRACTICE — *Continued.*

3. **Calling the jury into court.]** It is not error for the court to recall the jury, interrogate them as to the difficulties in the way of an agreement, and repeat a portion of the instructions given them when the case was submitted to them. *State v. Getchell*, Me., 597.
4. **Clerk refusing to furnish copies of record.]** An action of debt on a recognizance was pending on appeal in the county court. The clerk of the court from which the appeal was taken refused to furnish copies of the records, which were necessary for a defense, until after the appeal case was tried and the defendant had brought a petition for a writ of *mandamus* to compel the production of the records. In this condition the court heard the exceptions and rendered judgment, as if the matters in the records had been properly pleaded. *State v. Meagher*, Vt., 513.
5. **Demurrer overruled.]** When a demurrer is overruled, it is discretionary with the court to remand the case for trial, or for final decree; but it will not remand for final decree without exceptional circumstances. — v. — Vt., 365.
6. **Dismissal of complaint — when error.]** Where the evidence is conflicting and susceptible of inference either way, and the witnesses are neither indifferent to the result nor consistent in their statements, it is error for the trial court to grant a motion dismissing the complaint. *National Bank of Virginia v. Mills*, N. Y., 189.
7. **Discretion of court in organizing jury — attaching creditor — fraud — declarations of confederate — evidence — R. L., § 816.]** When the court adjourned the first day, eleven jurors had been accepted, but five of these were talesmen; on the next day, another panel being present, the court discharged the eleven, commenced *de novo*, and formed a panel from those regularly in attendance. *Held*, that there was no error; that the discretion of the court was reasonably exercised. A stenographer's transcript of testimony given on a former trial of the same case by a deceased witness is admissible, although the witness was dumb, and the signs made by him were described by the stenographer in words. It was for the jury to determine how much the manner of the reproduction of such evidence lessened its weight. The goods in question had been owned by D., the execution debtor, and were attached in his possession by the defendant as sheriff. The plaintiff's intestate replevied them, and claimed that he purchased them of D.'s assignee in bankruptcy, and that he employed D. to sell them as his agent. The defendant claimed that the intestate and D. had collusively combined to defraud his creditors, and had given evidence that they strongly supported this claim. *Held*, that the acts and declarations of D. while they were carrying out the scheme; what D. said when in possession and selling the goods, namely, that he was the owner; what he admitted was a fact, on an attempt to compromise this suit, that he was the owner of a claim held by the intestate against his estate, and entitled to the dividends; a receipt for \$2,000 given by the intestate to D.'s wife just before the bankruptcy proceeding; the fact that D. made unusually large purchases of goods immediately preceding his failure; his letter to a creditor announcing his inability to pay, were admissible in favor of the defendant; and this is so, although the parties represented by the defendant became creditors of D. subsequently to his bankruptcy. But a letter written by D. to a third party after the consummation of the fraud would not be admissible. The facts that the intestate procured the goods to be insured, that he frequently visited the store, that the word "agent" was on the sign, were admissible in favor of the plaintiff. The court should have instructed the jury, that the fact that D. deposited \$500 to secure the intestate against costs of this suit was evidence of fraud, and that they should weigh it with the other evidence, and determine whether fraud was proven. It was for the court to say what the fact tended to prove, and the jury, what it did prove. *Quinn v. Halbert*, Vt., 352.
8. **Exceptions — evidence — physician's.]** It is the duty of counsel, if he thinks a client's rights are being prejudiced, by the opposing counsel exceeding the proper license of an advocate in his argument to the jury, to interpose objections at the time; he cannot elect to take the chance of a verdict in his favor, and if he fails, then raise the objection. A plaintiff cannot complain that she was required on cross-examination to testify that she commenced her action before notifying the defendant of her claim against him. To lay the foundation for exceptions to the admission of testimony, the attention of the presiding justice

PRACTICE—Continued.

should be called to the specific objection to it. An exception to the exclusion of a question to a physician relating to the health of a person cannot be sustained when it does not appear what personal knowledge he had of the health of such person. An exception to the exclusion of admissible evidence will not be sustained when it appears that the excepting party is not aggrieved thereby. The opinions of physicians are admissible to show that a greater injury to the person would result from a direct blow than from a glancing one. *Powers v. Mitchell*, Me., 583.

- P **Exclusion of evidence—exception not specifying ground.]** Upon the hearing before a referee the defendant was asked this question: "Did you at any time inform the town of Errol, or the selectmen of the town, that you had used securities of the town to raise money, which you had appropriated to your individual use and which you had not accounted for to the town, and if so, when and to whom was that information communicated?" Ans. "I never did at any time, or to anybody." *Held*, that as upon the issue of concealment the evidence was relevant, an exception to its admission that did not point out the ground of exception, was unavailing. *Errol v. Bragg*, N. H., 677.
10. **Evidence harmless—exception.]** Defendant was asked whether one S. testified in a former suit that he paid a certain sum of money to the defendant. This was excepted to, and on being permitted to answer said that he did not know what S. testified to. *Held*, that his answer rendered the testimony harmless. *Ib.*
11. **Exclusion of evidence—proof of regulations—reading from stenographer's minutes—limiting counsel.]** In an action brought to recover damages for injuries received from the falling upon him of a pile of bricks placed in a street by a contractor engaged in taking down a building, a witness called by plaintiff testified on cross-examination that he did not consider that the brick pile was the same in its appearance as those he had seen in the streets constructed under similar circumstances. The plaintiff then asked the witness, "what was the difference that you observed between this pile and other piles of old brick?" This was objected to and excluded. *Held* not error; whether it was safe or dangerous could only be determined by proof of its own features and not by evidence showing the construction of other piles of brick, and the fact that the witness had testified on cross-examination that the brick pile in question differed in appearance from others seen in the streets by the witness did not entitle the plaintiff to prove in what respect it differed from the other piles. A regulation defining or limiting the extent of the obstruction of streets by building material cannot be proved by oral evidence; the ordinance itself must be produced, also the permit issued under such regulation. It is not error for the trial court to refuse to allow counsel in cross-examining a witness to read from the alleged minutes of the stenographer taken on the former trial, the accuracy of which has not been established. An exception is not well taken unless the attention of the court is directed to the precise point intended. The time to be allowed counsel in summing up, is a matter of discretion for the trial court, with which, unless abused, this court will not interfere. *Rehberg v. Mayor, etc., of New York*, N. Y., 182.
12. **Insolvency—exception to judgment of county court.]** An order of the court of insolvency, dismissing a petition brought to have one adjudged an insolvent debtor on appeal to county court was affirmed. *Held*, that the judgment of the county court was conclusive and exceptions thereto not allowable. *Matter of Bowles*, Vt., 734.
13. **Petition under the fraud, accident and mistake statute—verification by attorney when insufficient.]** A petition under the fraud, accident and mistake statute—Rev. Laws, § 1429—must be verified by the oath of one having personal knowledge of the facts alleged. The oath of the petitioner's attorney, "according to his best knowledge, information and belief," is not sufficient. *Woodworth v. Coleman*, Vt., 669.
14. **Petition for new trial—laches.]** The petitioner in her original suit claimed that the defendant, in a public store, promised to pay a debt discharged in bankruptcy; but in this proceeding she failed to show that she made inquiry whether any one present heard the talk with the defendant; and the case had been tried once before, and so the defense was known. *Held*, that the defendant had been guilty of laches, and the petition was dismissed. *Jones v. Sennott*, Vt., 664.

PRACTICE — *Continued.*

15. **New trial — when general term should order.]** In an action for conversion of chattels, tried by the court without a jury, the court from the facts as found by it decided that plaintiff was entitled to a judgment of \$400; on appeal the general term reversed the judgment, and rendered final judgment for nominal damages only. *Held* error; that the case should have been sent back for new trial. *Thomas v. New York Life Insurance Co.*, N. Y., 4.
16. **Nonsuit.]** A plaintiff, at any time before opening his case, may become nonsuit as a matter of right: After the case is opened, and before verdict, it is within the discretion of the court to grant leave to become nonsuit. After verdict there can be no nonsuit. *Washburn v. Allen*, Me., 574.
17. **Petition for review — discretion.]** A petition for review will be granted in the discretion of the court to enable a party to introduce testimony which was, without his fault, omitted by him at the trial. *Buck v. Pierce*, Me., 587.
18. **Probate court — guardian refusing to qualify — new appointment.]** When a person has been adjudged by the probate court, on proper petition and by appropriate proceedings, to be of unsound mind and incompetent to manage his own affairs or protect his rights, and the person who was appointed guardian refused to qualify for that trust, the judge of probate may, upon a petition therefor by a friend, stating the facts, after notice, appoint another person as guardian of the non compos. *Thompson v. Hall*, Judge of Probate. *Same v. Tibbetts*, Me., 189.
19. **Reference — general finding for defendant.]** Upon a general finding for the defendant by a referee, the defendant is entitled to judgment, notwithstanding the referee states in his report that he has been unable to reach a decision which he is satisfied is correct, and that he finds for the defendant on the ground that the burden of proof is on the plaintiff. *Cummings v. Renwick*, N. H., 675.
See CRIMINAL LAW, 584; DEPOSITION, 654; INSOLVENCY, 240; MARRIAGE, 605; MARRIED WOMAN, 373.

PRESUMPTION.

See EVIDENCE, 111; HOMESTEAD, 646; NEGLIGENCE, 101.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION, 86.

PROBATE COURT.

1. **Administrator — commissioners — suits discontinued — waiver—R. L., §§ 2115, 2130, 2143, 2154.]** When the probate court grants letters of administration, it should at the same time appoint commissioners to adjudicate upon the claims against the estate; and it is under the same duty to creditors as to the estate to appoint the commissioners. And it is also the duty of the court to appoint the commissioners on the petition of a creditor whose suit had been heard by referees, and a report filed before the death of the intestate, but had been recommitted for further hearing. Such creditor waived none of his rights, although he took part in the proceedings, after first objecting to the jurisdiction of the referees. Section 2143, R. L., and following sections, by which an administrator may enter and prosecute or defend certain suits, are rendered wholly inoperative by section 2154, R. L., when commissioners are appointed. *Powers v. Powers' Estate*, Vt., 237.
2. **Decree of, when void—homestead of widow.]** A decree of the probate court distributing the estate of a deceased husband is void so far as it includes money derived from the sale of the homestead right, or personal property, owned by his widow, whose death was subsequent to that of her husband, and whose estate was unadministered, and an action cannot be sustained against the administrator and his surety on the probate bond by an heir to recover his portion of his mother's estate so included in the decree distributing his father's estate. *Probate Court v. Winch*, Vt., 642.
3. **Disputed claims—reference—pleading—action of debt.]** The probate court is not restricted to any particular class of "disputed claims" in ordering a reference under the statute—R. L., § 2148; and after the parties have consented in writing to the reference, the court can appoint whom it pleases as referee. Such a reference is not an arbitration proper; and no formal submission is required.

PROBATE COURT — *Continued.*

The decree of the probate court in such a case on the referee's report, unappealed from, may be the basis of an action of debt. *Noyes v. Phillips*, Vt., 369.

See PRACTICE, 139.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENT, 396.

PUBLIC CHARITY.

☛ *Trustee of.* *See* NEGLIGENCE, 125.

QUARRY.

See TAXATION, 234.

QUO WARRANTO.

See CORPORATION, 660; OFFICE AND OFFICER, 541.

RAILROAD.

1. **Commissioner fixing maximum charges — no extra-territorial effect.]** The statute of 1883, requiring the railroad commissioners to fix tables of maximum charges for the transportation of passengers and freights upon the several railroads operated within this State, does not authorize the commissioners to fix such charges beyond the line of the State. *Merrill v. Boston and Lowell Railroad*, N. H., 325.
2. **Duty to keep crossing in repair.]** A provision in the charter of a railroad corporation, that the road shall be so constructed as not to obstruct the safe and convenient use of any private way which it crosses, imposes upon the corporation the duty of maintaining a safe and convenient crossing for such private way. *Krepe v. Sullivan County Railroad*, N. H., 848.
3. **Subscription to stock.]** A subscriber to stock in a railroad company signed a subscription list in which he agreed to take a certain number of shares and promised unconditionally to pay the par value of the same. *Held*, that he was liable to an action on his express promise, though the amount of the capital stock was not fixed, and the minimum number of shares named in the charter were not subscribed for. *Skowhegan and Athens Railroad Company v. Kinsman*, Me., 585.

Crossing.] *See* NEGLIGENCE, 96, 101.

Company obstructing highway.] *See* HIGHWAY, 263.

Employee.] *See* NEGLIGENCE, 310.

See EMINENT DOMAIN, 215.

RATIFICATION.

See ARBITRATION, 252; NEGOTIABLE INSTRUMENT, 166.

RECEIVER.

1. **Injunction — power of supreme court — discretionary order not reviewable in court of appeals.]** In one sense, every order of a court which commands or forbids is an injunction. But an injunction proper is a recognized provisional remedy, and the rules of the Code apply to it as such. The supreme court as a court of equity has power, outside of the provisions of the Code, to grant an order to protect the possession and authority of a receiver appointed by the court. Such a power, existing and resting in the discretion of the supreme court, is not reviewable in this court. *Weorishoffer v. North River Construction Co.*, N. Y., 329.
2. **Service of writs — amendment of officer's returns — sales on execution.]** Receivers of savings banks may maintain actions in their own name or in the name of the bank. The failure to obtain an order of notice on the defendant at the return term of the writ does not defeat the attachment. An officer's return on an execution, that he had given the notice of the intended sale required by law, is conclusive evidence of that fact, and he cannot be allowed to amend his return so as to show that no such notice was given. If a receiver improperly purchases property sold on an execution in favor of the estate which he represents, the sale will be valid, but the receiver will be responsible for any injury which the estate thereby sustains. A sale upon execution of the equity of redemption of real estate on which there are two or more mortgages at the same time, and for a gross sum, is not illegal or void. *Hobart v. Bennett*, Me., 593.

See PATENT, 17.

RECOGNIZANCE.

Costs.] A statute required the complainant to give recognizance "to prosecute such complaint to final judgment with effect, or in default thereof to pay the costs which may accrue thereon, to the State, or to the person or persons accused." The complainant gave recognizance "to prosecute the complaint with effect, or in default thereof, to pay all lawful costs which may accrue therefrom." *Held*, that the difference was immaterial. *State v. Palmer*, R. I., 444.

RECORDING ACT.

1. **Index.]** An index is not necessary to the validity of the record of a mortgage. A mortgage was recorded, but no index was made; a subsequent mortgage was executed, and assigned to the defendant, who purchased without notice. *Held*, that the first mortgage was superior to the second and could be foreclosed. *Barrett v. Prentiss*, Vt., 647.
2. **Mortgage — innocent purchaser — priority of title.]** The recording of conveyances under the registry laws was intended to take the place of the act of livery of seizin; and although by the first deed the title passes out of the grantor as against himself, yet he can, if such deed is not recorded, subsequently convey a good title to an innocent purchaser who receives and records his deed. If a purchaser upon examining the records finds a conveyance from the original owner to his grantor which gives him a perfect record title, completed by what the law regards as equivalent to a livery of seizin at the time it is recorded, he is entitled to rely upon such record title and is not obliged to search the records afterward made to see if there has been no earlier unrecorded deed of the original owners. *Morse v. Curtis*, Mass., 728.

REDEMPTION.

See MORTGAGE, 368.

REFERENCE.

See PRACTICE, 675; PROBATE COURT, 369.

RELEASE.

Joint wrong-doers — settlement with one.] Plaintiff and defendant were employed by C. Plaintiff was injured by the negligence of defendant moving a derrick. After the accident C. paid to plaintiff's attorney \$150, and took from plaintiff a general release from all causes of action for damages. *Held*, that the release was a bar to the action against the defendant. *Leddy v. Barney*, Mass., 806.

See WILL, 61.

RELIGIOUS SOCIETIES.

See WILL, 176.

REMOVAL.

See OFFICE AND OFFICER, 297.

REMOVAL OF CAUSE.

U. S. R. S., § 639 — repeal — act of 1875.] The third clause of section 639 of the United States Revised Statutes, which relates to the removal of causes to the Federal courts on account of prejudice or local influence, was not repealed by the act of congress of March 3, 1875, and is still in force. *Lang v. Lynch*, Mass., 817.

REPLEVIN.

1. **Bond — breach of — writ dismissed for want of jurisdiction.]** The condition of a replevin bond was that the plaintiff in replevin should prosecute the writ to final judgment, pay such damages and costs as the defendant might recover against him, and restore the same goods and chattels in like good order and condition as when taken, in case such should be the final judgment on the writ. The replevin writ, upon its face good, was dismissed on appeal for want of jurisdiction in the court below from which it issued. *Held*, that there had been a breach of the conditions of the bond. *Held*, further, that to satisfy the conditions of the bond, the plaintiff in replevin must prosecute the writ to a final judgment on the merits of the case affirming his own right of possession or ordering a return and restoration to the defendant. *Pierce v. King*, R. I., 87.

REPLEVIN — *Continued.*

2. **Demand.]** No demand is necessary before commencing an action of replevin if the defendant comes tortiously into the possession of the property and tortiously detains it from the party entitled thereto. *Bisbee v. Fadden*, Mass., 115.
3. **"Machinery — fixtures.]** Machinery separately constructed, and secured to a building by bolts, screws, nails or cleats, which is adapted for use in any building and which can be removed without injury to itself or the building, and it not appearing that the machinery was placed in the building to carry out the purposes for which it was erected, or to permanently increase its value for occupation, is not a part of the realty. *Maguire v. Park*, Mass., 120.
4. **Repairs of vessels — lien therefor while in repairer's possession — transfer of possession obtained by artifice.]** Where one, who has a lien on a boat for repairs, is induced by artifice and deceit to deliver possession of the same to the owner, upon the latter's promise to give forthwith a specified security therefor, and the owner afterward refuses the security, such delivery is not absolute and the repairer can maintain replevin for the boat. In an action of replevin by A. against B. & C., plaintiff's evidence was to the following effect; B. & C., owners of a tug-boat, sent her to A.'s works for repairs and promised to give him notes with good indorsers in payment therefor. When the work was partly finished C. told A. that the indorsers could not be procured but that there was nothing against the boat except A.'s claim, and that B. & C. would give a mortgage on her to secure the notes. This A. agreed to and completed the repairs; C. then paid him \$500, and asked for the boat, which A. refused to deliver until a settlement. Afterward C. brought the notes and promised A. that as soon as the mortgage was drawn B. & C. would execute it, and meantime he asked for possession of the boat. Relying upon this promise A. gave him possession of the boat and took the notes. Subsequently B. denied C.'s authority to promise the mortgage and it was never executed nor was the boat returned. The court upon this evidence granted a compulsory nonsuit. *Held*, that this was error. The evidence warranted a finding by the jury of an intention to deceive and cheat A. It did not show an absolute delivery of the boat, but simply a delivery on condition that if B. & C. refused the security, they would retain the boat. Replevin would, therefore, lie. *Neafie v. Patterson*, Penn., 688.
5. **Third person defending — title resting on fraud.]** A third person is not admitted to defend in an action of replevin when the only right he shows to the goods rests upon his own fraud. *Levy v. Woodcock*, N. H., 682.
6. **Timber cut from mortgaged premises.]** One who has purchased timber trees, that were wrongfully cut from mortgaged premises by the husband of the mortgagor, cannot maintain replevin for the same against the assignee of the mortgage, though the mortgage was assigned after the trees were cut. *Mosher v. Vehue*, Me., 292.
7. **Title to furniture in public building.]** A town owned an engine-house and a fire engine kept therein. Engine men composing the company were appointed from time to time and paid by the town. The furniture in the house was purchased by the company with money, part of which was paid by the town, part raised by subscription by citizens for the purpose of fitting up the house, and part was paid by the company from prize moneys received by it. Upon a claim of ownership to the furniture being made by members of the company, — *Held*, that the title to the furniture was in the town. *Inhabitants of Brookline v. Sherman*, Mass., 114.
8. **Voluntary organization — tenants in common.]** A band formed by voluntary association, divided into two factions. Each organized a new band, and acted under new by-laws, the plaintiffs retaining the name of the old band, and defendant's faction assuming a new name. *Held*, that the old organization was abandoned, and that the plaintiffs had no authority to act as its trustees; that they could not maintain replevin against the defendants to recover the common property, as the parties are tenants in common. *Hewitt v. Hatch*, Vt., 228.

See STATUTE OF FRAUDS, 64.

RESCISSION.

See FRAUD, 186.

REVENUE LAW.

Stamped instruments — who may affix stamp — burden of proof on whom, to show stamp, when instrument lost.] Where an instrument requiring a stamp

REVENUE LAW — *Continued.*

has been lost, but is made the basis of a suit, the onus of proving the absence of a stamp is upon the party who raises the objection. The principles upon which secondary evidence of the contents of a written instrument is refused have no application to an objection which arises only under the policy of the revenue laws. The maker of an instrument requiring a stamp is not obliged literally to affix and cancel a stamp with his own hand. Under a reasonable construction of the act of congress any party interested in such instrument may affix and cancel the stamp at and immediately before the execution thereof. *Merkel's Administrators v. Marx*, Penn., 636.

REVOCATION.

See ARBITRATION, 217.

SALE.

1. Breach of warranty of title — incumbered with a chattel mortgage.] If a conditional vendee fails to pay according to the terms of the sale, he cannot maintain an action for deceit and breach of warranty of title, although the property was incumbered with a chattel mortgage, and had been taken under the statute by the owner of the mortgage, in case the mortgagee was present and acquiesced in the sale; because if the vendee had fulfilled, the mortgagee would have been estopped from enforcing his claim. When one sells personal property in his possession, actual or constructive, he sells it with an implied warranty of title; thus, when mortgaged personalty on premises occupied by both the mortgagor and mortgagee is sold by the latter, his possession is sufficient to raise an implied warranty of title. *Reynolds v. Roberts*, Vt., 735.
2. Conditional lease — insolvency — assignee — contract — *lex loci*.] Property, sold conditionally and delivered, without a legal record of the lien, passes to the assignee of the vendee under the insolvent law. A contract, by which a vendee of billiard tables agrees to pay in monthly installments in one year the entire value of the tables, and if he so paid, the property was to be his, and if not, the vendor's, is a conditional sale, and not a lease. When one here orders goods from a party in New York on certain terms as to payment, etc., but they are shipped consigned to the vendor, and accepted on different terms, *held*, that the contract was made in this State. *Collender Co. v. Marshall*, Vt., 371.
3. False representations of vendor.] The rule that it is not an actionable fraud for a vendor to falsely represent to a vendee the price paid for property sold, affirmed; still the rule should be carefully construed and applied, and it may admit of exceptions. *Richardson v. Noble*, Me., 588.
4. Vendee with notice buying of bona fide purchaser.] A purchaser with notice may protect himself by showing that he derived title from a bona fide purchaser, or one without notice. *Barber v. Richardson*, Vt., 739.
5. Warranty.] In an action for false warranty, whether it be *assumpsit* or case in tort, a *scienter* need not be averred by the plaintiff; and if averred, need not be proved. *Place v. Merrill*, R. I., 21.
6. Warranty — instruction to jury.] In an action for breach of warranty of soundness of a horse, a "curb" which lamed the horse, made its appearance the day after the sale. Experts were examined as to the nature and cause of "curbs," the judge gave an instruction which authorized the jury to find from such personal knowledge as they might have of the nature, cause, etc., of a curb. *Held* error; that the subject was not one of general knowledge and observation, but one of science, and the jury not being experts, the instruction left them at liberty to disregard the evidence, and the verdict they rendered would not be "according to evidence." *Douglas v. Trask*, Me., 60.

SAVINGS BANK DEPOSIT.

See GIFT, 136.

SCHOOL-DISTRICT TAX.

Assessment — abatement.] The proper remedy for an assessment of a school-district tax upon persons not taxable in the district is an application made by them for an abatement. *School District v. Selectmen*, N. H., 335.

See TAXATION, 231.

SCIRE FACIAS.

Bail—copies of appeal—evidence—practice.] In *scire facias* against bail on *meane* process, with a plea of *nul tiel record*, copies of appeal are record evidence of the proceedings and judgments shown thereby. Such copies, when the officer's return is incorporated into them, attested, and shows that the defendants became bail, are *prima facie* evidence of that fact. The defendants by going on with the case, without raising the question, admitted, by implication, that they were the persons returned by the officer as bail. A certified copy of the record and original writ were not admissible for the defendants, as they showed nothing amounting to a discharge of bail. An *exoneretur* should have been entered. The failure of an officer to deliver a bailpiece will not discharge the bail. The defendants in the court below claimed that there was a variance between the amount of the judgment offered in evidence and the judgment described. *Held*, that they could not under such an objection raise the point that the execution issued for too large a sum. The court affirmed the judgment below, deducting the amount of error. *Darling v. Cutting*, Vt., 866.

SEDUCTION.

Loss of services of child—action by parent.] The seduction of a child without the father's consent, resulting in a loss to him of her services, entitles him to maintain an action against her seducer. Whether the act was produced by force or persuasion is a question with which the appellate court has no concern. *Lawrence v. Spence*, N. Y., 414.

SETTLEMENT.

See PAUPER, 59.

SETTLEMENT AND RELEASE.

Fiduciary relations—equity jurisprudence.] The principle of equity jurisprudence that it is the duty of courts of equity to examine the transactions of persons between whom fiduciary relations have existed with the utmost watchfulness and caution, does not apply to transactions occurring subsequent to the time when such fiduciary relations were dissolved, and the parties are each represented by counsel, and no charge of corruption is made against the counsel. *Korn v. Executor of Becker*, N. J., 760.

SHERIFF.

See EXECUTION, 32.

SHIP AND SHIPPING.

1. **Contract between part owners as to who shall be master.]** A contract between two part owners of a vessel, that each shall sail the vessel as master on alternate years, cannot be invoked by one (against the other) when he has acquired such habits of intemperance as render him unfit to perform the duties of master. Whether such a contract is void as being against public policy, *quære*. *Rogers v. Sheerer*, Me., 524.
2. **Earnings—master.]** It is not the duty of the master of a vessel to ascertain how much of the earnings belong to any part owner. He may remit the freight money to the managing owner, though he has received notice from one of the part owners to remit his "one-fourth" to himself. *Patten v. Percy*, Me., 566.
3. **Master—part owner.]** The master of a vessel may recover of a part owner of the vessel any sum found due him on settlement for wages and primage, though he may have remitted to the ship's husband the freight money exceeding in amount the sum thus found due him. *Percy v. Patten*, Me., 566.

SPECIFIC PERFORMANCE.

1. **Oral agreement to convey land—substantial improvements.]** When a party to an agreement fair and just in its terms, understandingly entered into and concluded, is injured, without default on his own part, by its non-fulfillment of the other party, the most direct and satisfactory remedy which he instinctively seeks is specific performance. The ground of the remedy is an equitable estoppel based on an equitable fraud. A father-in-law made an oral agreement with his son-in-law that if he would sell his farm and come and live with him on the homestead, carry on the farm and maintain him and his wife while they lived and furnish them with a horse and carriage for their own convenience, he would convey the farm to plaintiff. The plaintiff entered into possession upon

SPECIFIC PERFORMANCE—*Continued.*

faith of the agreement, made improvements, paid taxes, etc., thereby enhancing the value of the land. Subsequently some unpleasantness arose between the parties and the father-in-law refused to convey, although he continued to reside with, and be supported by the plaintiff until his death. *Held*, that plaintiff was entitled to a specific performance of the agreement by the sole devisee of the vendor. *Woodbury v. Gardner*, Me., 103.

2. Statute of frauds—part performance.] A court of equity has power to decree specific performance of contracts for the conveyance of lands, notwithstanding the statute of frauds is pleaded as a defense. Part payment of the purchase-price is not such part performance as will take the case out of the statute, but where the contract is admitted and no benefit of the statute claimed, the court will decree performance if the evidence clearly shows who is the real vendee. *Douglass v. Snow*, Me., 98.

See ATTACHMENT, 185; STATUTE OF FRAUDS, 253.

STATE.

See NEGLIGENCE, 155.

STATUTES.

1. Construction of public—taxation—stock in corporation—exemption.] The public statutes were intended to be only a consolidation and arrangement of the statutes as they were then in force, without changing any existing rights. When the law, as expressed in the public statutes, is ambiguous or doubtful, or susceptible of two constructions, it is then most proper to examine the statutes as they previously existed to aid in their construction. Under Public Statutes, chap. 11, § 4, and chap. 13, §§ 46, 57, etc., the shares of stock in corporations formed for building foreign railroads are subject to the excise tax of one-tenth of one per cent, the same as before the enactment of the public statutes. *Pratt v. Street Commissioners of Boston*, Mass., 424.
2. Appointment to be made within certain time—directory.] A statute provided that "a census . . . shall be taken . . . on the first day of June," and that at least six months previous the governor shall appoint a superintendent of the census. *Held*, that the power to appoint a superintendent was incident to the imperative duty of taking the census; and that the governor not having made an appointment within the prescribed time could make it afterward. *In re the Census Superintendent*, R. I., 494.

See CORPORATION, 660.

STATUTE OF FRAUDS.

1. Forbearance of opposition to probate of will—consideration.] The promise of an executor to pay \$5,000 to one of the testator's heirs at law who received nothing under the will, in consideration that he would forbear further opposition to the probate of the will, claimed to have been made as it was through undue influence, is not within the statute, and such forbearance is a sufficient consideration. *Bellows v. Soules*, Vt., 268.
2. Growing timber—mortgage—replevin.] Simple contracts for the sale of growing timber, *as such*, to be cut and severed from the freehold by the vendee, being executory contracts for the sale of chattels, are not contracts for a sale of an interest in lands, and are not within the statute of frauds. Plaintiff claiming under a mortgage of real estate, which it was admitted was recorded after defendants had severed the chattels in suit from the freehold, sought to replevin the same. *Held*, that the title to the chattels was in defendant and plaintiffs could not recover. *Banton v. Shorey*, Me., 64.
3. Parol contract—sale of land—R. L., § 981.] The plaintiff's house being mortgaged, he entered into a parol contract with the defendant to purchase the mortgage, sell the house, and after satisfying the mortgage debt, costs, etc., to pay the balance to the plaintiff. The defendant purchased as agreed, foreclosed and sold the house, the plaintiff in reliance on the contract allowing the equity of redemption to expire. *Held*, that the plaintiff was entitled to recover; the contract was not within the statute of frauds, in that it was not for the sale of lands or an interest in or concerning them, and could be completely performed within one year; and parol evidence was admissible to prove the contract. *McGinnis v. Cook*, Vt., 233.

STATUTE OF FRAUDS—*Continued.*

4. **Part performance—sale of growing trees—contract not to be performed within a year—injunction—parol evidence to prove license.]** The bill charged the defendant with entering upon and cutting and removing standing wood, etc., from the timbered lands owned by the orator's intestate, and prayed for damages and a perpetual injunction. The defendant admitted the charge and justified under a parol contract. The master found such contract; and that by it the defendant was to clear eighty acres of land—ten acres the first year, and then five each year—and was to have the wood in payment; that he had performed for three years and claimed the right to continue; that he had expended somewhat in teams, etc., in preparation; and, at the intestate's request, that he had cleared that part culled of timber, and so less remunerative. *Held*, (1) that parol evidence was admissible, at least to prove a license, which would be a defense to the trespass; (2) that the contract was within the statute of frauds, *as it was not to be performed within a year*, and that the defendant had not so far performed that he had any enforceable rights under the unexecuted portion of the contract; (3) but before the injunction is granted, the orator should do equity in respect to the executed portion, *i. e.*, make the defendant whole. *Sheldon v. Preva*, Vt., 680.
5. **Prospective guaranty.]** The guaranty of a future liability is within the statute of frauds; thus, C., a son-in-law of the defendant, was about to erect a house, and wished to purchase doors, windows, etc., for the same. For this purpose the two went to the plaintiffs' place of business, had a conversation with them, and the result was, the articles were delivered from time to time to C., on his order, and charged to him. The referee found that the plaintiffs understood "that whatever C. ordered, the defendant would guarantee the payment of," and would not have sold except for such understanding. But later on in the report, it was found that the "plaintiffs understood that they were to collect the same of C., if possible, and that the defendant was only liable to pay the same in case" it could not be collected of C. *Held*, that the defendant's contract was collateral to that of C., and, therefore, within the statute of frauds, although prospective. *Mead v. Watson*, Vt., 745.
6. **Sale of goods—what sufficient acceptance.]** A constructive receipt and acceptance of goods to meet the requirements of the statute of frauds can only be proved by clear and unequivocal acts on the part of the buyer. The defendant verbally bargained with the plaintiffs for a lot of crockery to be imported by them at Boston, and forwarded to him at Manchester; and it was further agreed that upon its arrival in Boston, it should be stored and kept there by the plaintiffs for him till he ordered it sent forward. After keeping it a reasonable time they forwarded it to him at Manchester with a bill, and he refused to receive and pay for it. *Clark v. Labreche*, N. H., 499.
7. **Specific performance—assignee—administrator—surviving partner—insolvent law—notice—put on inquiry.]** The oratrix entered into a parol contract for the conveyance of a house. She paid for it and occupied the tenement in the upper story, without rent, for more than four years; and also agreed with the original owners to collect the rent for her of the lower tenement. The contract was made with one of two partners, one of whom is now dead, and the other insolvent; but the contract was made known to the other partner, who did not object to it. A bill having been brought against the assignee and administrator, *held*, that the case was not within the statute of frauds; that the oratrix was entitled to a decree for the conveyance of the premises, and an accounting for the rent. The house did not pass to the assignee; it was not attachable by the creditors of the original owners, they holding the title in trust for the oratrix; and the fact that she was in possession was notice to the creditors, and put them on inquiry as to her rights. *Holmes v. Caden and Carroll, Administrators, etc.*, Vt., 253.
8. **Stock jobbing—partnership.]** An oral agreement to share equally in the profits and losses resulting from the purchase and sale of stock already owned by one of the parties is not a contract for the sale of goods, wares and merchandise, and is not within the statute of frauds. A contract with brokers for the purchase of stock upon margin is not void as a wager contract, or within the statutory provisions against stock jobbing. To constitute a partnership in profits it is not essential that there should be a community of interest in the capital or stock producing the profits. *Bullard v. Smith*, Mass., 212.

See SPECIFIC PERFORMANCE, 98.

STATUTE OF LIMITATIONS:

1. **Absence from the State.]** A temporary absence does not arrest the running of the statute, so long as a residence is retained in this State. Defendant, having a residence here, and leaving his family here, went into New York, and was absent several years for business purposes, without intending to acquire a new residence or to abandon the old one. He was frequently here with his family, and his presence could have been easily ascertained. *Held*, that the running of the statute was not arrested. *Rutland Marble Co. v. Bliss*, Vt., 80.
2. **Cause of action accruing in another State.]** The statute of limitations is not a defense, when the cause of action accrued in another State, unless both parties resided there at the time the cause of action accrued. The plaintiff resided in Ohio, and the defendants in Pennsylvania, when the debt was contracted, the residence of neither party having been changed. *Held*, that the statute was not a bar. *Troll v. Hanauer*, Vt., 261.
3. **As against executors, etc.]** The statute of limitations limiting actions in *assumpsit* to six years — Pub. Stat. R. I., chap. 205, § 3 — begins to run in favor of executors and administrators as soon as they are qualified. Executors and administrators may reduce this time to three years — Pub. Stat. R. I., chap. 189, § 8; chap. 205, § 9 — by giving the notices provided in the last-named section. These notices are, however, not a condition precedent to the qualification of the executor or administrator. *Knowles v. Whaley*, R. I., 465.
4. **Lapse of time — presumption of payment.]** Payment by the mortgagor after he had sold and quit possession rebuts the presumption of payment arising from lapse of time, not only as to him, but his grantees affected with constructive notice of the mortgage. *Barrett v. Prentice*, Vt., 647.
5. **Mutual accounts — auditors — acknowledgment.]** An item in an account annexed which has been paid, and a receipt given and accepted therefor, cannot be considered an "unsettled item" within Rev. Stat. 1871, chap. 81, § 87. An item in a mutual account which accrued within six years of the date of the writ cannot save from the operation of the statute of limitations any other items in the account, if there be none within six years of the date of the former. An auditor has no authority to pass upon the account laid before him by the defendant unless it was filed in set-off in the court. In a letter, before suit, the defendant wrote the plaintiff concerning the account sued "when we meet, we will talk it over." *Held*, that this was not a sufficient promise or acknowledgment to bring the case within the provisions of Rev. Stat., chap. 81, § 97, which provides that no promise or acknowledgment takes a case out of the operations of the statute of limitations unless the promise or acknowledgment is express, in writing, and signed by the party chargeable thereby. *Perry v. Chesley*, Me., 591.
6. **Promise by administrator to pay claim — Gen. Laws, chap. 198, § 5.]** A promise by an administrator to pay a claim against the estate does not bind either the estate or the sureties on his bond so as to take the case out of the limitation contained in Gen. Laws, chap. 198, § 5. *Judge of Probate v. Ellis*, N. H., 711.
7. **Promise to pay "when able" — burden of proof.]** A cause of action founded upon a written promise to pay a debt "when able" accrues as soon as the defendant has the pecuniary ability to pay; but proof that the defendant at a particular time subsequent to making the promise had property equal to and greater than the amount of the debt, would not conclusively show that he was able to pay the debt within the meaning of the promise, and thus give a right of action on the promise. Such a promise should be reasonably interpreted, and when a question is raised as to the promisor's ability to pay, it should be left to the jury as a question of fact. *Tobo v. Robinson*, N. Y., 750.

See DAMAGES, 463.

SHERIFF.

See COSTS, 517.

SUBROGATION.

See INSURANCE, 274; MORTGAGE, 512, 668; SURETY.

SURETY.

1. **Contribution.]** A surety may recover in *assumpsit* of a co-surety for contribution, and therefore is not entitled to relief by equity proceedings. *Tilcomb v. McAllister*, Me., 609.

SURETY — *Continued.*

2. **Joint — when entitled to share in collaterals.]** The rule that if one of two joint sureties for an insolvent principal holds collateral the other is entitled to share in it does not apply where the sureties are on separate bonds to secure a faithful discharge of duty on the part of the principal acting in different capacities, first as guardian of an insane ward, and then on the ward's death, as administrator of her estate, when the collateral was not given as security for signing the bond, but for signing as surety certain bank notes; and this is so, although, after it was claimed that the principal was in default, the sureties entered into a written agreement to join in defense and share equally in the liability; and the defendant realized more out of the collateral than he was compelled to pay on said notes. *Somers v. Johnson*, Vt., 638.
3. **Subrogation — foreclosure — deficiency — assignment of bond — extinguishment.]** When a surety has paid the debt, he is entitled to be subrogated to all the rights of the creditor against the principal debtor. Plaintiff conveyed land to defendant, who covenanted in the deed to assume the payment of a mortgage thereon given by her grantor. In an action to foreclose said mortgage, plaintiff and defendant were made parties defendants, and personal judgment for deficiency against each was sought. The defendant in this action defended in the foreclosure suit, and previous to the trial she stipulated that judgment might be entered except so far as to charge her with a deficiency. Judgment of foreclosure and sale was entered accordingly and against plaintiff in this action for a deficiency, who thereafter took an assignment of the bond and mortgage. In an action on the bond, *held*, that the transfer of the bond did not operate as an extinguishment of the personal security, and that plaintiff was entitled to recover. *Held*, further, that in the foreclosure action, the rights of the parties here, as between themselves, were not involved, or essential to the judgment rendered. The rule that a judgment is conclusive not only as to the questions litigated, but those which might have been litigated, means such as were within the issues before the court, and so might have been determined. *Fairchild v. Lynch*, N. Y., 190.

See BOND, 427; INSOLVENT LAW, 645; EXECUTORS AND ADMINISTRATORS, 559.

TAXATION.

1. **Assessment-roll — wrong name inserted.]** In the city of New York a failure to insert the name of the owner of real estate in the assessment-roll, or inserting the name of one who is not the owner, does not invalidate the assessment, but simply confines its enforcement to the land assessed. *Haight v. Mayor, etc., of New York*, N. Y., 157.
2. **Committee of school district — assessment — warrant — R. L., §§ 2693, 3053 — replevin — collector.]** 1. A school district voted to have two terms of school, and "to use the public money, and raise the balance on the grand list, for the support of said schools." After using the public money to defray the expenses of the first term, it was necessary to raise only \$41.85; but before the second term commenced the committee assessed a tax amounting to \$153.14; and also another tax, after the close of the second term, which was \$32.14 in excess of the expenses of that term. *Held*, that the tax was illegal, in that, while a slight excess over the amount voted would not vitiate the tax, here the excess was unreasonable; and, under the vote, that the public money could be used only toward defraying the expenses of the school. 2. It is necessary that a collector of town taxes should have a legal warrant to collect unpaid highway taxes delivered to him by the selectmen under R. L., § 3053. *Rowell v. Horton*, Vt., 231.
3. **Corporation — acts of 1853, 1859 and 1880 — neglect to make report of cost.]** Relator failed to make the report required by its act of incorporation (Laws 1853, chap. 471, § 3). *Held*, that the commissioners of taxes were not thereby deprived of jurisdiction to assess relator's property. Under the act of 1859, chap. 302, § 8, the tax book was kept open for examination and correction during the time limited by said act; the relator did not appear, and made no objection to the assessment, until after the right of the commissioners to correct the same had expired. *Held*, that under the act of 1880, chap. 269, relator was entitled to no relief. *People, ex rel. Mutual Union Tel. Co., v. Commissioners of Taxes*, N. Y., 6.

TAXATION — *Continued.*

4. **Exemption of manufacturing property.]** The statute authorizing towns to exempt manufacturing property from taxation for a term not exceeding ten years does not confer authority to exempt the same property for a second period of ten years. *Boody v. Watson*, N. H., 496.
5. **Local assessment — constitutional guaranty — offset.]** Under the act chapter 631 of the Laws of 1868, for the widening of portions of Sackett and other streets in the city of Brooklyn, land-owners, part of whose property has been taken for the improvement, are only entitled to receive the balance of award over the assessment against their property. But where several lots are owned by the same person, which are treated in the proceedings as distinct and separate parcels, the city is not entitled to aggregate the whole amount of the awards and assessments and set off one against the other. An assessment can only be enforced against the land assessed. The imposition of local assessments for benefits is an exercise of the taxing power of the legislature, and the reduction of an award by applying thereon an assessment not measured by actual benefit is not in conflict with the constitutional provision that private property shall not be taken for public use without just compensation. *Genet v. Brooklyn*, N. Y., 150.
6. **Notice — personal.]** A statute authorized any collector after due notice to sue for a tax. *Held*, that a personal demand was contemplated, and a written request by mail was insufficient. *Parks v. Cressy*, Me., 98.
7. **Non-resident stockholders, where may be listed — constitutional law — mandamus — judge.]** Under our statute — R. L., § 283 — the stock of non-resident stockholders of a corporation located in this State may be legally set in the list of the town in which the corporation has its principal place of business; and the corporation compelled by *mandamus* to pay the taxes assessed upon such stock. A statute authorizing such taxation, and allowing the corporation to deduct the taxes thus paid from the dividends due to such stockholders is constitutional. When a charter is taken subject to future legislation, it may be modified not only by special amendments, but also by a general law. After the parties had formally agreed in their statement that the "list was duly made out, verified and returned according to law," if notice of assessment were necessary, the court would hold that it was given. A judge of the supreme court can legally make an order for the return of a petition for writ of *mandamus* and for filing an answer thereto, although the proceeding was in favor of a town to compel a corporation to pay a tax, in which town the judge was a tax payer, as it was a ministerial, not a judicial, act. *Town of St. Albans v. The National Car Co.; Village of St. Albans v. Same*, Vt., 243.
8. **Quarry leased — Rev. Laws, § 348.]** A slate quarry, leased for the purpose of manufacturing roofing slate, should be set in the list of lessor; and if set in the list of the lessee, a tax assessed thereon is invalid. Real estate, within the meaning of the tax law, is land with its fixtures and accessories, — land, measurable and capable of description by metes and bounds. *Hughes v. Vail*, Vt., 234.
9. **Uncertainty — omission of dollar signs.]** With an assessment-list for town taxes was a certificate setting forth the total valuation in dollars and cents and the amounts in dollars and cents of the total realty tax and of the total personalty tax. *Held*, that the assessment-list sufficiently described the estate taxed, and was not void for uncertainty owing to a lack of dollar signs. *Hopkins v. Young*, R. I., 529.

See INTEREST, 606; PUBLIC STATUTES, 424.

TAXES.

1. **Assessments.** An assessment of taxes to L. "*et ux.*," cannot be upheld. *Trott v. Lowell*, Me., 396.
2. **Statement of — adjutant-general's reports.]** The fact that a tax has not been abated is no evidence that it has been paid. The appendices to the report of the adjutant-general of the State, printed by the State printer, are admissible as copies of returns made to that officer. *Milford v. Greenbush*, Me., 569.

See EXECUTOR AND ADMINISTRATOR, 106.

TAX COLLECTOR.

- Action on bond of delinquent — election of remedies for the same wrong.]** The two remedies afforded a town against a delinquent tax collector are elective,

TAX COLLECTOR — *Continued.*

and not concurrent; thus, the plaintiff procured a justice of the peace to issue an extent against the defendant collector, caused him to be imprisoned, and now holds his body on the extent. *Held*, that an action could not be sustained on the collector's bond; that a prosecution of one remedy was a bar to the other. And this is so, although the defendant is out on bail, and this action was commenced before the extent proceedings. There was a waiver of the previous suit. It is presumed that the regular process of the law for the enforcement of a judgment is effectual to that end. Whether the plaintiff under the pleadings is able to contend that the imprisonment was not a satisfaction of the judgment, as the plea alleges that it was, and the point was raised by demurrer, not decided. *Hartland v. Hackett*, Vt., 247.

TAX SALE.

1. **Illegal proceedings—title.]** Where land is forfeited to the State for the non-payment of taxes assessed upon it, and the State fails to convey the title to a purchaser because of illegality in its proceedings of sale, the original owner has the better title, and may maintain an action therefor against such purchaser. *Chandler v. Wilson*, Me., 519.
2. **Prescriptive title to wild lands.]** A person having for over twenty years a recorded deed of a township of mainly wild land, and during that time lumbering on some portions of it and cultivating other portions, does not thereby divest the true owner of his title to certain lots within the township which have not been occupied during that period of time. A person who obtains the title of three of the five heirs of an owner of land, deceased, can recover only three undivided fifths of the land of a person in possession, although the latter person does not occupy under the other heirs. *Ib.*

TENANTS IN COMMON.

1. **Deed of real estate to association not authorized to hold—erections made on common land without co-tenant's consent—adverse possession.]** A deed of real estate to a well-known association, all of whose members can be ascertained, but which is not authorized to take and hold real estate, may properly be considered as a grant of the estate to those who are described by its title, making the persons associated in the society tenants in common of the land conveyed. A structure wrongfully placed upon common property by a part of the tenants in common, and which excludes other tenants from full possession and enjoyment, and tends to establish a title adverse to them, may be removed by such other tenants, they not having given their consent to its erection. *Byam v. Bickford*, Mass., 428.
2. **One cannot maintain replevin against other.]** Plaintiff and B. were tenants in common of a horse kept by B. on plaintiff's farm. Plaintiff sold his half to B., and took a lien on the horse as security, which lien was seasonably recorded. B. subsequently sold the horse to H., who purchased without notice; and H. sold to the defendant, who purchased with notice of plaintiff's lien. *Held*, that any notice which the defendant had did not affect his rights, as he derived his title from a *bona fide* purchaser; and that plaintiff could not maintain replevin, as he and the defendant were tenants in common. *Barber v. Richardson*, Vt., 739.

See PARTITION, 565; REPLEVIN, 228; WILL, 4th.

TENDER.

See USURY, 752.

TITLE.

Cloud on—vacating tax title—remedy at law.] A lot of land in Providence was devised to A. for life, remainder to B. and C. in fee. Pending the life estate B. mortgaged his interest to D. While the title remained thus, the collector of taxes levied on the lot, and after advertisement sold "the right, title and interest of A., B. and C. in and to an undivided seven-eighths part," and subsequently for another tax levied again, and after advertisement sold "the right, title and interest of A., B. and C. in and to three undivided eighths part." No notice of the sales were given by the collector to D., and D. was the purchaser at both sales. *Held*, under the provisions of Pub. Stat. R. I., chap. 42, §§ 4, 6, and chap. 44, §§ 8, 10, 12, that the sales were void. As to annual taxes, the estate

TITLE — Continued.

of the life tenant is first liable. As to both tax levies, the effect of the course pursued was to throw a disproportionate charge on A. and C., and to relieve *pro tanto* B. and D., thus selling one man's estates for another's taxes. C. filed a bill in equity against D. to obtain a reconveyance. *Held*, that the bill could not be sustained. Equity will not interfere to remove a cloud upon title in favor of a party out of possession, claiming under a legal title against his antagonist who is in possession under the written title which makes the cloud. The remedy at law is sufficient. *Weaver v. Arnold*, R. I., 532.

See EXECUTION, 32; FRAUDULENT CONVEYANCE, 755; OFFICE AND OFFICER, 541; TAX SALE, 519.

TOLLS.

See CORPORATION, 63.

TOWN.

Compensation of lister.] A lister can recover only such compensation for his services as the town votes him, in a case where long usage is not an element. *Barnes v. Town of Bakersfield*, Vt., 671.

TOWN BONDS.

Validity of — Liability of commissioners.] Bonds issued by a town for the construction of a railroad under an act authorizing the same, upon consent being obtained of a majority of the tax payers, are void unless such consent has actually been given. The affidavits of the assessors certifying that such consent had been obtained, and upon which the bonds were authorized to be issued, are not conclusive as against the town, and in an action brought upon the bonds the town may show that consent of a majority of the tax payers had not been given. But no action will lie on behalf of the town against the commissioners for damages sustained by the wrongful issuing of the bonds. The verified certificate of the assessors, made in conformity with the act, is a justification of and protection to the commissioners, acting in good faith, in issuing the bonds. *The Town of Ontario v. Hill and others*, N. Y., 160.

TOWN CLERK RECORDS.

A record made by a town clerk of a document which the law does not require to be recorded is not admissible as evidence that it is a copy of the original, even though the town clerk is deceased. *Milford v. Greenbush*, Me., 569.

TREASURER'S BOND.

Liability of sureties — evidence — res gestæ.] Sureties on a treasurer's bond are liable only for derelictions of duty occurring during the term covered by the bond. The undertaking of sureties on a treasurer's official bond, that he shall faithfully perform his duties, involves the obligation of making correct reports according to law as well as the payment of funds in his custody. A false report made by a treasurer is a violation of official duty rendering his sureties liable to the party injured thereby. In an action against sureties for an alleged breach of such a bond the official reports made by the treasurer during the term covered are a part of the *res gestæ* and competent evidence, not only of the affirmative facts appearing therein, but also as reflecting upon and illustrating the objects and motives of other official acts which are properly the subject of investigation. *Supervisors of Tompkins County v. Bristol*, N. Y., 164.

TRESPASS.

1. **Damage by sheep.]** If the defendant admits, in an action of trespass *quare clausum*, that his sheep were upon the plaintiff's land, the burden is upon him to show some justification or excuse; and if the sheep entered from the highway, and no justification or excuse is shown by the defendant, the plaintiff is entitled to recover damages. *Hodsdon v. Kilgore*, Me., 290.
2. **Judgment conclusive of title.]** A judgment for the plaintiff in an action of trespass *quare clausum fregit*, rendered upon a plea of soil and freehold in the defendant, is conclusive of the title in a writ of entry for the same land brought

TRESPASS — *Continued.*

- by the former defendant against the former plaintiff. *Moran v. Mansur*, N. H., 501.
3. **Railroad conductor — stolen property.**] A railroad conductor, who permits a passenger to travel on his train, taking with him goods known by the conductor to be stolen, is not liable to an action therefor by the owner of the goods. *Randlette v. Judkins*, Me., 129.
 4. **Local transitory action — jurisdiction — motion to dismiss.**] Trespass on the freehold will not lie in this State for a trespass committed on lands in Massachusetts. Objection to the jurisdiction may be raised at any stage of the proceedings by motion to dismiss. *Niles v. Howe*, Vt., 510.
 5. **Tenant by curtesy — lease — jurisdiction.**] A., as tenant by the curtesy, the inheritance belonging to B., leased certain realty to D. After the death of A., B. conveyed the estate to C., D. remaining in possession. C. gave D. notice both of his title and to quit the premises. *Held*, that D. was tenant by sufferance of C.; that D.'s occupation was of a tenement or estate let within the meaning of the statute. A statute gave to special courts of common pleas jurisdiction "of all actions brought for possession of tenements or estates let, against tenants and others who have broken the terms and conditions of the lease or agreement under which they hold, or who hold or occupy tenements or estates by wrongful entry of detainer, or as tenants at will or by sufferance." *Held*, that a special court of common pleas had jurisdiction of an action of trespass and ejectment brought by C. against D. *Kenney v. Sweeney*, 22 R. I. 22.
 6. **Writ of possession — officer — lease.**] Trespass cannot be maintained against an officer charged with the duty of serving a writ of possession, for removing from the premises the person and goods of one in possession as *cestui que trust* of him who was the nominal tenant and against whom the writ of possession issued. A judgment for possession against a tenant is a judgment against one in possession under such tenant. *Danforth v. Stratton*, Me., 220.

See CHATTEL MORTGAGE, 672; EXEMPTION, 690.

TRIAL.

1. **Charge of court — request covered by.**] Defendant's counsel requested the court to charge "that if the jury find that the defendant was not acting deliberately but impulsively when he first struck his wife, and that the subsequent striking of Mrs. Harris and the boy Neals was impulsive and not deliberate, then they must take into consideration the defendant's state of mind, which would be consistent with such impulse when they consider the question of the deliberation of the defendant when he fired the shot." The court said "Yes. It is a mere play upon words. It seems to me I have covered the whole ground." Defendant's counsel excepted to the language "It is a mere play upon words." *Held*, that defendant was not prejudiced, as the court had already presented to the jury, but in different language, the ideas included in the request. *People v. Jones*, N. Y., 380.
2. **Charge of court — defendant must produce license.**] On such a trial a request to charge the jury "that the sale of intoxicating liquor on divers occasions at a place or tenement is not conclusive evidence that the sale was illegal unless the State prove that the defendant, at the time of said sales, had no license," was rightly refused. The guilt of the defendant is to be established not conclusively but beyond a reasonable doubt. A statute makes the keeping for sale evidence that the sale or keeping is illegal, and it is for the defendant to produce his license. *State v. Hozzie*, R. I., 441.
3. **Charge of court.**] On such trial a request to charge the jury "that the notorious character of the defendant's premises or the notoriously bad or intemperate character of persons visiting the same, or the keeping of the implements or appurtenances usually appertaining to grog-shops, tippling-shops and places where intoxicating liquors are sold is not *prima facie* evidence that such premises are nuisances," was rightly refused, because ambiguous and misleading. *Ib.*
4. **Charge of court.**] The presiding justice at the trial, when asked to instruct the jury that they must be satisfied the name of the person on whom the larceny was committed was as charged in the indictment, B., did so, adding "but there is evidence tending to show the man's name was B." Evidence had been introduced that B. gave his name as B.; that some one called at the police station,

TRIAL — *Continued.*

- asked for "B." recognized him, and paid a fine imposed on him. *Held* no error. *State v. McAndrews*, R. I., 455.
5. Cross-examination — collateral matters.] The extent to which a cross-examination, relating to collateral matters, may be carried, is within the discretion of the presiding judge. *State v. Rollins*, Me., 584.
 6. Jury unable to agree — further instructions.] After the jury had taken the case and been in the jury room for two hours the court sent to them a message by the sheriff, inquiring if the jury desired further instructions. The sheriff reported that the jury were unable to agree whether they desired further instructions or not. Thereupon the presiding judge ordered the jury to be brought into court, and further instructed them upon the importance of agreement, and in relation to the manner of considering certain testimony and evidence in the case. *Held* no error. *Ib.*
 7. Instruction as to whether title passed — delivery questioned.] When the question whether a deed was ever in fact delivered is pending, it is not error for the court to decline to instruct the jury that the deed conveyed a title. *Osgood v. Eaton*, N. H., 707.

See CONSTITUTIONAL LAW, 206; CRIMINAL LAW, 455.

TRUST AND TRUSTEE.

Accounts kept by — evidence — sureties — securities — interest.] The dealings of a trustee of trust funds, and the acts done by him in the performance of his duty as trustee while the surety remains liable on his bond, are admissible in evidence against the surety in an action upon the bond. It is the duty of a trustee to keep accounts of the trust estate, and the accounts kept by him, although kept in a firm register of a company of which the trustee was a member, are admissible in evidence as acts done by him in the performance of his duties. Where securities forming a part of the trust estate have been wrongfully sold by the trustee, at a price below their original cost, and the proceeds converted by him, his sureties are only chargeable with the value of the bonds at the time of their unlawful sale and conversion in the absence of any evidence of a subsequent increase in their value. In determining the amount for which execution should issue in such a case, interest should be computed upon the amount converted by the trustee from the date it is found to be due up to the date of issuing the execution, without costs. *McKim v. Blake*, Mass., 435.

See DEED, 47; WILL, 729.

TRUSTEE PROCESS.

1. Agency — claimant.] The principal defendant, as agent of the claimant, entered into a contract to build a bridge for the trustee. Both the claimant and defendant worked on the bridge, the former employing the latter, and paying him. The officers of the town did not know of the agency. *Held*, that the trustee should be discharged, and that the fund belonged to the claimant. *Davis v. Willey*, Vt., 257.
2. Claimant of funds.] When the claimant of funds in the hand of an alleged trustee is examined as a witness and fails to make full, true and explicit answers to all questions touching the funds and the source of his claim to them, his claim will be adjudged invalid. *Thompson v. Reed and Trustees*, Me., 604.
3. Note payable in another State — maker not trustee.] The maker of a negotiable sight draft, not payable in this State, cannot be held as trustee of the payee of the draft. *Chadbourn v. Gilman*, N. H., 614.
4. Proceeds of exempt property — life annuity.] Where one sells property, a part of which is exempt and a part non-exempt, an amount of the debt equal to the value of the exempt part cannot be attached by trustee process. If in such case there was no fraud, and it was the understanding between the parties that a debt due from the vendor to the vendee should be paid out of the non-exempt, it will be so applied, and only the balance held. Nor can the avails of exempt property be reached by trustee process, although the debt assumed the form of a life annuity, and the defendant had left the State to reside in New Hampshire. *Hastis v. Kelley*, Vt., 646.
5. Wages of seaman.] The wages of a seaman engaged in coasting trade are not exempt from trustee process while in the hands of his attorney, a proctor in the

TRUSTEE PROCESS — *Continued.*

admiralty court, by whom it has been collected. *Ayer v. Brown and Trustee, Me.*, 219.

6. Writ of error — releasing debtor from arrest does not satisfy judgment.] On a writ of error brought by the plaintiff in error to review the judgment of a municipal court, error in fact cannot be assigned when the matter of fact might have been put in issue and tried in the original action. The arrest of a judgment debtor on execution and his subsequent release by order of the judgment creditor does not operate as a discharge and satisfaction of the judgment. In a trustee process the fact that the only trustee within the jurisdiction of the court was, upon his answer and with the consent of the plaintiff, discharged, did not oust the jurisdiction of the court. *Raymond v. Butterworth, Mass.*, 216.

USURY.

1. Foreclosure of mortgage — tender — amendment of pleadings — evidence.] An offer to pay the amount due on a mortgage, either at the law day or thereafter before foreclosure, will extinguish the security, although the tender is not kept good and the money brought into court; but that rule does not apply where the affirmative relief of a cancellation of the security is sought and granted. Where an answer contains two defenses inconsistent with each other, the defendant has the right to choose upon which of the defenses he will rely, and the court may order the pleadings to be so amended as to conform them to his choice, the plaintiff not being misled thereby. The defense set up to a mortgage sought to be foreclosed was usury. On the trial the defendant testified, that before the action was commenced she tendered plaintiff the precise amount she had received from him together with the interest, but told him she would not pay the *bonus*, and plaintiff refused to accept it. *Held*, that this was not an admission on the part of the defendant of the debt as a valid, legal obligation. *Breunich v. Weselmann, N. Y.*, 752.
2. Referee's report should state the facts.] In an action against a bank to recover the penalty for the taking of illegal interest, the usurious transaction having been conducted nominally at least by the cashier, but claimed by the plaintiff to be a mere cover of the bank to conceal its part in receiving the usury, the referee failed to find the material fact, which of the two the plaintiff negotiated with, — the bank, or the cashier individually; but reported the facts for and against the plaintiff's theory, and submitted to the court, not to infer the *fact*, but to decide whether the "things done amounted in law to a mere cover," etc. *Held*, that it was not an inference of law but a pure question of fact, and that the court had no authority to infer from the reported facts, that the loan was made by the defendant, and the manner of it a trick to evade the usury laws. *Darby v. First National Bank of St. Albans, Vt.*, 670.

VENDOR AND PURCHASER.

Agreement to convey real estate — equity — trusts — assignment — mortgage — attaching creditors.] When one delivers to another his promise in writing to convey to him real estate for a specified price, payable at a certain time, he thereby transmits an equitable estate, and he becomes the trustee of the estate for the equitable vendee, who becomes the trustee of the purchase-money for the equitable vendor. The vendee may mortgage such an equitable interest and that mortgage may be assigned; and when the assignee gives notice of the mortgage and assignment to the vendor the latter then becomes the trustee of the estate for the assignee. Such an assignee after seasonable tender of the purchase-money brought a bill in equity against the vendor for conveyance, making the creditor of the vendee, who had attached the latter's interest in an action still pending, a party defendant. *Held*, that such creditor, not having tendered the purchase-money, cannot set up that the mortgage and assignment were fraudulent as to creditors. *Bicker v. Moore, Me.*, 523.

WARRANTY.

See SALE, 21, 60.

WATER AND WATER-COURSE.

1. Floatable streams — driving logs — corporations.] A corporation was chartered by the legislature, and authorized to make such improvement in the upper waters of Androscoggin river, as would "facilitate and render more convenient

WATER AND WATER-COURSE — *Continued.*

the drifting or driving of the logs, masts, spars and other timber, by removing obstructions, building dams, wing dams, gates, piers, booms and so forth," and further authorized to demand and receive a specified toll upon every log that should pass its dam at the outlet of Big lake. *Held* (in an action by a log-owner who had paid the toll, for damages for so unreasonably managing their dams as to deprive the plaintiff of the advantages for which he had paid), that the wants, desires or demands of a particular shareholder in the defendant corporation could not abridge or modify the duties and obligations of the defendant; that it was not material who was the owner of the lands upon which the dams were built. *Lewiston Steam Mill Company v. Richardson Lake Dam Company, Me.*, 571.

2. **Riparian owners — injunction.]** A bill in equity by one mill-owner to enjoin other mill-owners upon the opposite side of a stream, at the same power, for using more than one-half the water, complained that the defendant, within ten days, commenced to use, and were continuing to use, and were threatening to use in the future more water than they were lawfully entitled to, thereby depriving the plaintiffs of sufficient water to run their mill, and obliging them to shut down portions of it, and thus throwing out of employment some two hundred persons. *Held*, that the injury claimed does not appear to be of that permanent or irreparable character necessary to justify or require the interposition of a court of equity by way of injunction. *Westbrook Manufacturing Company v. Warren, Me.*, 608.
3. **Waste from saw-mills thrown into the river — riparian owners — reasonable use — prescription — equity practice — multifariousness.]** Where several respondents, acting separately and independently of each other, deposit the refuse material and debris arising from the operation of their saw-mills into the same stream, whence, by the natural current of the water, it is carried down the stream and commingles into one indistinguishable mass before reaching the complainant's premises where it creates the nuisance and inflicts the injuries complained of, *held*, upon a bill in equity for perpetual injunction, that the several acts of the respondents constitute but one cause of action and all the respondents may be joined in the same bill to restrain the nuisance. Where the same relief is asked against all claiming a common right, and the same general acts are alleged and proved against all as contributing to the same nuisance, and the object of the bill is to obtain relief for one nuisance to which all the respondents contribute, it is not multifarious, although the respondents may have different and separate interests. Nuisances and injuries affecting waters, including the obstruction, diversion and polluting of streams, affords sufficient ground for equitable interference, and at, too, without first establishing the fact of the nuisance by a suit at law, where the injury is irreparable or where adequate compensation therefor cannot be obtained at law. The law does not lay down any fixed rule for determining what is a reasonable use of the water of a stream by a riparian owner. It is such reasonable use as will not interfere with a like reasonable use by all others affected by his acts, and must depend upon the circumstances of each particular case. In order to obtain a prescriptive right to the use of the water of a stream there must have been a perceptible amount of injury to the adverse party throughout the period necessary to gain such right. *Lockwood Company v. Lawrence, Me.*, 408.

See CONSTITUTIONAL LAW, 258; EQUITY, 397.

WAYS.

Report of committee on damages.] The report of a committee, appointed under the statutes of Maine to appraise the damages of the land-owner for the location of a way, may be to the supreme judicial court when it is finally completed. It is not required to be made at the first term next after the appointment of the committee. *Webb v. County Commissioners, Me.*, 149.

See EASEMENT, 222.

WIDOW.

See HOMESTEAD, 224.

WILL.

1. **Absolute gift of note.]** Under a clause in a will giving "to my sister the promissory note I hold signed by her and by M., also the sum of my deposit with interest," in a savings bank, and "three hundred dollars of the sum of my deposit in" another savings bank "for her support for life, the residue from and after her decease to be equally divided between my nephews and nieces," the legatees takes an absolute title to the note. *Herrick, Executor, v. Wright*, N. Y., 336.
2. **Codicil—real estate in trust—duty to rent.]** A testator, by his will, gave to his grandchildren certain moneys in trust, to be paid to them at a certain time together "with the interest it had gained or received." By a codicil he also gave to them certain real estate "in trust, the same as mentioned in my aforesaid will." *Held*, that by the terms of the will and codicil, construed together, it was the duty of the trustee to obtain a reasonable rent from the real estate for the benefit of the infants. *Thompson, Trustee, v. Thompson*, Mass., 276.
3. **Construction of—bequest of personalty when absolute.]** A testator, by the first clause of his will, provided as follows: "I give and bequeath to my beloved wife, Susanna, my remaining personal property, it may be money or whatever kind it will, to her full ownership, so long as she doth live. Further, I recommend that my hereinafter-named executor shall see that her money does not become lost." The widow used but part of the income of the personal property and, at her death, left the principal and surplus interest still in the hands of the testator's executor. *Held*, that the clause of the will, quoted, vested the personalty therein-mentioned in the widow, absolutely. The recommendation to the executor to see that the widow's money did "not become lost," was not sufficient to convert the devise into a trust; and the fact that she allowed the *corpus* of the personalty to remain in the executor's hands was immaterial. The bequest of the widow was the residue of the testator's personal property remaining after provision had been made for the other bequests contained in the will; and this, although the widow's bequest preceded the others in the instrument. *Merkel's Appeal*, Penn., 638.
4. **Construction of—distribution.]** Trustees under a will were directed to pay the net income of the residue of the testator's property (not required for the payment of two annuities) to his wife during her life, and at her death to distribute the fund (except so much as might be required to pay the two annuities) among those who would take as distributees of his personal estate had he died intestate, immediately after the death of his wife. At the death of his wife the trust fund contained bonds for the payment of money with semi-annual interest coupons attached, payable at different times. The surviving trustee had collected the coupons as they matured. A bill in equity being brought by the trustee for instructions as to whether the amount received by the trustee in payment of the first set of coupons which matured after the death of the testator's widow were apportionable between her estate and the distributees under the will, and if so, in what manner the apportionment should be made. *Held*, that the moneys received by the trustee from the coupons not payable at or before the time of her death, being coupons for interest for six months, which had begun to run at the time of her death, should be apportioned according to the proportional part of the six months which in each class of coupons had elapsed at the time of her death. *Adams, Jr., Trustee, v. Adams*, Mass., 121.
5. **Construction of—trust estate—distribution of.]** The testator by his will provided, after certain specific bequests, that the remainder of his estate should remain invested as he should leave it at his death, for the space of five years; that all the income accruing from the estate during that time should be divided equally among his wife and four children; that in case of the death of any of the children during that time, without issue, their share should be divided equally among the surviving children, except as to the share of his daughter, Louisa Whitney, and as to her share he provided that in case of her death her share should be divided between her two children, Anna Louisa Field and Eleanor G. Whitney (afterward Mrs. Allen); but should either or both of her said children die without issue, then the income bequeathed to such child or children should be divided equally among his immediate children. The testator further provided that at the expiration of the five years after his death the principal of all the property should be divided into five equal portions, one portion to be invested and the income thereof paid to his wife, and one portion to be invested and the income thereof paid to his daughter Louisa Whitney, and at her death

WILL — *Continued.*

the same to be divided between her two children; but should either of her children die without issue then her share of the income was to go to his immediate children. He also gave one of said portions to each of his other three children, "to have and to hold and to dispose of the same; but if either of them should die intestate and without legal issue, it is my will that all of his or her portion of my estate shall be equally divided among their surviving brothers and sisters." He also provided that if either of his children should die without legal issue during the space of five years after the testator's death, "then all of that portion of the principal of my estate bequeathed to such child or children shall be added in equal shares to the portions of such of my immediate children who may be living at the expiration of the five years aforesaid." William D. Goddard, one of the children, died intestate and without issue, after the will was made and during the life-time of the testator, and one-third of the portion of the estate, which would otherwise have belonged to him, was paid to the petitioner as trustee for the portion of Louisa Whitney. He managed it for her for several years when she died leaving a husband and two children surviving, Mrs. Field and Mrs. Allen. Mrs. Allen subsequently died leaving a husband and issue surviving. In an action brought for the construction of the will the question arose in regard to the trust estate whether one-third of the portion given William D. Goddard by the will, and held in trust by the petitioner as aforesaid, was to be held in trust and subject to the provisions which applied to the other portions of the estate given in trust, or whether at the expiration of the period of five years, after the decease of the testator, it became the absolute property of Louisa Whitney discharged of all trust; also whether the said trust was terminated in whole or in part by the decease of Mrs. Allen leaving lawful issue, and if so, who was entitled to the property. *Held*, that it was the intention of the testator that the division should be made by addition to the portions elsewhere given to such surviving children, and upon the same terms as those upon which such portions were given. When a testator, in the entire structure of his will, has revealed an intention, the language of individual clauses is always to be construed with reference to that intention, even if in another instance or another connection it might properly receive a different construction. That the rights of Mrs. Field and Mrs. Allen were derived directly from the will and that they took thereunder as purchasers. *Held*, also, that the devise over, in case either of the granddaughters died without legal issue, necessarily implied that if she died leaving issue, an estate of inheritance was devised to her; that the fact that Mrs. Allen's share was to be kept in trust during her life-time was not inconsistent with the fact that she was equitably the owner of the property; that after her decease the property was to be treated as her intestate property and the personality would pass to her administrator, and by the law which prevailed at the time of her decease, the husband would be entitled to the whole thereof after payment of debts and expenses, and in the real estate he was entitled to his tenancy by the curtesy. *Goddard v. Whitney, Mass., 729.*

6. *Devise.*] A testator devised as follows: "Item. I give, bequeath and devise unto the town of Dresden in the county of Lincoln, to have and to hold forever in trust, and upon the conditions hereinafter stated, all my real estate, situated in said town of Dresden, and all my meeting-house property in said town owned by me; also in addition to the above, the sum of five thousand dollars (\$5,000), provided that the said town of Dresden shall create and establish a fund of three thousand dollars (\$3,000), to be known as the Lithgow Pine Grove Cemetery fund, to be kept in trust, and held in trust by said town. The interest of which shall be paid annually to the owners or proprietors of such cemetery . . ." *Held*, 1. That the testator intended to establish a fund of \$3,000 and the real estate named for the benefit of the cemetery. 2. That the rejection of the real estate by the town was a rejection of the whole devise. 3. That the condition could not be performed, since the town had no legal authority to raise a fund or a part of a fund, the income of which was to be a gratuity to a private corporation or to individuals. 4. That the devise falls into the residuum of the estate. 5. That the residuary legatees take the real estate in common and personal property in severalty under a further clause of the will reading as follows: "Should any one of the aforesaid devisees or legatees refuse to accept the devised estate upon the conditions named in said devise, then such part together with the remainder of my estate I then give, bequeath and devise one-half to the said

WILL—Continued.

- town of Dreden, and the remaining half to the city of Augusta." *Luques v. Inhabitants of Dreden and others, Me.*, 146.
7. **Devise—absolute fee.]** A testator devised a portion of his estate as follows: "I give and devise to my wife . . . all the rest and residue of my real estate; but, on her decease, the remainder thereof I give and devise to my said children . . ." *Held*, that the wife took the fee, and that the devise over was void. *Mitchell v. Morse, Me.*, 608.
8. **Devise—contingent remainder.]** Testator bequeathed to each of his seven children, who might survive him, \$3,000 in money, or real estate equivalent to that sum, deducting therefrom what may have been charged to either, as an advancement, said legacy to be paid to them severally on their arriving at the age of twenty-one years, or on their marriage, without interest. He gave his wife the income of the remainder of his estate for life. "And after the decease of my said wife, I give, devise and bequeath all my estate, both real, personal and mixed, to my children, *who may then be living*, in equal shares; and in case either of them shall have died, leaving legal heirs, then such heirs shall be entitled to the share which their deceased father or mother would have been entitled to if living, to hold to them and their respective heirs and assigns forever." Petitioners asked for the partition of the real estate claiming an undivided third by virtue of a deed, from the widow, one son and a daughter who are still alive. *Held*, that no interest passed by the deed, for until the widow was dead, it was not known who would take, the interest being a contingent remainder. *Cobby v. Duncan, Mass.*, 70.
9. **Devise—perpetuities.]** A devise was as follows: "I give and bequeath unto Hiram Coffin, his heirs, etc., the remainder of my homestead farm . . . upon condition as follows: that he pay annually the sum of \$50 to the M. E. Church in Columbia village, for the support of preaching, or if the said Hiram choose to play the principal of which the above sum is the interest all at one time or in payments within . . . then my executors, hereinafter named, shall give a good and sufficient deed to the said Hiram Coffin, his heirs, etc., which shall be as good and binding as if given by me . . . But if the said Hiram or his heirs fail in any way to perform the conditions above named, then I give and bequeath the farm before named to the said M. E. Church." *Held*, 1. That as the contingency upon which the devise to the church was to vest might not happen within life in being and twenty-one years, the devise was void, as offending the rule against perpetuities. 2. That the option given the first taker to extinguish the condition and perfect his own title did not remove the uncertainty of the time of the vesting of the devise over, and hence did not take the devise out of the rule. 3. That the first taker was not made a trustee for the second contingent devisee, but held in fee subject to the conditions. 4. That whatever rights the demandants representing the church have in equity, they have not the legal title accompanied by a present right of entry. *Merritt v. Bucknam, Me.*, 386.
10. **Devisees taking as tenants in common—per capita—lapsed legacy—residuary clause carries.]** Testator's will concluded with the following residuary clause: "I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, wherever and however situate, of which I am now possessed or may die seized or possessed, unto my sons S., T., B., H., J. and C. to have and to hold the same with all the privileges and appurtenances to the same belonging, to them the said S., T., B., H., J., and C. their heirs and assigns forever." *Held*, that the devisees took under Pub. Stat., chap. 172, § 1, as tenants in common, not as joint tenants. The devisees being individually named and nothing in the will or in the testator's circumstances indicating a different intent, that the devisees took as individuals not as a class. One of these sons died without issue before the testator. *Held*, that the deceased son's share lapsed, and at the testator's death descended to his heirs as intestate estate. A general residuary devise or bequest carries lapsed or void devises or bequests, but does not include any gift which falls of the residue itself. *Church v. Church, R. I.*, 485.
11. **Donee for life—powers of sale—absolute title—power to mortgage.]** When a testamentary gift is expressly limited to the donee, for life, a superadded power given to the donee to sell and appropriate the proceeds will not enlarge his interest in an absolute estate. A testamentary gift for life with added power in the donee of sale and appropriation of proceeds will not enable the donee to

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mortgage more than his life interest. *R. I. Hospital Trust Co. v. Commercial Nat. Bank*, R. I., 44.

12. **Extrinsic evidence to aid construction—bequests to religious societies.**] The testator gave the residue of his estate "equally to the authorized agents of the home and foreign missionary societies, to aid in propagating the holy religion of Jesus Christ." There being no societies the names of which conformed accurately to the description contained in the will, and several societies of the character described having appeared as claimants to the fund, a bill in equity was brought to obtain the direction of the court for its distribution. *Held*, that extrinsic evidence could be given to ascertain the intention of the testator, and that for that purpose the facts known to the testator at the time he executed the will, the names by which he was accustomed to call the missionary societies, or by which they were usually called and known in the religious society with which he worshipped, the interest shown by him in any particular missionary society, and the contributions which he made for missionary purposes, were competent facts to aid in identifying the societies intended by the will. *Held*, also, that such a bequest was a good, charitable bequest. *Hinckley, Executor, v. Thacher*, Mass., 176.
13. **Execution of power.**] A person taking under the execution of a power created by will does not derive his title from the donee but from the donor, under the authority of the instrument creating the power. The intention to execute a power must appear by a reference in the instrument to it, or to the subject of it, or from the fact that the instrument would be inoperative without the aid of the power. Accordingly *held*, where the testatrix, after certain specific bequests, described all the other property disposed of as "all the rest, residue and remainder of my estate, real, personal and mixed, wheresoever situated and to which I am in any manner whatsoever entitled," that it was not an execution of a power, it appearing that the testatrix had other property of her own to which the language used could have referred. *Patterson v. Wilson*, Md., 692.
14. **Execution of—presence of witnesses.**] It is not necessary to the legal execution of a will that it be signed or sealed in the presence of the subscribing witnesses, nor that the witnesses sign in the presence of each other. *Welch v. Adams*, N. H., 544.
15. **Execution—witness—presence of testator.**] In Rhode Island the witnesses to a will must subscribe their names in the presence of the testator. Acknowledgment by a witness, in the presence of the testator, of the witness' signature affixed in the testator's absence, is a nullity. *Pawtucket v. Ballou*, R. I., 534.
16. **Fee, subject to executory devise—"child or children"—"issue."**] A clause in testator's will provided as follows: "I give, devise and bequeath to my daughter, M. A. W., during her natural life, and at her decease to her children, one-half of a lot and half of all the buildings and improvements thereon, situated One-quarter of said house and lot I devise to S. L., her heirs and assigns, and the remaining quarter of said house and lot I give and devise to J. B., her heirs and assigns, for and during the natural life of each of them, but if any of them or all may die, leaving no child or children, then my will is that each respective right shall be divided equally amongst my daughters, A. A., S. L. and J. B., their heirs and assigns forever." M. A. W. died childless. *Held*, that, on her decease, her one-half, not the whole estate, became divisible among her sisters, and that S. L. took under the will an estate in fee-simple, subject to a gift over by executory devise. Distinction traced between the words "child or children" and the word "issue" in case of a testamentary gift with limitations over. *Barney v. Arnold*, R. I., 620.
17. **Distribution—heir absent fifteen years—alien—probate court—notice—R. L., § 2245.**] The intestate died in 1871, unmarried and without issue, but leaving, as it was supposed, as her heirs, only two brothers, but, in fact, also an absent sister, the female plaintiff. The defendants purchased the interest of one brother in 1874; and the probate court in 1877 distributed the estate, one-half to one brother, and the other half to the defendants, the assignees of the other brother, in accordance with a statute passed in 1876—R. L., § 2245—which provided that the share of an heir, absent and unheard of for fifteen years, could be distributed to the other heirs, and if the absent person proved to be alive an action was given to recover his share of any one receiving the same under order

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- of the court. *Held*, that the defendants are liable, and that the plaintiff could sustain an action against them to compel payment for her share; and that they are jointly liable, having taken the title jointly. The fact that the intestate was an alien cannot avail as a defense. The amount to be recovered is not the value of the share at the time of distribution, with interest; but the share is chargeable with expenditures necessary for the preservation of the property, and with loss caused by depreciation without the fault of the distributee. The heir should be credited with rents and profits, if any were or might have been received. The notice given by the probate court, before the order of the distribution, was sufficient; and the finding of the court as to the absence of the heir, etc., is conclusive. *Lenahan v. Spaulding*, Vt., 255.
18. **Fraud—court of chancery, jurisdiction of—legacy—charge on land.**] When a testator devises his real estate to his heirs, and in the same will gives certain sums of money to persons who are not his heirs, making the payment of the legacy a charge on the land, it is a fraud for the heirs, by agreement exclusively between themselves, to procure the county court to render a judgment disallowing the will. In such a case, the court of chancery has jurisdiction, and, the land still being in the possession of the heir, has power to charge the legacy upon it, and this on the ground of fraud. *Wetherbee v. Chase*, Vt., 663.
 19. **Intestacy — who entitled to administration.**] In granting letters of administration the interest of the estate is the main object to be kept in view. Hence, other things being equal, the person should be appointed administrator who is entitled to the residue of the estate after creditors have been paid. A. died intestate, leaving B. the widower of her bastard daughter, and two grandchildren, C. a son and D. a daughter of B. by his deceased wife, A.'s daughter. *Held*, that C. rather than B. was entitled to administer the estate of A. *Johnson v. Johnson*, R. I., 472.
 20. **Legacy charged with a payment.**] A testatrix coupled the following condition to a legacy "the same to be indorsed on a note given by him to my daughter Emily aforesaid, in the year 1878." *Held*, that the executor should appropriate the legacy to the payment of such note, and pay the residue, only, to the legatee. *Low v. Low*, Me., 143.
 21. **Legacy — compelling payment — joinder of parties.**] When the probate court has decreed the payment of a legacy, a court of equity has jurisdiction to compel the executor to pay it. And when a legatee brings a bill to enforce the payment of a legacy, it appearing that no other legatee or creditor is interested, they need not be joined as parties. *Bellows v. Swoles*, Vt., 740.
 22. **Legacy — release — construction.**] A general legatee, who, after payment of the testator's debts and other legacies, was entitled to share in the residuum, executed an instrument releasing the estate from paying the "legacy named in said will." *Held*, that both the general legacy and the interest under the residuary clause of the will were released. *Low v. Low*, Me., 61.
 23. **Life estate — income.**] A testator by apt and proper expression gave to his widow, by his will, a life estate in all the property of which he died seized; with power to sell and dispose of any of the same as may be most for her comfort and convenience. *Held*, that the income and increase of the estate became absolutely the property of the widow, but the estate did not vest in her, and all that remained of it at her decease, whether in the same specific form or in a changed condition from exchange, sale and re-investment; should be distributed under the will. Those articles consumed by the widow, by her own fire, at her own table, or as food for stock, were disposed of by her as she had a right to. She is not chargeable therefor, and like articles cannot be retained from her estate in their place and stead. *Gorham v. Billings*, Me., 589.
 24. **"Moneys" — what included in.**] If a will contains no residuary clause, and it is manifestly the testator's intention to dispose of all of his property, the words "all my moneys after paying all my just debts" may pass deposits in a savings bank and railroad stock not specifically devised. *Jenkins v. Fowler*, N. H., 323.
 25. **Patent ambiguities — declarations of testator — devise construed.**] Patent ambiguities in a will must be solved by construction, not by evidence. Hence the declarations of a testator to the scrivener of the will are not admissible to explain conflicting provisions of the will itself. Testamentary dispositions are as follows: "1. I give, devise and bequeath to my wife, P. . . . the privilege of the south half of the house and also the south garden, and also the

WILL — *Continued.*

- keeping of a cow the year round, and also all the household furniture for her own personal benefit during her natural life or widowhood. . . . 2. I give and bequeath to my wife, P. . . . after all my just debts and funeral charges are paid, all of my remaining property during her natural life and widowhood. . . . 3. I . . . do appoint B. . . . executor of my last will and testament, to dispose of all my real and personal property that I am possessed of at my decease, and what remains of that property to be divided equally between my three sons, M. . . . D. . . . and B. . . ." *Held*, that clause 2 did not cover the house and homestead estate mentioned in clause 1. And that clause 3 was to be construed simply as a general residuary clause affecting property not disposed of in the preceding clauses. *Lewis v. Douglass*, R. I., 83.
26. **Power to several coupled with trust — one renounces — other conveys.]** When a power, coupled with a trust, is given to two or more persons to be executed by them jointly, and one renounces, the other or others may execute the power as if originally given only to them, that the trust may not fail or suffer delay. A. by will devised and bequeathed his estate to B. and C. in trust, to sell, to invest the proceeds, and to use the income for his daughters during their lives with remainder over. In case of the death, refusal or inability of one of the trustees, the testator desired the other to fill the vacancy. One of the trustees refused the trust; the other did not make an appointment in his stead, but alone made sales and gave deeds of the devised realty. *Held*, that the sales and deeds so made and given by the one trustee were valid; that such sales and deeds were valid whether the estate devised to the trustees was a joint tenancy or a tenancy in common. *Bailey, Junior, Petitioner*, R. I., 536.
27. **Rule in Shelley's case.]** A testatrix, by her will, devised certain real estate to her daughters during their natural lives, and after their death then to their lawful issue and the heirs and assigns of such issue. *Held*, that the devise was within the operation of the rule in Shelley's case and vested an estate tail in the daughters, which estate, under the act of April 27, 1855, was converted into a fee-simple. *Carroll v. Burns*, Penn., 686.
28. **Testamentary capacity — declarations of testator.]** The declarations of a testatrix, made subsequently to the execution of the will, and at a time when she was of a sound mind, are not admissible for the purpose of showing her mental condition when the will was executed. *Crocker v. Chase*, Vt., 741.
29. **Undue influence — declarations of legatee.]** The issues were, whether the testatrix was of unsound mind, and whether undue influence had been exerted to procure the will. The declarations of a legatee, tending to show that she exercised undue influence upon the testatrix, are admissible. But such legatee, being a married woman and wife of one of the parties to the suit, is not a competent witness. Evidence tending to show the pecuniary condition of the relatives of the testatrix, and their relation to her, is admissible. *Id.*
30. **Trustee — fee-simple — power of sale.]** Testamentary disposition as follows: "The remaining one-third part of said residuary (estate) I give, devise and bequeath unto my said nephew, William Ames, in trust for the uses and purposes following, that is to say: The said trustee shall collect and receive all the rents, dividends, profits and income that may arise or accrue from or out of said one-third part, and the same, from time to time, in his own discretion apply and appropriate for the sole use and benefit of my said sister, Candace C. Carrington, for and during the term of her natural life; hereby authorizing and empowering my said trustee in his discretion, and if he shall, at any time, deem it wise and expedient, to apply and appropriate the whole or any portion of the body or capital of said one-third so held in trust as aforesaid, to the use and benefit of my said sister Candace during her life-time. And upon the decease of my said sister Candace, I hereby direct my said trustee to assign, transfer and convey the said one-third part of my residuary estate, or such portion thereof as shall remain in his hands, unto the children of my said sister Candace, or their descendants, in equal portions, share and share alike, to have and to hold the same unto them, their heirs and assigns forever." *Held*, that Ames took as trustee a fee-simple, with power to sell and to convey in fee. *Ames, Trustee, v. Ames*, R. I., 446.
31. **"Use and income" — life estate.]** B. by will gave his wife the use and income of his homestead for life; also "every article of household furniture in or on said premises, including piano, books, minerals, shells and curiosities, and every

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article of personal property in and about said homestead, or wherever found belonging to my estate; also, "the dividends and income on all my railroad shares I may own at the time of my decease, and also the interest and income on all my government and other bonds which I may possess at the time of my decease;" and after making sundry bequests to other persons added a residuary clause as follows: "Lastly, after the decease of my said wife Susan A., and in the final disposition of property, I hereby give and bequeath the rest, residue and remainder of my estate, wherever found or however situated," to certain legatees named. *Held*, that neither the railroad shares and government bonds, nor cash on hand and promissory notes of which the testator died possessed, passed by the will to the wife, and that an inventory thereof should be returned to the probate court. *Benton v. Benton*, N. H., 847.

See APPEAL, 544.

WITNESS.

1. **Credibility** — "spotter" not accomplice.] The credibility of witnesses is a question for the jury, and a "spotter" or informer is not in contemplation of law an accomplice. *State v. Hozzie*, R. I., 441.
2. **Leading question.**] Whether facts exist upon which the law allows leading questions to be put to a witness by the party calling him is a question of fact to be determined at the trial. *Osgood v. Eaton*, N. H., 707.
3. **Rev. Laws, § 1002 — agent — overseer of poor — insane person — Rev. Laws, § 7.**] An overseer of the poor, in contracting with one for the support or labor of an insane pauper, is not a party to the contract, but an agent of the town; and, after the death of the overseer, in an action by the pauper to recover pay for his labor, his employer, under the statute, is a witness in his own behalf to prove a settlement with the overseer. *Rev. Laws, §§ 1001-2.* An overseer of the poor having power to make a valid contract as to a pauper's support or labor has power to make a valid settlement binding on the pauper. The overseer made a parol contract with the defendant as to the support and labor of the pauper, but did not bind him out; therefore, section 2831, *Rev. Laws*, requiring certain contracts to be in writing, does not affect the case. *Billings v. Kneen*, Vt., 748.

See EVIDENCE, 697, 762.

WORDS.

- "Debt." *See* BANKRUPTCY, 840.
 "Business or vocation." *See* NEGLIGENCE, 7.
 "Merchant or trader." 392.
 "Moneys." *See* WILL, 323.
 "Spotter." *See* WITNESS, 441.
 "Team." 133.
 "Use and income." *See* WILL, 847.
 "When able." *See* STATUTE OF LIMITATIONS, 750.

Ex. J. M.

